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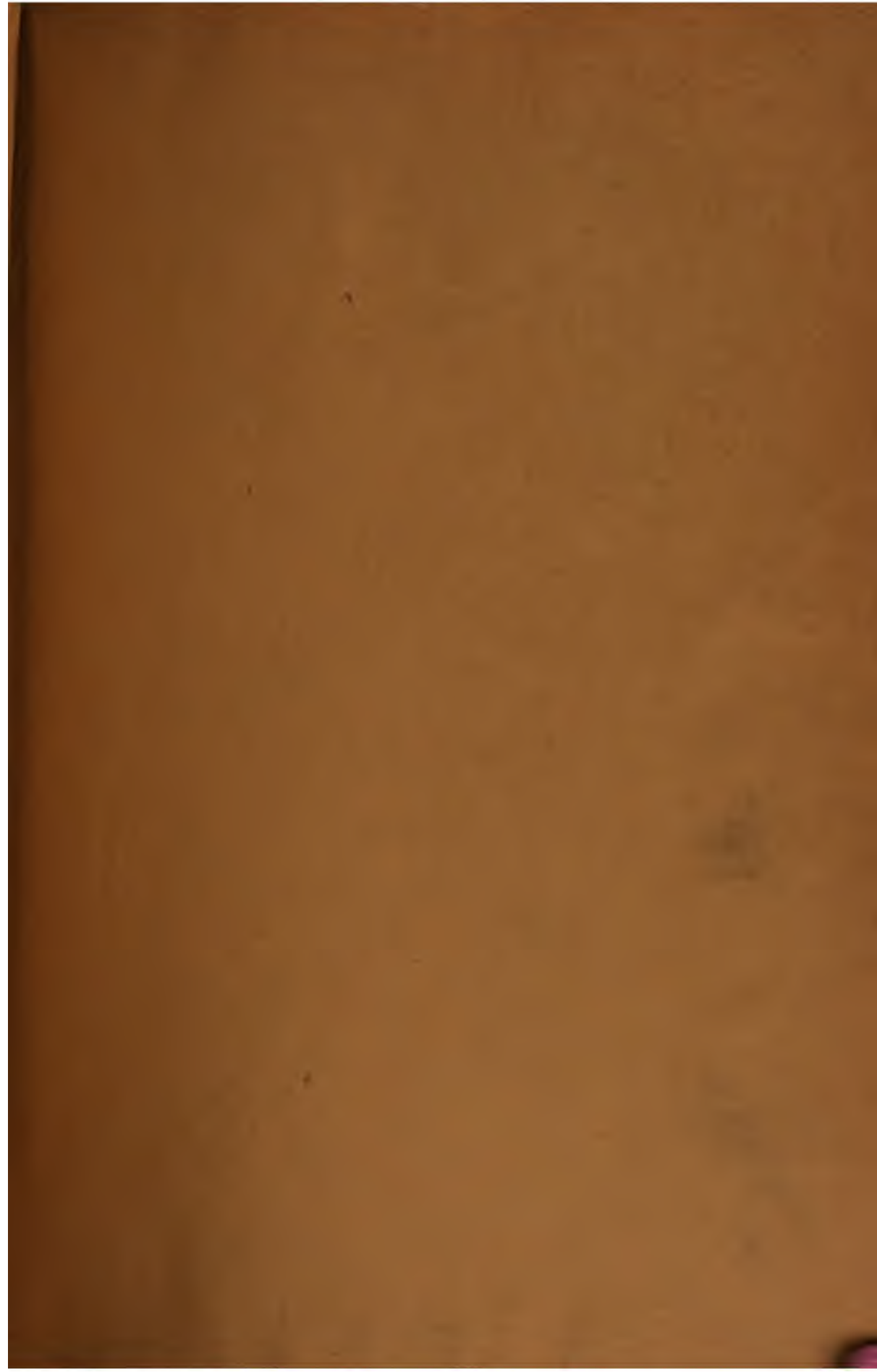
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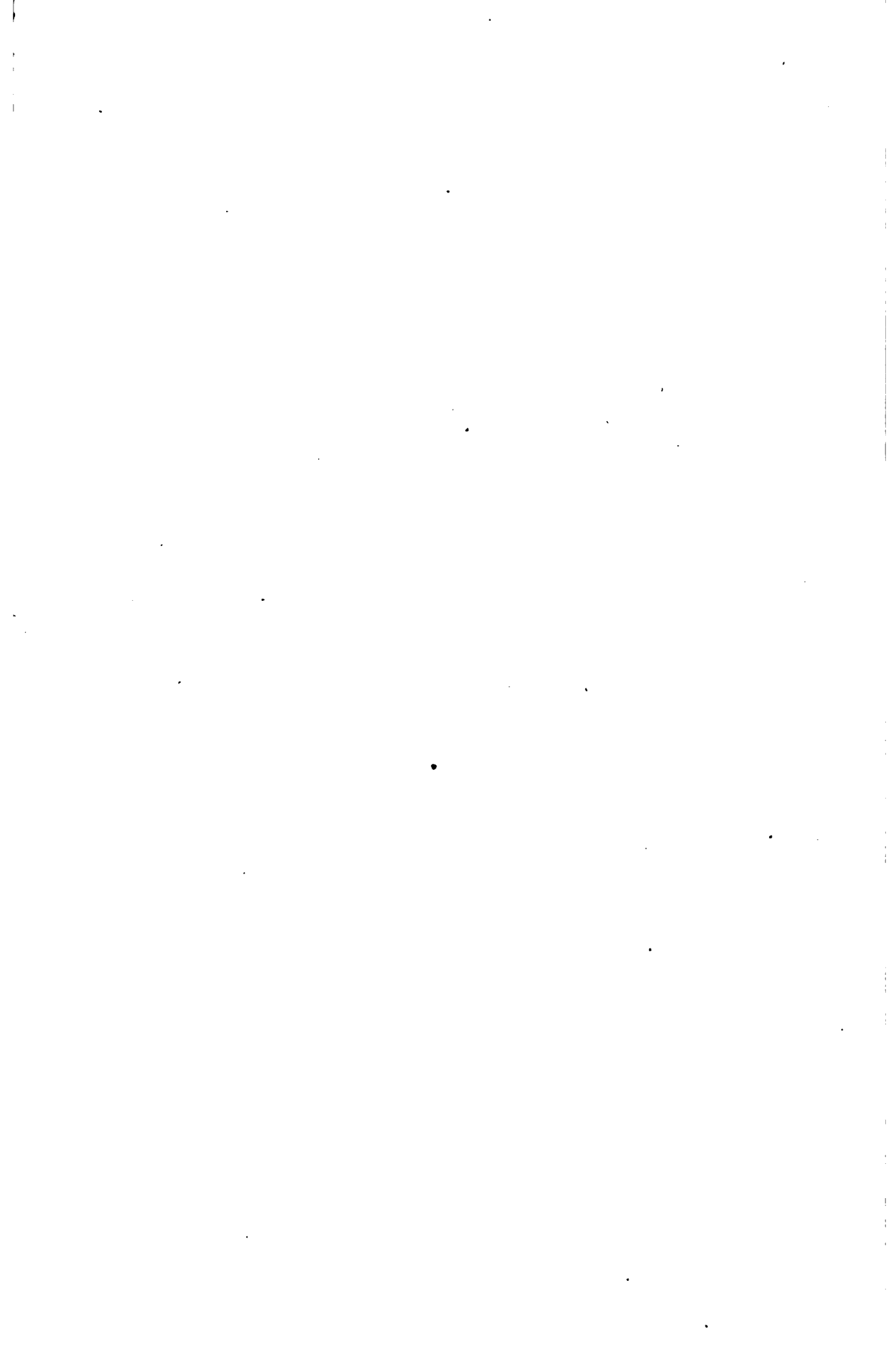


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# TABLE OF ABBREVIATIONS.

## A

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abbott's Law Dict.....Abbott's Law Dictionary.  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)...Abbott's Practice, New Series (N. Y.)  
 Abb. Shipp.....Abbott on Shipping.  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Adams, Eq.....Adams' Equity.  
 Add. ....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Ecc.....Addams' Ecclesiastical Reports.  
 Add. Torts .....Addison on Torts.  
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & E. (N. S.)...Adolphus and Ellis' English Queen's Bench Reports, New Series.  
 Aik. Dig.....Aikin's Digest of Laws (Ala.)  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky.)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Allen .....Allen (Mass.)  
 Allison's Am. Dict...Allison's American Dictionary.  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Reg....National Bankruptcy Register (U. S.)  
 Am. Bankr. Rep....American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Enc. Dict.....American Encyclopedic Dictionary.  
 Am. Eng. Enc. Law..American and English Encyclopedia of Law.  
 Am. Ins.....Arnold on Marine Insurance.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) .....American Law Register, New Series.  
 Am. Law Reg. (O. S.) .....American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep...American Law Times Reports.  
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).  
 Amos & F. Fixt...Amos and Ferard on Fixtures.  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.  
 Am. St. Rep.....American State Reports.  
 Am. & Eng. Dec. Eq..American and English Decisions in Equity.  
 Am. & Eng. Enc. Law .....American and English Encyclopedia of Law.

Am. & Eng. Ry. Cas..American and English Railway Cases.  
 And. Law Dict....Anderson's Law Dictionary.  
 Ang. Car.....Angell on Carriers.  
 Ang. Highw.....Angell & Durfee on Highways.  
 Ang. Ins.....Angell on Insurance.  
 Ang. Lim.....Angell on Limitation of Actions.  
 Ang. Tide Waters...Angell on Tide Waters.  
 Ang. & A. Corp....Angell and Ames on Corporations.  
 Ann. ....Queen Anne (as 8 Ann. c. 19).  
 Ann. Code.....Annotated Code.  
 Ann. Codes & St....Bellinger and Cotton's Annotated Codes and Statutes (Or.)  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchequer Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)  
 App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Arch. Cr. Pl.....Archbold's Criminal Pleading.  
 Arch. N. P.....Archbold's Law of Nisi Prius.  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Atk. ....Atkins' English Chancery Reports.  
 Atl. ....Atlantic Reporter.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Bac. Ins.....Bacon on Benefit Societies and Life Insurance.  
 Bac. Max.....Bacon's Maxims of the Law.  
 Bailey .....Bailey (S. C.)  
 Bailey, Eq.....Bailey's Equity (S. C.)  
 Baldw. ....Baldwin (U. S.)  
 Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes (Wash.)  
 Bankr. Act.....Bankruptcy Act.  
 Bankr. Form.....Bankruptcy Forms.  
 Ban. & A.....Banning & Arden's Patent Cases (U. S.)  
 Barb. ....Barbour (N. Y.)  
 Barb. (Ark.).....Barber (Ark.)  
 Barb. Ch.....Barbour's Chancery (N. Y.)  
 Barb. Cr. Law.....Barbour's Criminal Law.  
 Barb. Ch. Pr.....Barbour's Chancery Practice.  
 Barn. & Adol.....Barnewall and Adolphus' English King's Bench Reports.  
 Barn. & Ald.....Barnewall and Alderson's English King's Bench Reports.



Barn. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Blatchf. & H.....	Blatchford & Howland (U. S.)
Barn. & S.....	Best and Smith's English Queen's Bench Reports.	Bl. Comm.....	Blackstone's Commentaries on the Laws of England.
Barr .....	Barr (Pa.)	Bliss, Code Pl.....	Bliss on Code Pleading.
Bates' Ann. St.....	Bates' Annotated Revised Statutes (Ohio).	B. Mon.....	B. Monroe (Ky.)
Battle's Revisal....	Battle's Revisal of the Public Statutes of North Carolina.	Bond .....	Bond (U. S.)
Batts' Ann. Civ. St..	Batts Annotated Revised Civil Statutes (Tex.)	Bosw. ....	Bosworth (N. Y.)
Bart. ....	Baxter (Tenn.)	Bos. & P.....	Bosanquet and Puller's English Common Pleas Reports.
Bay .....	Bay (S. C.)	Bos. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.
Bayley, Bills.....	Bayley on Bills.	Bouv. Inst.....	Bouvier's Institutes of American Law.
Beach, Contrib. Neg.	Beach on Contributory Negligence.	Bouv. Law Dict....	Bouvier's Law Dictionary.
Beach, Mod. Eq. Jur.	Beach's Commentaries on Modern Equity Jurisprudence.	Bradf. Sur. ....	Bradford's Surrogate (N. Y.)
Beach, Priv. Corp.	Beach on Private Corporations.	Bradw. ....	Bradwell (Ill.)
Beal. ....	Beasley (N. J.)	Branch .....	Branch (Fla.)
Beav. ....	Beavan's English Rolls Court Reports.	Brandt, Sur.....	Brandt on Suretyship and Guaranty.
Bee .....	Bee (U. S.)	Brayt. ....	Brayton (Vt.)
Ben. ....	Benedict (U. S.)	Breese .....	Breese (Ill.)
Benj. Sales.....	Benjamin on Sales.	Brev. ....	Brevard (S. C.)
Benn. ....	Bennett (Cal.)	Brewst. ....	Brewster (Pa.)
Benth. Jud. Ev.....	Bentham's Judicial Evidence.	Brick. Dig.....	Brickell's Digest (Ala.)
Best, Ev.....	Best on Evidence.	Brightly, Elect. Cas.	Brightly's Leading Election Cases (Pa.)
Best & S.....	Best and Smith's English Queen's Bench Reports.	Brightly, N. P.....	Brightly's Nisi Prius Reports (Pa.)
Bibb .....	Bibb (Ky.)	Bro. Civ. Law.....	Browne's Civil and Admiralty Law.
Bid. Ins.....	Biddle on Insurance.	Brock. ....	Brockenbrough (U. S.)
Bid. War. Sale Chat.	Biddle on Warranties in Sale of Chattels.	Brock. & H.....	Brockenbrough & Holmes (Va.)
Big. ....	Bignell's Reports (India).	Brod. & B.....	Broderip & Bingham's English Common Pleas Reports.
Bigelow, Estop....	Bigelow on Estoppel.	Brooke, Abr.....	Brooke's Abridgment.
Bigelow, Lead. Cas.	Bigelow's Leading Cases on Bills and Notes, Torts, or Wills.	Broom's Com. Law..	Broom's Commentaries on the Common Law.
Bin. ....	Binney (Pa.)	Brown, Adm.....	Brown's Admiralty (U. S.)
Bing. ....	Bingham's English Common Pleas Reports.	Brown, Ch.....	Brown's English Chancery Reports.
Bing. N. C.....	Bingham's New Cases, English Common Pleas.	Browne .....	Browne (Pa.)
Bish. Cont.....	Bishop on Contracts.	Browne, Jud. Interp.	Browne's Judicial Interpretation of Common Words and Phrases.
Bish. Cr. Law.....	Bishop on Criminal Law.	Brown's Roman Law .....	Brown's Epitome and Analysis of Saligny's Treatise on Obligations in Roman Law.
Bish. Cr. Proc.....	Bishop on Criminal Procedure.	Browne, St. Frauds.	Browne on Statute of Frauds.
Bish. Eq.....	Bispham's Principles of Equity.	Brunner, Col. Cas...	Brunner's Collected Cases (U. S.)
Bish. Mar., Div. & Sep. ....	Bishop on Marriage, Divorce, and Separation.	Bull. N. P.....	Buller's Law of Nisi Prius.
Bish. Mar. & Div...	Bishop on Marriage and Divorce.	Bulst. ....	Bulstrode's English King's Bench Reports.
Bish. New Cr. Law.	Bishop's New Criminal Law.	Bump. Fraud. Conv.	Bump on Fraudulent Conveyances.
Bish. New Cr. Prac.	Bishop's New Criminal Procedure.	Burge, Sur.....	Burge on Suretyship.
Bisp. Eq.....	Bispham's Principles of Equity.	Burn. ....	Burnett (Wis.)
Biss. ....	Bissell (U. S.)	Burns' Ann. St....	Burns' Annotated Statutes (Ind.)
Bissett, Est.....	Bisset on Estates for Life.	Burns' Rev. St....	Burns' Annotated Statutes (Ind.)
Bl. ....	Henry Blackstone's English Common Pleas Reports.	Burr. ....	Burrows' English King's Bench Reports.
Black .....	Black (U. S.)	Burrill, Circ. Ev...	Burrill on Circumstantial Evidence.
Black. Com.....	Blackstone's Commentaries on the Laws of England.	Burr. L. Dict.....	Burrill's Law Dictionary.
Black, Const. Law..	Black on Constitutional Law.	Burr. Pr.....	Burrill's New York Practice.
Black, Dict.....	Black's Law Dictionary.	Burt. Real Prop....	Burton on Real Property.
Black, Judg.....	Black on Judgments.	Busb. ....	Busbee (N. C.)
Blackf. ....	Blackford (Ind.)	Busb. Eq.....	Busbee's Equity (N. C.)
Black, Interp. Laws.	Black on the Construction and Interpretation of Laws.	Bush .....	Bush (Ky.)
Bland .....	Bland (Md.)	B. & Ald.....	Barnewall and Alderson's English King's Bench Reports.
Blatchf. ....	Blatchford (U. S.)		
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)		

B. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Cir. Ct. Dec.....	Circuit Decisions (Ohio)
B. & C. Comp.....	Bellinger and Cotton's Annotated Codes and Statutes (Or.)	Cir. Ct. R.....	Circuit Court Reports (Ohio)
B. & P.....	Bosanquet & Puller's English Common Pleas Reports.	City Ct. R.....	City Court Reports (N. Y.)
		City Ct. R. Supp....	City Court Reports, Supplement (N. Y.)
		City H. Rec.....	City Hall Recorder (N. Y.)
		Civ. Code.....	Civil Code.
		Civ. Code Practices..	Civil Code of Practice.
		Civ. Prac. Act.....	Civil Practice Act.
		Civ. Proc. R.....	Civil Procedure Reports (N. Y.)
		Clancy, Husb. & W.	Clancy on Husband and Wife.
		Clark .....	Clark (Pa.)
		Clarke .....	Clarke (Iowa)
		Clarke, Ch.....	Clarke's Chancery (N. Y.)
		Clark & F.....	Clark and Finnely's House of Lords Reports.
		Clay's Dig.....	Clay's Digest of Laws of Alabama.
		Cleve. Law Rec....	Cleveland Law Recorder (Ohio)
		Cleve. Law Rep....	Cleveland Law Reporter (Ohio)
		Cliff .....	Clifford (U. S.)
		Co. ....	Coke's English King's Bench Reports.
		Cobbe's Ann. St..	Cobbe's Annotated Statutes (Neb.)
		Code Civ. Proc.....	Code of Civil Procedure.
		Code Cr. Proc.....	Code of Criminal Procedure.
		Code Prac.....	Code of Practice.
		Code Proc. ....	Code of Procedure.
		Code Pub. Gen. Laws .....	Code of Public General Laws.
		Code Pub. Loc. Laws .....	Code of Public Local Laws.
		Code R. (N. S.)....	Code Reports, New Series (N. Y.)
		Code Rep.....	Code Reporter (N. Y.)
		Code Supp.....	Supplement to the Code.
		Co. Inst.....	Coke's Institutes.
		Coke .....	Coke's English King's Bench Reports.
		Cold. ....	Coldwell (Tenn.)
		Colem. Cas.....	Coleman's Cases (N. Y.)
		Colem. & C. Cas....	Coleman & Caines' Cases (N. Y.)
		Co. Litt.....	Coke on Littleton.
		Collier, Partn.....	Collyer on Partnership.
		Colly. ....	Collyer's English Chancery Cases.
		Colo. ....	Colorado.
		Colo. App.....	Colorado Appeals Reports.
		Colo. Law Rep....	Colorado Law Reporter.
		Com. Dig.....	Comyn's Digest of the Laws of England.
		Comm. ....	Commentaries.
		Com. on Con.....	Comyn's Law of Contracts.
		Comp. Laws.....	Compiled Laws.
		Comp. St.....	Compiled Statutes.
		Comst. ....	Comstock (N. Y.)
		Comyn .....	Comyn's English King's Bench Reports.
		Conf. R.....	Conference Reports (N. C.)
		Cong. ....	Congress.
		Conn. ....	Connecticut.
		Consol. St.....	Consolidated Statutes.
		Const. ....	Constitution.
		Const. Amend.....	Amendment to Constitution.
		Const. U. S. Amend.	Amendment to the Constitution of the United States.
		Con. Sur.....	Connolly's Surrogate (N. Y.)
		Cooke .....	Cooke (Tenn.)
		Cooke, Ins.....	Cooke on Life Insurance.
		Cook's Pen. Code ..	Cook's Penal Code (N. Y.)
		Cooley, Const. Lim.	Cooley's Constitutional Limitations.
		Cooley, Tax'n ....	Cooley on Taxation.
		Cooley, Torts.....	Cooley on Torts.
		Coop. Eq. Pl.....	Cooper's Equity Pleading.
		Copp, Pub. Land	Copp's United States Pub- Laws .....
			lic Land Laws.

## C

Cab. & El.....	Cababé and Ellis' Queen's Bench Reports.
Caines .....	Caines (N. Y.)
Caines, Cas.....	Caines' Cases (N. Y.)
Cal. ....	California.
Call .....	Call (Va.)
Calvin, Lex.....	Calvin's Lexicon Juridicum.
Camp. ....	Campbell's English Nisi Prius Reports.
Cam. & N.....	Cameron & Norwood's Conference (N. C.)
Car. ....	Carolus (as 22 & 23 Car. II.)
Car. Law Repos...	Carolina Law Repository (N. C.)
Carr. & M.....	Carrington and Marshman's English Nisi Prius Reports.
Cart .....	Carter (Ind.)
Car. & K.....	Carrington and Kirwan's English Nisi Prius Reports.
Car. & P.....	Carrington & Payne's English Nisi Prius Reports.
Casey .....	Casey (Pa.)
C. B. ....	English Common Bench Reports (Manning, Granger & Scott).
C. B. (N. S.)....	English Common Bench Reports, New Series, by John Scott.
C. C. A.....	Circuit Court of Appeals (U. S.)
C. E. Green.....	C. E. Green (N. J.)
Cent. Dict.....	Century Dictionary.
Cent. Law J.....	Central Law Journal, St. Louis, Mo.
Chand. ....	Chandler (Wis.)
Chan. Sentinel ...	Chancery Sentinel (N. Y.)
Ch. App.....	Chancery Appeal Cases, English Law Reports.
Charlt., R. M.....	R. M. Charlton (Ga.)
Charlt., T. U. P....	T. U. P. Charlton (Ga.)
Chase .....	Chase (U. S.)
Chase, Steph. Dig.	Chase on Stephens' Digest of Evidence.
Ch. Cas.....	English Cases in Chancery.
Ch. Div.....	Chancery Division, English Law Reports.
Chest. Co. Rep....	Chester County Reports (Pa.)
Cheves .....	Cheves (S. C.)
Cheves, Eq.....	Cheves' Equity (S. C.)
Chi. Leg. N.....	Chicago Legal News (Ill.)
Chip., D.....	D. Chipman (Vt.)
Chip., N.....	N. Chipman (Vt.)
Chit. Bills .....	Chitty on Bills.
Chit. Bl.....	Chitty's Edition of Blackstone's Commentaries.
Chit. Cont.....	Chitty on Contracts.
Chit. Cr. Law ....	Chitty's Criminal Law.
Chit. Pr.....	Chitty's General Practice.
Chitty, Bl. Comm..	Chitty's Edition of Blackstone's Commentaries.
Ch. Pl. ....	Chitty on Pleading.
Cin. R.....	Cincinnati Superior Court Reports (Ohio)
Cin. Super. Ct. Rep'r .....	Cincinnati Superior Court Reporter (Ohio)

Co. Rep.....	Coke's English King's Bench Reports.		<b>D</b>
Corn. Deeds .....	Cornish on Purchase Deeds.	Dak. ....	Dakota.
Cornish, Purch. Deeds .....	Cornish on Purchase Deeds.	Dall. (Pa.).....	Dallas (Pa.)
Cow. ....	Cowen (N. Y.)	Dall. (U. S.).....	Dallas (U. S.)
Cow. Cr. Rep.....	Cowen's Criminal Reports (N. Y.)	Dall. Dig.....	Dallam's Digest and Options (Tex.)
Cowp. ....	Cowper's English King's Bench Reports.	Daly .....	Daly (N. Y.)
Cox .....	Cox (Ark.)	Dana .....	Dana (Ky.)
Cox .....	Cox's English Chancery Cases.	Dane's Abr.....	Dane's Abridgment of American Law.
Cox, C. C.....	Cox's English Criminal Cases.	Daniell, Ch. Pl. & Prac. ....	Daniell's Chancery Pleading and Practice.
Cox, Cr. Cas.....	Cox's English Criminal Cases.	Daniel, Neg. Inst...	Daniel's Negotiable Instruments.
Coxe .....	Coxe (N. J.)	Davis, Cr. Law.....	Davis' Criminal Law.
C. P. Div.....	Common Pleas Division, English Law Reports.	Dawson's Code.....	Dawson's Code of Civil Procedure (Colo.)
C. P. Rep.....	Common Pleas Reporter (Pa.)	Day .....	Day (Conn.)
Crabbe .....	Crabbe (U. S.)	D. C. ....	District of Columbia.
Crabb, Eng. Synonyms .....	Crabb's English Synonyms.	D. Chip.....	D. Chipman (Vt.)
Cr. Act.....	Criminal Act.	Deac. Cr. Law.....	Deacon on Criminal Law of England.
Craig & P.....	Craig and Phillips' English Chancery Reports.	Deady .....	Deady (U. S.)
Cranch .....	Cranch (U. S.)	Dears. & B. Crown Cas. ....	Dearsly and Bell's English Crown Cases.
Cranch, C. C.....	Cranch's Circuit Court (U. S.)	De Gex, F. & J....	De Gex, Fisher & Jones' English Chancery Reports.
Cranch, Pat. Dec..	Cranch's Patent Decisions (U. S.)	De Gex, M. & G....	De Gex, Macnaghten, and Gordon's English Chancery Reports.
Cr. Cir. Comp.....	Crown Circuit Companion (Irish).	Del. ....	Delaware.
Cr. Code.....	Criminal Code.	Del. Ch.....	Delaware Chancery.
Cr. Law Mag.....	Criminal Law Magazine (N. J.)	Del. Co. R.....	Delaware County Reports (Pa.)
C. Rob. Adm.....	Charles Robinson's English Admiralty Reports.	Del. Term R.....	Delaware Term Reports.
Cro. Car.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)	Dem. Sur.....	Demarest's Surrogate (N. Y.)
Cro. Cas.....	Croke's English King's Bench Reports temp. Charles I (3 Cro.)	Denio .....	Denio (N. Y.)
Cro. Eliz.....	Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)	Denison, Cr. Cas....	Denison's English Crown Cases.
Cro. Jac.....	Croke's English King's Bench Reports temp. James (Jacobus) I (2 Cro.)	Desaus. ....	Desaussure's Equity (S. C.)
Cromp. Just.....	Crompton's Office of Justice of the Peace.	Desty, Tax'n.....	Desty on Taxation.
Crompt. ....	Star Chamber Cases by Crompton.	Dev. ....	Devereux (N. C.)
Cromp. & J.....	Crompton & Jervis' English Exchequer Reports.	Dev. Ct. Cl.....	Devereux's Court of Claims (U. S.)
Cr. Prac. Act ....	Criminal Practice Act.	Dev. Eq.....	Devereux's Equity (N. C.)
Cr. Proc. Act ....	Criminal Procedure Act.	Devl. Deeds.....	Devlin on Deeds.
Cr. St.....	Criminal Statutes.	Dev. & B.....	Devereux & Battle (N. C.)
Cruise's Dig.....	Cruise's Digest of the Law of Real Property.	Dev. & B. Eq.....	Devereux & Battle's Equity (N. C.)
Ct. Cl.....	Court of Claims (U. S.)	Dacey, Dom.....	Dacey's Law of Domicil.
Curt. ....	Curtis (U. S.)	Dick. ....	Dickinson (N. J.)
Cush. ....	Cushing (Mass.)	Dickens .....	Dickens' English Chancery Reports.
Cush. Law & Prac. Leg. Assem.....	Cushing's Law and Practice of Legislative Assemblies.	Dict. ....	Dictionary.
Cushm. ....	Cushman (Miss.)	Dig. ....	Digest.
Cyc. Law & Proc...	Cyclopedia of Law and Procedure.	Dig. Fla.....	Thompson's Digest of Laws (Fla.)
Cyclop. Dict.....	Shumaker & Longsdorf's Cyclopedic Dictionary.	Dig. L. K.....	Littell and Swigert's Digest of Statute Law (Ky.)
C. & K.....	Carrington and Kirwan's English Nisi Prius Reports.	Dig. St.....	English's Digest of the Statutes (Ark.)
C. & P.....	Carrington and Payne's English Nisi Prius Reports.	Dill. ....	Dillon (U. S.)
		Dillon, Mun. Corp...	Dillon on Municipal Corporations.
		Disn. ....	Disney (Ohio)
		Dom. Civ. Law.....	Domat's Civil Law.
		Doug. ....	Douglas' English King's Bench Reports.
		Doug. ....	Douglass (Mich.)
		Dowl. & L.....	Dowling & Lowndes' English Ball Court Reports.
		Dowl. & R.....	Dowling and Ryland's English King's Bench Reports.
		Drake, Attachm....	Drake on Attachment.
		Dud. ....	Dudley (Ga.)
		Dud. Eq.....	Dudley's Equity (S. C.)
		Dud. Law.....	Dudley's Law (S. C.)
		Duer .....	Duer's Superior Court (N. Y.)

Dup. Jur.....Duponceau on Jurisdiction  
of United States Courts.  
Dutch.....Dutcher (N. J.)  
Duv. ....Duvall (Ky.)  
Dyer .....Dyer's English King's  
Bench Reports.

## E

East .....East's English King's  
Bench Reports.  
East, P. C.....East's Pleas of the Crown.  
Eccl. R.....English Ecclesiastical Re-  
ports.  
E. C. L.....English Common Law Re-  
ports (American Re-  
print).  
Ed. ....Edition.  
Edm. Rev. St.....Edmonds' Statutes at Large  
(N. Y.)  
Edm. Sel. Cas.....Edmonds' Select Cases (N.  
Y.)  
E. D. Smith.....E. D. Smith (N. Y.)  
Edw. ....King Edward (as 4 Edw.  
I).  
Edw. Bailm.....Edwards on the Law of  
Bailments.  
Edw. Bills & N.....Edwards on Bills and  
Notes.  
Edw. Brok. & F....Edwards on Factors and  
Brokers.  
Edw. Ch.....Edwards' Chancery (N. Y.)  
El, Bl. & El.....Ellis, Blackburn, and El-  
lis' English Queen's  
Bench Reports.  
Elia. ....Queen Elizabeth (as 18  
Elia.).  
Elliot, Deb.....Elliot's Debates on the  
Federal Constitution.  
Elliot, Supp.....Elliot Supplement to the  
Indiana Revised Stat-  
utes.  
Elliott, Roads & S. Elliott on Roads and  
Streets.  
Elliott, R. R.....Elliott on Railroads.  
Elm. Dig.....Elmer's Digest of Laws  
(N. J.)  
El. & Bl.....Ellis and Blackburn's Eng-  
lish Queen's Bench Re-  
ports.  
E. L. & Eq.....English Law and Equity  
(American Reprint).  
Emerig. Ins.....Emerison on Insurance.  
Enc. Amer.....Encyclopædia Americana.  
Enc. Brit.....Encyclopædia Britannica.  
Enc. Ins. U. S.....Insurance Year-Book.  
Enc. Law.....American and English En-  
cyclopædia of Law.  
Enc. Pl. & Prac...Encyclopædia of Pleading  
and Practice.  
End. Interp. St....Endlich's Commentaries on  
the Interpretation of  
Statutes.  
Endlich, Bldg.  
Ass'ns. ....Endlich on Building Asso-  
ciations.  
Eng. ....English (Ark.)  
Eng. C. L.....English Common Law Re-  
ports (American Reprint).  
Eng. Ecc. R.....English Ecclesiastical Re-  
ports (American Reprint).  
Eng. Law & Eq....English Law and Equity  
Reports (American Re-  
print).  
Eq. ....Equity.  
Ersk. Inst.....Erskine's Institutes of the  
Law of Scotland.  
Escrive, Dict.....Escrive's Dictionary of  
Jurisprudence.  
Ev. ....Evidence.  
Ex. ....English Exchequer Reports  
(Welsby, Hurlstone &  
Gordon).  
Exch. ....English Exchequer Re-  
ports (Welsby, Hurlstone  
& Gordon).

Ex. Sess. ....Extra Session.  
E. & B.....Ellis and Blackburn's Eng-  
lish Queen's Bench Re-  
ports.

## F

Fairf. ....Fairfield (Me.)  
Fearne, Rem.....Fearne on Contingent Re-  
mainders.  
Fed. ....Federal Reporter (U. S.)  
Fed. Cas.....Federal Cases (U. S.)  
Fernald, Eng. Syn-Fernald's English Syno-  
nyms .....nyms  
Finch, Law.....Finch, Sir Henry; a Dis-  
course of Law (1759).  
Fish. Pat. Cas....Fisher's Patent Cases (U.  
S.)  
Fish. Pat. Rep....Fisher's Patent Reports  
(U. S.)  
Fish. Prize Cas....Fisher's Prize Cases (U.  
S.)  
Fla. ....Florida.  
Flip. ....Flippin (U. S.)  
Fost. ....Foster (N. H.)  
Foster .....Foster's English Crown  
Law or Crown Cases.  
Fost. & F.....Foster and Finlason's Eng-  
lish Nisi Prius Reports.  
Freem. ....Freeman (Ill.)  
Freem. Ch.....Freeman's Chancery (Miss.)  
Freem. Judgm.....Freeman on Judgments.

## G

G. ....King George (as 15 Geo. II).  
Ga. ....Georgia.  
Gabb. Cr. Law....Gabbett's Criminal Law.  
Ga. Dec.....Georgia Decisions.  
Gale & Whatley  
Easem. ....Gale and Whatley (after-  
wards Gale) on Easem-  
ents.  
Gall. ....Gallison (U. S.)  
Gantt's Dig.....Gantt's (& Caldwell's) Di-  
gest of Statutes (Ark.)  
Gav. & H. Rev. St..Gavin and Hord's Revised  
Statutes (Ind.)  
Gen. Assem.....General Assembly.  
Gen. Laws.....General Laws.  
Gen. St.....General Statutes.  
Geo. ....King George (as 15 Geo.  
II).  
George .....George (Miss.)  
Gil. ....Gillfillan (Minn.)  
Gilbert, Ev.....Gilbert's Law of Evidence.  
Gild. ....Gilderseere Reports  
(N. M.)  
Gilbert, Tenures...Gilbert on Tenures.  
Gill .....Gill (Md.)  
Gillet, Cr. Law....Gillett's Treatise on Crimi-  
nal Law and Procedure  
in Criminal Cases.  
Gill & J.....Gill & Johnson (Md.)  
Gilman .....Gilman (Ill.)  
Gilmer .....Gilmer (Va.)  
Gilp. ....Gilpin (U. S.)  
Godd. Easem.....Goddard on Easements.  
Gould, Pl.....Gould on the Principles of  
Pleading in Civil Actions.  
Gould's Dig.....Gould's Digest of Laws  
(Ark.)  
Grant, Cas. ....Grant's Cases (Pa.)  
Grant's Dig.....Gantt's (& Caldwell's) Di-  
gest of Statutes (Ark.)  
Grat. ....Grattan (Va.)  
Gray .....Gray (Mass.)  
Green, C. E.....C. E. Green (N. J.)  
Green, Cr. Law R...Green's Criminal Law Re-  
ports (N. Y.)  
Green, H. W.....H. W. Green (N. J.)  
Green, J. S.....J. S. Green (N. J.)  
Greene, G.....G. Greene (Iowa)



Greenl. .... Greenleaf (Me.)  
 Greenl. Cruise, Real  
 Prop. .... Greenleaf's Edition of  
 Cruise's Digest of Real  
 Property.  
 Greenl. Ev. .... Greenleaf on Evidence.  
 Gross, St. .... Gross' Illinois Compiled  
 Laws (or Statutes).

## H

Hagg. .... Haggard's English Admi-  
 nistrative Reports.  
 Hagg. Cons. .... Haggard's English Con-  
 sistory Reports.  
 Hagg. Ecc. .... Haggard's English Eccle-  
 siastical Reports.  
 Hale, P. C. .... Hale's Pleas of the Crown.  
 Hall ..... Hall's Superior Court (N.  
 Y.)  
 Halleck, Int. Law. .... Halleck's International  
 Law.  
 Hall, Mex. Law. .... Hall's Mexican Law.  
 Halst. .... Halsted (N. J.)  
 Halst. Ch. .... Halsted's Chancery (N. J.)  
 Ham. .... Hammond (Ohio)  
 Ham. Cont. .... Hammond on Contracts.  
 Hand ..... Hand (N. Y.)  
 Handy ..... Handy (Ohio)  
 Har. (Del.) .... Harrington (Del.)  
 Har. (Mich.) .... Harrington (Mich.)  
 Har. (N. J.) .... Harrison (N. J.)  
 Hardin ..... Hardin (Ky.)  
 Hare ..... Hare's English Vice Chan-  
 cellors' Reports.  
 Harg. Co. Litt. .... Hargrave's Notes to Coke  
 on Littleton.  
 Harp. .... Harper (S. C.)  
 Harp. Eq. .... Harper's Equity (S. C.)  
 Harris ..... Harris (Pa.)  
 Hart Dig. .... Hartley's Digest of Laws,  
 (Tex.)  
 Har. & G. .... Harris & Gill (Md.)  
 Har. & J. .... Harris & Johnson (Md.)  
 Har. & McH. .... Harris & McHenry (Md.)  
 Hasb. .... Hasbrouck's Reports (Ida-  
 ho)  
 Hask. .... Haskell (U. S.)  
 Hata. .... Hatsell's Parliamentary  
 Precedents.  
 Haw. .... Hawaiian Reports.  
 Hawk. .... Hawkins' Pleas of the  
 Crown.  
 Hawkins' Wills. .... Hawkins' Construction of  
 Wills.  
 Hawk. P. C. .... Hawkins' Pleas of the  
 Crown.  
 Hawks ..... Hawks (N. C.)  
 Hayes ..... Hayes' Irish Exchequer  
 Reports.  
 Hayw. (N. C.) .... Haywood (N. C.)  
 Hayw. (Tenn.) .... Haywood (Tenn.)  
 Hayw. & H. .... Hayward & Hazelton (U.  
 S.)  
 Haz. Reg. .... Hazard's Register (Pa.)  
 H. Bl. .... Henry Blackstone's Eng-  
 lish Common Pleas Re-  
 ports.  
 Head ..... Head (Tenn.)  
 Heisk. .... Heiskell (Tenn.)  
 Hemp. .... Hempstead (U. S.)  
 Hen. .... King Henry (as 8 Hen.  
 VI.)  
 Hen. St. .... Hening's Statutes (Va.)  
 Hen. & M. .... Hening & Munford (Va.)  
 Herm. Chat. Mortg. .... Herman on Chattel Mort-  
 gages.  
 Hill ..... Hill (N. Y.)  
 Hill. Cont. .... Hilliard on Contracts.  
 Hill. Eq. .... Hill's Equity (S. C.)  
 Hilliard, R. R. .... Hilliard on Real Property.  
 Hill, Law. .... Hill's Law (S. C.)  
 Hill's Ann. Codes &  
 Laws ..... Hill's Annotated Codes and  
 General Laws (Or.)

Hill's Ann. St. &  
 Codes ..... Hill's Annotated General  
 Statutes and Codes  
 (Wash.)  
 Hill & D. Supp. .... Hill & Denio, Lator's Sup-  
 plement (N. Y.)  
 Hilt. .... Hilton (N. Y.)  
 Hil. Term 4, Will.  
 IV. .... Hilary Term 4, William  
 IV.  
 Hil. Torts. .... Hilliard on the Law of  
 Torts.  
 H. L. Cas. .... House of Lords' Cases,  
 English.  
 Hobart ..... Hobart's English King's  
 Bench Reports.  
 Hodge, Presb. Law. .... Hodge on Presbyterian  
 Law.  
 Hoff. Ch. .... Hoffman's Chancery (N.  
 Y.)  
 Hoff. Land Cas. .... Hoffman's Land Cases (U.  
 S.)  
 Holmes ..... Holmes (U. S.)  
 Holt, N. P. .... Holt's English Nisi Prius  
 Reports.  
 Holt, Shipp. .... Holt on Shipping.  
 Hopk. Ch. .... Hopkins' Chancery (N. Y.)  
 Horner's Ann. St. .... Horner's Annotated Revis-  
 ed Statutes (Ind.)  
 Horner's Rev. St. .... Horner's Annotated Re-  
 vised Statutes (Ind.)  
 Houst. .... Houston (Del.)  
 Houst. Cr. Cas. .... Houston's Criminal Cases  
 (Del.)  
 How. (Miss.) .... Howard (Miss.)  
 How. .... Howard (U. S.)  
 How. Ann. St. .... Howells' Annotated Stat-  
 utes (Mich.)  
 How. Prac. .... Howard's Practice (N. Y.)  
 How. Prac. (N. S.) .... Howard's Practice, New  
 Series (N. Y.)  
 How. St. .... Howells' Annotated Stat-  
 utes (Mich.)  
 How. & H. St. .... Howard and Hutchinson's  
 Statutes (Miss.)  
 Howell, N. P. .... Howell's Nisi Prius Re-  
 ports (Mich.)  
 Howell, St. Tr. .... Howell's English State  
 Trials.  
 Hughes (Ky.) .... Hughes (Ky.)  
 Hughes ..... Hughes (U. S.)  
 Hume's Hist. Eng. .... Hume's History of Eng-  
 land.  
 Humph. .... Humphrey (Tenn.)  
 Hun ..... Hun (N. Y.)  
 Hurd's Rev. St. .... Hurd's Revised Statutes  
 (Ill.)  
 Hurl. Bonds. .... Hurlstone on Bonds.  
 Hurl. & C. .... Hurlstone & Coltman's  
 English Exchequer Re-  
 ports.  
 Hurl. & G. .... Hurlstone and Gordon's  
 Reports (10, 11, Eng-  
 lish Exchequer Reports).  
 Hurl. & N. .... Hurlstone and Norman's  
 English Exchequer Re-  
 ports.  
 Hutch. Carr. .... Hutchinson on Carriers.  
 Hutch. Code. .... Hutchinson's Code (Miss.)  
 Hutch. Dig. St. .... Hutchinson's Code (Miss.)

## I

Idaho ..... Idaho.  
 Ill. .... Illinois.  
 Ill. App. .... Illinois Appellate Court  
 Reports.  
 Imp. Dict. .... Imperial Dictionary.  
 Ind. .... Indiana.  
 Ind. App. .... Indiana Appellate Court  
 Reports.  
 Ind. T. .... Indian Territory.  
 Ins. Law J. .... Insurance Law Journal  
 (Pa.)  
 Inst. .... Coke's Institutes.

Internat. Dict. .... Webster's International Dictionary.  
 Interst. Com. R.... Interstate Commerce Reports.  
 Iowa ..... Iowa.  
 Ired. .... Iredell's Law (N. C.)  
 Ired. Eq. .... Iredell's Equity (N. C.)

## J

Jac. .... King James (as 21 Jac. I).  
 Jac. Law Dict. .... Jacob's Law Dictionary.  
 Jagg. Torts. .... Jaggard on Torts.  
 Jarm. Willa. .... Jarman on Willa.  
 Jeff. .... Jefferson (Va.)  
 Jelllett, Cr. Law.... Gillett's Treatise on Criminal Law and Procedure in Criminal Cases.  
 Jeremy, Eq. .... Jeremy's Equity Jurisdiction.  
 J. J. Marsh. .... J. J. Marshall (Ky.)  
 Johns. .... Johnson (N. Y.)  
 Johns. Cas. .... Johnson's Cases (N. Y.)  
 Johns. Ch. .... Johnson's Chancery (N. Y.)  
 Johnson's Quarto Dict. .... Johnson's Quarto Dictionary.  
 Jones ..... Jones (Pa.)  
 Jones, Chat. Mortg. Jones on Chattel Mortgages.  
 Jones, Eq. .... Jones' Equity (N. C.)  
 Jones, Law. .... Jones' Law (N. C.)  
 Jones, Mortg. .... Jones on Mortgages.  
 Jones & S. .... Jones & Spencer (N. Y.)  
 Jour. Juris. .... Journal of Jurisprudence.  
 J. P. Smith. .... J. P. Smith's English King's Bench Reports.  
 J. Scott (N. S.).... English Common Bench Reports, New Series by John Scott.  
 Jud. Repos. .... Judicial Repository (N. Y.)

## K

Kan. .... Kansas.  
 Kan. App. .... Kansas Appeals.  
 Kay & J. .... Kay and Johnson's English Vice Chancellors' Reports.  
 Keb. .... Keble's English King's Bench Reports.  
 Keen ..... Keen's English Rolls Court Reports.  
 Keene, Ch. .... Keen's English Rolls Court Reports.  
 Keener, Quasi Cont. Keener on Quasi Contracts.  
 Kel. .... Sir John Kelyng's English Crown Cases.  
 Kelly ..... Kelly (Ga.)  
 Kent, Comm. .... Kent's Commentaries on American Law.  
 Kern. .... Kernan (N. Y.)  
 Keyes ..... Keyes (N. Y.)  
 Kielway ..... Keilway's English King's Bench Reports.  
 Kirby ..... Kirby (Conn.)  
 Knight, Mech. Dict. Knight's American Mechanical Dictionary.  
 Kulp ..... Kulp (Pa.)  
 Ky. .... Kentucky.  
 Kyd ..... Kyd on Bills of Exchange.  
 Kyd, Corp. .... Kyd on Corporations.  
 Ky. Dec. .... Kentucky Decisions.  
 Ky. Law Rep. .... Kentucky Law Reporter.  
 K. & R. .... Kent and Radcliff's Law of New York (Revision of 1801).

## L

La. .... Louisiana.  
 La. Ann. .... Louisiana Annual.  
 Lack. Jur. .... Lackawanna Jurist (Pa.)

Lack. Leg. N. .... Lackawanna Legal News (Pa.)  
 Lallor, Supp. .... Lallor's Supplement to Hill & Denio's Reports (N. Y.)  
 Lanc. Bar ..... Lancaster Bar.  
 Lanc. Law Rev. .... Lancaster Law Review.  
 Lans. .... Lansing (N. Y.)  
 Lans. Ch. .... Lansing's Chancery (N. Y.)  
 Law J. Ch. .... Law Journal, New Series, Chancery.  
 Law J. Q. B. .... Law Journal, New Series, Queen's Bench (English).  
 Law of Trusts (Tiff. Tiffany and Bullard on & Bul.) .... Trusts and Trustees.  
 Law Rep. .... Law Reporter (Mass.)  
 Lawson, Exp. Ev. .... Lawson on Expert and Opinion Evidence.  
 Lawson, Rights, Rem. & Pr. .... Lawson on Rights, Remedies and Practice.  
 Law T. .... English Law Times Reports.  
 Law T. (N. S.) .... English Law Times Reports, New Series.  
 Ld. Raym. .... Lord Raymond's English King's Bench Reports.  
 Lea ..... Lea (Tenn.)  
 Leach, Cr. Cas. .... Leach's English Crown Cases.  
 Leach's C. L. .... Leach's Club Cases, London.  
 L. Ed. .... Lawyers' Edition Supreme Court Reports.  
 Lee ..... Lee (Cal.)  
 Leg. Chron. .... Legal Chronicle.  
 Leg. Gaz. .... Legal Gazette (Pa.)  
 Leg. Gaz. R. .... Legal Gazette Reports (Pa.)  
 Leg. Int. .... Legal Intelligencer (Pa.)  
 Leg. News. .... Legal News, Chicago.  
 Leg. Op. .... Legal Opinions.  
 Leg. Rec. Rep. .... Legal Record Reports.  
 Leg. Rep. .... Legal Reporter (Tenn.)  
 Leg. & Ins. Rep. .... Legal & Insurance Reporter.  
 Lehigh Val. Law Rep. .... Lehigh Valley Law Reporter.  
 Leigh ..... Leigh (Va.)  
 Leigh & C. .... Leigh and Cave's English Crown Cases.  
 Leon. .... Leonard's English King's Bench Reports.  
 Lev. .... Levin's English King's Bench Reports.  
 Lill. Conv. .... Lilly's Conveyancer.  
 Lill. Ab. .... Lilly's Abridgment, or Practical Register.  
 Litt. .... Coke on Littleton.  
 Litt. .... Littell (Ky.)  
 Litt. Comp. Laws. .... Littell's Statute Law (Ky.)  
 Litt. Sel. Cas. .... Littell's Select Cases (Ky.)  
 L. J. Ch. .... Law Journal, New Series, Chancery, English.  
 Loc. Acts. .... Local Acts.  
 Loc. Laws. .... Local Laws.  
 Lomax, Ex'rs. .... Lomax on Executors.  
 Long, Irr. .... Long on Irrigation.  
 Low. .... Lowell (U. S.)  
 Lower Ct. Dec. .... Lower Court Decisions (Ohio)  
 L. R. A. .... Lawyers' Reports Annotated.  
 L. R. App. Cas. .... English Law Reports, Appeal Cases, House of Lords.  
 L. R. C. P. .... English Law Reports, Common Pleas.  
 L. R. Eq. .... English Law Reports, Equity.  
 L. R. Ex. Cas. .... English Law Reports, Exchequer.  
 L. R. Exch. .... English Law Reports, Exchequer.  
 L. R. H. L. .... English Law Reports, English and Irish Appeal Cases.

L. R. H. L. Sc.....	English Law Reports, Scotch and Divorce Appeal Cases.	Meigs .....	Meigs (Tenn.)
L. R. Prob. & Div..	English Law Reports, Probate and Divorce.	Mer. ....	Merivale's English Chancery Reports.
L. R. Prov. & Div..	See L. R. Prob. & Div.	Metc. (Ky.) .....	Metcalf (Ky.)
L. R. Q. B.....	English Law Reports, Queen's Bench.	Metc. (Mass.) .....	Metcalf (Mass.)
Luz. Law T. ....	Luzerne Law Times (Pa.)	Mich. ....	Michigan.
Luz. Leg. Obs. ....	Luzerne Legal Observer (Pa.)	Mich. N. P.....	Michigan Nisi Prius.
Luz. Leg. Reg.....	Luzerne Legal Register (Pa.)	Miles .....	Miles (Pa.)
<b>M</b>		Mill, Const. ....	Mill's Constitutional Reports (S. O.)
		Miller, Const. ....	Miller on the Constitution of the United States.
McAdam, Landl. & T. ....	McAdam on Landlord and Tenant.	Miller's Code.....	Miller's Revised and Annotated Code (Iowa)
McAll. ....	McAllister (U. S.)	Mills' Ann. St.....	Mills' Annotated Statutes (Colo.)
MacArthur .....	MacArthur (D. C.)	Mill. & V. Code....	Milliken & Vertrees' Code (Tenn.)
MacArthur, Pat. Cas.	MacArthur's Patent Cases (U. S.)	Minn. ....	Minnesota.
MacArthur & M. ..	MacArthur & Mackey (D. C.)	Minor .....	Minor (Ala.)
McCahon .....	McCahon (Kan.)	Minor, Inst. ....	Minor's Institutes of Common and Statute Law.
McCart. ....	McCart (N. J.)	Misc. Laws.....	Miscellaneous Laws (Or.)
McCarty, Civ. Proc.	McCarty's Civil Procedure Reports (N. Y.)	Misc. Rep. ....	Miscellaneous Reports (N. Y.)
McClain, Cr. Law..	McClain's Criminal Law.	Miss. ....	Mississippi.
McClell. Dig.....	McClellan's Digest of Laws (Fla.)	Mitt. Eq. Pl.....	Mitford's Equity Pleading.
McCord .....	McCord's Law (S. C.)	Mo. ....	Missouri.
McCord, Eq.....	McCord's Equity (S. C.)	Moak, Eng. R.....	Moak's English Reports.
McCrary .....	McCrary (U. S.)	Mo. App. ....	Missouri Appeal Reports.
McCul. Dict. ....	McCulloch's Commercial Dictionary.	Mo. App. Rep'r ..	Missouri Appellate Reporter.
McGloin .....	McGloin (La.)	Mod. ....	Modern Reports, English King's Bench.
McKelvey, Ev. ....	McKelvey on Evidence.	Monag. ....	Monaghan (Pa.)
Mackey .....	Mackey (D. C.)	Mon., B. ....	B. Monroe (Ky.)
McLean .....	McLean (U. S.)	Mon., T. B.....	T. B. Monroe (Ky.)
McMul. ....	McMullan (S. C.)	Mont. ....	Montana.
McMul. Eq. ....	McMullan's Equity (S. C.)	Month. Law Bul...	Monthly Law Bulletin (N. Y.)
Macq. ....	Macqueen's Scotch Appeal Cases.	Montg. Co. Law Rep'r .....	Montgomery County Law Reporter (Pa.)
Madd. ....	Maddock's Reports, English Chancery.	Mont. & B.....	Montagu & Bligh's English Bankruptcy Reports.
Maine, Anc. Law...	Maine's Ancient Law.	Mont. & M.....	Montagu and MacArthur's English Bankruptcy Reports.
Manning (Mich.)	Manning (Mich.)	Moody, Or. Cas....	Moody's Crown Cases, English Courts.
Manaf. Dig.....	Mansfield's Digest of Statutes (Ark.)	Moody & M.....	Moody and Malkin's English Nisi Prius Reports.
Man., G. & S.....	Manning, Granger, and Scott's English Common Pleas Reports.	Moody & R.....	Moody and Robinson's English Nisi Prius Reports.
Man. Unrep. Cas...	Manning's Unreported Cases (La.)	Moore .....	Moore (Ark.)
Man. & G.....	Manning & Granger's English Common Pleas Reports.	Moore, Cr. Law....	Moore's Criminal Law and Procedure.
Man. & R.....	Manning & Ryland's English Magistrates' Cases.	Moore, Presb. Dig.	Moore's Presbyterian Digest.
Marsh. ....	Marshall's English Common Pleas Reports.	Moreau & Carleton's Partidas .....	Moreau and Carleton's Laws of Las Siete Partidas in force in Louisiana.
Marsh., A. K.....	A. K. Marshall (Ky.)	Mor. Priv. Corp....	Morawets on Private Corporations.
Marsh., J. J.....	J. J. Marshall (Ky.)	Morrell, Bankr. Cas.	Morrell's English Bankruptcy Cases.
Mart. (N. C.).....	Martin (N. C.)	Morris .....	Morris (Iowa)
Mart. (N. S.).....	Martin's New Series (La.)	Morse, Banks .....	Morse on the Law of Banks and Banking.
Mart. (O. S.).....	Martin's Old Series (La.)	Mun. Code.....	Municipal Code.
Mart. & Y.....	Martin & Yerger (Tenn.)	Munf. ....	Munford (Va.)
Marv. ....	Marvel's Reports (Del.)	Murfree, Off. Bonds	Murfree on Official Bonds.
Mason .....	Mason (U. S.)	Murph. ....	Murphey (N. C.)
Mass. ....	Massachusetts.	Murray's Eng. Dict.	Murray's English Dictionary.
Maule & S.....	Maule and Selwyn's English King's Bench Reports.	Myl. & C.....	Myline & Craig's English Chancery Reports.
Maxw. Adv. Gram..	W. H. Maxwell's Advanced Lessons in English Grammar.	Myl. & K.....	Myline and Keen's English Chancery Reports.
Maxw. Cr. Proc....	Maxwell's Treatise on Criminal Procedure.	Myr. Prob. ....	Myrick's Probate Court Reports (Cal.)
Md. ....	Maryland.	M. & W.....	Meeson and Welsby's English Exchequer Reports.
Md. Ch. ....	Maryland Chancery.		
Me. ....	Maine.		
Mees. & W.....	Meeson and Welsby's English Exchequer Reports.		

## N

Nat. Bankr. Law... National Bankruptcy Law.  
 Nat. Bankr. R..... National Bankruptcy Register (U. S.)  
 N. B. R..... National Bankruptcy Register (U. S.)  
 N. C..... North Carolina.  
 N. C. Term R..... North Carolina Term Reports.  
 N. Chip..... N. Chipman (Vt.)  
 N. D..... North Dakota.  
 N. E..... Northeastern Reporter.  
 Neb..... Nebraska.  
 Nev..... Nevada.  
 Newb. Adm..... Newberry's Admiralty (U. S.)  
 Newell, Defam.... Newell on Defamation, Slander and Libel.  
 N. H..... New Hampshire.  
 Nix. Dig..... Nixon's Digest of Laws (N. J.)  
 N. J. Eq..... New Jersey Equity.  
 N. J. Law..... New Jersey Law.  
 N. J. Law J..... New Jersey Law Journal.  
 N. M..... New Mexico.  
 Nisi Prius & Gen. T. Rep..... Nisi Prius & General Term Reports (Ohio)  
 Norris..... Norris (Pa.)  
 Northam. Law Rep.. Northampton County Law Reporter (Pa.)  
 Northumb. Co. Leg. N..... Northumberland County Legal News (Pa.)  
 Nott & McCl..... Nott & McCord (S. C.)  
 N. R. L..... Revised Laws 1818 (N. Y.)  
 N. S..... New Series.  
 N. W..... Northwestern Reporter.  
 N. Y..... New York.  
 N. Y. Ann. Cas.... New York Annotated Cases.  
 N. Y. Cr. R..... New York Criminal Reports.  
 N. Y. Daily Reg.... New York Daily Register.  
 N. Y. Law J..... New York Law Journal.  
 N. Y. Leg. Obs.... New York Legal Observer.  
 N. Y. St. Rep.... New York State Reporter.  
 N. Y. Super. Ct.... New York Superior Court.  
 N. Y. Supp..... New York Supplement.

## O

O. C. D..... Ohio Circuit Decisions.  
 Ohio..... Ohio.  
 Ohio Cir. Ct. R.... Ohio Circuit Court Reports.  
 Ohio Dec..... Ohio Decisions.  
 Ohio Law J..... Ohio Law Journal.  
 Ohio Leg. N..... Ohio Legal News.  
 O. L. D..... Ohio Lower Court Decisions.  
 Ohio N. P..... Ohio Nisi Prius.  
 Ohio St..... Ohio State.  
 Ohio S. & C. P. Dec..... Ohio Superior and Common Pleas Decisions.  
 Okl..... Oklahoma.  
 Olcott..... Olcott (U. S.)  
 Op. Atty. Gen.... Opinions of the United States Attorneys General.  
 Or..... Oregon.  
 O. S..... Old Series.  
 Outerbridge..... Outerbridge (Pa.)  
 Overt..... Overton (Tenn.)

## P

Pac..... Pacific Reporter.  
 Pa. Co. Ct. R..... Pennsylvania County Court Reports.  
 Pa. Com. Pl..... Pennsylvania Common Pleas Reporter.

Pa. Dist. R..... Pennsylvania District Reports.  
 Pa..... Pennsylvania State.  
 Paige..... Paige's Chancery (N. Y.)  
 Paine..... Paine (U. S.)  
 Pa. Law J..... Pennsylvania Law Journal.  
 Paley, Ag..... Paley on Principal and Agent (or Agency).  
 Pamphl. Laws.... Pamphlet Laws (Acts).  
 Parker, Cr. R..... Parker's Criminal Reports (N. Y.)  
 Para. Bills & N.... Parsons on Bills and Notes.  
 Para. Cont..... Parsons on Contracts.  
 Para. Eq. Cas..... Parsons' Select Equity Cases (Pa.)  
 Para. Mar. Law.... Parsons on Maritime Law.  
 Partidas..... Moreau and Carleton's Laws of Las Siete Partidas in force in Louisiana.  
 Pasch. Dig..... Paschal's Texas Digest of Decisions.  
 Pa. Super. Ct..... Pennsylvania Superior Court Reports.  
 Pat..... Paterson's Laws.  
 Pat. & H..... Patton & Heath (Va.)  
 Pears..... Pearson (Pa.)  
 Peck (Ill.)..... Peck (Ill.)  
 Peck (Tenn.)..... Peck (Tenn.)  
 Pen. Code..... Penal Code.  
 Pennewill..... Pennewill Reports (Del.)  
 Penning..... Pennington (N. J.)  
 Penny..... Pennypacker (Pa.)  
 Pen. & W..... Penrose & Watts (Pa.)  
 Pepper & L. Dig. Laws..... Pepper and Lewis' Digest of Laws (Pa.)  
 Perry, Trusts..... Perry on Trusts.  
 Pet..... Peters (U. S.)  
 Pet. Ab..... Petersdorff's Abridgment.  
 Pet. Adm..... Peters' Admiralty (U. S.)  
 Pet. C. C..... Peters' Circuit Court (U. S.)  
 Peterad. Ab..... Peteradorff's Abridgment.  
 P. F. Smith..... P. F. Smith (Pa.)  
 Phila..... Philadelphia (Pa.)  
 Phil..... Phillips' Law (N. C.)  
 Phil. Ch..... Phillips' English Chancery Reports.  
 Phil. Eq..... Phillips' Equity (N. C.)  
 Phil. Ev..... Phillips on Evidence.  
 Phil. Ins..... Phillips' Law of Insurance.  
 Pick..... Pickering (Mass.)  
 Pickle..... Pickle (Tenn.)  
 Pierce & King's Revisory Legislation. Pierce, Taylor and King's Revised Statutes (La.)  
 Pike..... Pike (Ark.)  
 Pin..... Pinney (Wis.)  
 Pittsb. Leg. J..... Pittsburgh Legal Journal (Pa.)  
 Pittsb. R..... Pittsburgh Reports (Pa.)  
 P. L..... Public Laws.  
 Ploud..... Plowden's English King's Bench Reports.  
 Flow..... Plowden's English King's Bench Reports.  
 Poe, Pl..... Poe on Pleading and Practice.  
 Pol. Code..... Political Code.  
 Pol. Cont..... Pollock on Principles of Contract at Law and Equity.  
 Pom. Eq. Jur..... Pomeroy's Equity Jurisprudence.  
 Pom. Rem..... Pomeroy on Civil Remedies.  
 Pom. Rem. & Rem. Rights..... Pomeroy on Civil Remedies & Remedial Rights.  
 Pom. Spec. Perf.... Pomeroy on Specific Performance of Contracts.  
 Port. (Ala.)..... Porter (Ala.)  
 Posey, Unrep. Cas.. Posey's Unreported Cases (Tex.)  
 Pow. Cont..... Powell on Contracts.



Prac. Act.....Practice Act.  
 Pr. Ch. ....Precedents in Chancery,  
           by Finch.  
 Prest. Est.....Preston on Estates.  
 Priv. Laws.....Private Laws.  
 Priv. St.....Private Statutes.  
 Prob. Div. ....Probate Division, Eng-  
           lish Law Reports.  
 Prob. R. ....Probate Reports (Ohio)  
 Prov. St. ....Statutes (Laws) of the  
           Province of Massachu-  
           setts.  
 Pub. Acts .....Public Acts.  
 Pub. Gen. Laws....Public General Laws.  
 Pub. Laws.....Public Laws.  
 Pub. Loc. Laws....Public Local Laws.  
 Pub. St.....Public Statutes.  
 Pub. & Loc. Laws..Public and Local Laws.  
 Puffendorf .....Puffendorf's Law of Nature  
           and Nations.  
 Purd. Dig. Laws...Purdon's Digest of Laws  
           (Pa.)  
 P. Wms.....Peere Williams' English  
           Chancery Reports.  
 P. & L. Dig. Laws..Pepper & Lewis' Digest of  
           Laws (Pa.)

## Q

Q. B. ....Queen's Bench Reports,  
           Adolphus & Ellis, N. S.  
           (English)  
 Q. B. Div.....Queen's Bench Division  
           (English Law Reports)  
 Quincy .....Quincy (Mass.)

## R

Rand. ....Randolph (Va.)  
 Rand. Com. Paper..Randolph on Commercial  
           Paper.  
 Rap. Contempt ....Rapelje on Contempt.  
 Rap. & L. Law Dict. Rapalje and Lawrence  
           Law Dictionary.  
 Rawle .....Rawle (Pa.)  
 Rawle, Cov. ....Rawle on Covenants for  
           Title.  
 Raym. ....Lord Raymond's English  
           King's Bench Reports.  
 R. C.....Revised Statutes 1855  
           (Mo.)  
 Redf. Railways....Redfield on Railways.  
 Redf. Sur.....Redfield's Surrogate (N.  
           Y.)  
 Redf. Wills.....Redfield on the Law of  
           Wills.  
 Rep. ....Coke's English King's  
           Bench Reports.  
 Rev. ....Revision of the Statutes.  
 Rev. Civ. Code....Revised Civil Code.  
 Rev. Civ. St.....Revised Civil Statutes.  
 Rev. Code.....Revised Code.  
 Rev. Code Cr. Proc.Revised Code of Criminal  
           Procedure.  
 Rev. Laws.....Revised Laws.  
 Rev. Ord. ....Revised Ordinances.  
 Rev. Pen. Code....Revised Penal Code.  
 Rev. St.....Revised Statutes.  
 R. I. ....Rhode Island.  
 Rice .....Rice's Law (S. C.)  
 Rice, Eq. ....Rice's Equity (S. C.)  
 Rich. Dict.....Richardson's New Diction-  
           ary of the English Lan-  
           guage.  
 Rich. Eq. ....Richardson's Equity (S. C.)  
 Rich. Eq. Cas....Richardson's Equity Cases  
           (S. C.)  
 Rich. Law.....Richardson's Law (S. C.)  
 Rich. (S. C.)....Richardson (S. C.)  
 Riley .....Riley's Law (S. C.)  
 Riley, Eq. ....Riley's Equity (S. C.)  
 R. L. ....Revised Laws.  
 R. M. Charlt. ....R. M. Charlton (Ga.)  
 Rob. ....Charles Robinson's English  
           Admiralty Reports.

Rob. (N. Y.).....Robertson (N. Y.)  
 Rob. (La.) .....Robinson (La.)  
 Rob. (Va.) .....Robinson (Va.)  
 Robb, Pat. Cas....Robb's Patent Cases (U.  
           S.)  
 Rob. Pat. ....Robinson on Patents.  
 Rolle .....Rolle's English King's  
           Bench Reports.  
 Rolle, Abr. ....Rolle's Abridgment of the  
           Common Law.  
 Roll. Rep.....Rolle's English King's  
           Bench Reports.  
 Root .....Root (Conn.)  
 Roper, Leg.....Roper on Legacies.  
 Rorer, Jud. Sales...Rorer on Void Judicial  
           Sales.  
 Rorer, R. R.....Rorer on Railways.  
 Roscoe, Cr. Ev....Roscoe on Criminal Evi-  
           dence.  
 R. S.....Revised Statutes.  
 Russ. ....Russell's English Chancery  
           Reports.  
 Russ. Crimes.....Russell on Crimes and Mis-  
           demeanors.  
 Russ. Fact.....Russell on Factors and  
           Brokers.  
 Russ. & R.....Russell and Ryan's English  
           Crown Cases Reserved.  
 Ry. & Corp. Law J.Railway and Corporation  
           Law Journal.  
 R. & Ry. C. C.....Russell and Ryan's English  
           Crown Cases.

## S

Salk. ....Salkeld's English King's  
           Bench Reports.  
 Sanb. & B. Ann. St.Sanborn and Berryman's  
           Annotated Statutes (Wis.)  
 Sanders, Pl. & Ev...Saunders' Pleading and  
           Evidence.  
 Sandf. ....Sandford (N. Y.)  
 Sandf. Ch. ....Sandford's Chancery (N.  
           Y.)  
 Sand. & H. Dig....Sandels and Hill's Digest  
           of Statutes (Ark.)  
 Saund. ....Saunders' English King's  
           Bench Reports.  
 Saund. Pl. & Ev...Saunders' Pleading and  
           Evidence.  
 Sawy. ....Sawyer (U. S.)  
 Saxt. Ch. ....Saxton's Chancery (N. J.)  
 Sayles' Ann. Civ.  
   St. ....Sayles' Annotated Civil  
           Statutes (Tex.)  
 Sayles' Civ. St....Sayles' Revised Civil Stat-  
           utes (Tex.)  
 Sayles' St.....Sayles' Revised Civil Stat-  
           utes (Tex.)  
 Sayles' Supp.....Supplement to Sayles' An-  
           notated Civil Statutes  
           (Tex.)  
 S. C. ....South Carolina.  
 Scam. ....Scammon (Ill.)  
 Schoales & L.....Schoales and Lefroy's Irish  
           Chancery Reports.  
 Schouler, Pers.  
   Prop. ....Schouler on the Law of  
           Personal Property.  
 S. D.....South Dakota.  
 S. E.....Southeastern Reporter.  
 Sedg. St. & Const.  
   Law .....Sedgwick on Statutory and  
           Constitutional Law.  
 Sedg. & W. Tr. Ti-  
   tle Land.....Sedgwick and Walt on the  
           Trial of Title to Land.  
 Seld. ....Selden (N. Y.)  
 Seld. Notes.....Selden's Notes (N. Y.)  
 Serg. & R.....Sergeant & Rawle (Pa.)  
 Sess. ....Session.  
 Sess. Laws.....Session Laws.  
 Shannon's Code...Shannon's Annotated Code  
           (Tenn.)

Shars. Bl. Comm...	Sharswood's Edition of Blackstone's Commentaries.	Story, Comm. Const.	Story's Commentaries on the Constitution of the United States.
Shars. & B. Lead.		Story, Conf. Laws.	Story on the Conflict of Laws.
Cas. Real Prop....	Sharswood and Budd's Leading Cases of Real Property.	Story, Const. ....	Story's Commentaries on the Constitution of the United States.
Sheld. ....	Sheldon (N. Y.)	Story, Cont. ....	Story on Contracts.
Shep. ....	Shepley (Me.)	Story, Eq. Jur. ....	Story on Equity Jurisprudence.
Shep. Abr. ....	Sheppard's Abridgment.	Story, Eq. Pl. ....	Story on Equity Pleading.
Shep. Touch. ....	Sheppard's Touchstone of Common Assurances.	Story, Partn. ....	Story on Partnership.
Silvernall ....	Silvernall (N. Y.)	Story, Prom. Notes.	Story on Promissory Notes.
Sim. ....	Simons' English Vice Chancery Reports.	Story, Sales. ....	Story on Sales of Personal Property.
Sim. (N. S.) ....	Simon's English Vice Chancery Reports, New Series.	Story's Laws. ....	Story's United States Laws.
Sim. & S. ....	Simons & Stuart's English Vice Chancery Reports.	Strange ....	Strange's English King's Bench Reports.
Smedes & M. ....	Smedes & Marshall (Miss.)	Strob. ....	Strobhart's Law (S. C.)
Smedes & M. Ch..	Smedes & Marshall's Chancery (Miss.)	Strob. Eq. ....	Strobhart's Equity (S. C.)
Smith, E. D. ....	E. D. Smith (N. Y.)	Sub. Rev. ....	Supplement to the Revision.
Smith (Ind.) ....	Smith (Ind.)	Sumn. ....	Sumner (U. S.)
Smith, J. P. ....	J. P. Smith's English King's Bench Reports.	Sup. Ct. ....	Supreme Court Reporter.
Smith (N. H.) ....	Smith (N. H.)	Super. Ct. Rep. ....	Superior Court Reports (Pa.)
Smith (N. Y.) ....	Smith (N. Y.)	Supp. Code. ....	Supplement to Code.
Smith, F. F. ....	F. F. Smith (Pa.)	Supp. Gen. St. ....	Supplement to the General Statutes.
Smith, Cont. ....	Smith on Contracts.	Supp. Rev. Code. ....	Supplement to the Revised Code.
Smith, Man. Eq.		Supp. Rev. St. ....	Supplement to the Revised Statutes.
Jur. ....	Smith's Manual of Equity Jurisprudence.	Supp. U. S. Comp.	
Smith's Laws. ....	Smith's Laws (Pa.)	St. 1903 ....	Supplement 1903 to the United States Compiled Statutes of 1901.
Smith's Lead. Cas.	Smith's Leading Cases.	Sus. Leg. Chron. ....	Susquehanna Legal Chronicle (Pa.)
Sneed ....	Sneed (Tenn.)	Suth. Dam. ....	Sutherland on Damages.
Sol. J. ....	Solicitors' Journal, London.	S. W. ....	Southwestern Reporter.
Soule, Syn. ....	Soule's Dictionary of English Synonyms.	Swab. ....	Swabey's English Admiralty Reports.
South. ....	Southern Reporter.	Swab. & T. ....	Swabey and Tristram's English Probate and Divorce Reports.
Southard ....	Southard (N. J.)	Swan ....	Swan (Tenn.)
Sp. Acts. ....	Special Acts.	Swan's St. ....	Swan's Statutes (Ohio)
Speers ....	Speers' Law (S. C.)	Swanst. ....	Swanston's English Chancery Reports.
Speers, Eq. ....	Speers' Equity (S. C.)	Swan & C. St. ....	Swan and Critchfield's Revised Statutes (Ohio)
Spell. Extr. Rel. ....	Spelling in Extraordinary Relief in Equity and in Law.	Swan & S. St. ....	Swan and Saylor's Supplement to the Revised Statutes (Ohio)
Spencer ....	Spencer (N. J.)	Sweeny ....	Sweeny (N. Y.)
Sp. Laws. ....	Special Laws.	S. & C. Rev. St. ....	Swan and Critchfield's Revised Statutes (Ohio)
Spr. ....	Sprague (U. S.)	S. & R. on Neg. ....	Shearman and Redfield on Negligence.
Sp. Sess. ....	Special Session.		
St. ....	Laws or Acts (in some states).		
St. ....	State, Statutes.		
Stand. Dict. ....	Standard Dictionary.		
Starkey, Sland. & L.	Starkie, on Slander and Libel.		
Starkie ....	Starkie's English Nisi Prius Reports.		
Starkie, Ev. ....	Starkie on Evidence.		
Starr & C. Ann. St.	Starr and Curtis' Annotated Statutes (Ill.)		
Stat. ....	Statutes at Large (U. S.)		
St. at Large. ....	Statutes at Large (S. C.)		
Steph. Bailm. ....	Story on Bailment.		
Steph. Comm. ....	Stephen's Commentaries on the Laws of England.		
Steph. Dig. Cr. Law.	Stephen's Digest of the Criminal Law.		
Stephen, Ev. ....	Stephen's Digest of the Law of Evidence.		
Steph. Pl. ....	Stephen on Pleading.		
Stew. (Ala.) ....	Stewart (Ala.)		
Stew. (N. J.) ....	Stewart (N. J.)		
Stew. & P. ....	Stewart & Porter (Ala.)		
Stiles ....	Stiles (Iowa)		
St. Law. ....	Loughborough's Digest of Statute Law (Ky.)		
Stockt. ....	Stockton's Equity (N. J.)		
Sto. Const. ....	Story's Commentaries on the Constitution of the United States.		
Story ....	Story (U. S.)		
Story, Ag. ....	Story on Agency.		
Story, Bailm. ....	Story on Bailment.		
Story, Bills ....	Story on Bills.		

## T

Taney ....	Taney (U. S.)
Tapp. ....	Tappan (Ohio)
Tariff Ind., New..	New's Tariff Index.
Taunt. ....	Taunton's English Common Pleas Reports.
Tayl. ....	Taylor (N. C.)
Tayl. Corp. ....	Taylor on Private Corporations.
Tayl. Ev. ....	Taylor on the Law of Evidence.
Tayl. Landl. & Ten.	Taylor's Landlord and Tenant.
Tayl. Med. Jur. ....	Taylor's Manual of Medical Jurisprudence.
Tayl. Priv. Corp. ....	Taylor on Private Corporations.
Tayl. St. ....	Taylor's Revised Statutes (Wis.)
T. B. Mon. ....	T. B. Monroe (Ky.)
Tenn. ....	Tennessee.
Tenn. Cas. ....	Shannon's Tennessee Cases.

Tenn. Ch.....	Tennessee Chancery.	Vern. ....	Vernon's English Chancery Reports.
Term R. ....	Term Reports, English King's Bench (Durnford and East's Reports).	Ves. ....	Vesey, Junior, English Chancery Reports.
Ter. Laws.....	Territorial Laws.	Ves. Jr.....	Vesey, Junior, English Chancery Reports.
Tex. ....	Texas.	Ves. Sr.....	Vesey, Senior, English Chancery Reports.
Tex. App. ....	Texas Appeals Reports.	Vict. ....	Queen Victoria (as 5 & 6 Vict.)
Tex. Civ. App.....	Texas Civil Appeals Reports.	Vin. Abr.....	Viner's Abridgment.
Tex. Cr. R.....	Texas Criminal Reports.	Vroom .....	Vroom (N. J.)
Tex. Supp.....	Texas Supplement.	V. S.....	Vermont Statutes.
Thacher, Cr. Cas....	Thacher's Criminal Cases (Mass.)	Vt. ....	Vermont.
Thayer, Prelim. Treatise Ev.....	Thayer's Preliminary Treatise on Evidence.		
Theob. on Wills....	Theobald on Wills.		
Thom. Co. Litt.....	Thomas' Edition of Coke upon Littleton.		
Thomp. Tenn. Cas....	Thompson's Unreported Tennessee Cases.		
Thomp. & C.....	Thompson & Cook (N. Y.)		
Thomp. & St. Code....	Thompson and Steger's Code (Tenn.)		
Tidd, Prac.....	Tidd's Practice.		
Tied. Lim.....	Tiedeman's Treatise on the Limitations of Police Power in the United States.		
Tiedman, Real Prop.	Tiedeman on Real Property.		
Tiffany .....	Tiffany (N. Y.)		
Times L. Rep.....	Times Law Reports.		
Toller .....	Toller on Executors.		
Toml. Law Dict....	Tomlins' Law Dictionary.		
T. R.....	Term Reports, English King's Bench (Durnford and East's Reports).		
Tread. Const.....	Treadway's Constitutional Reports (S. C.)		
Troub. & H. Prac...	Troubat & Haly's Practice (Pa.)		
Tuck. ....	Tucker's Surrogate (N. Y.)		
Tucker's Blackstone.	Tucker's Blackstone's Commentaries.		
T. U. P. Charlt.....	T. U. P. Charlton (Ga.)		
Turn. ....	Turner (Ark.)		
Turn. & R. Ch.....	Turner and Russell's English Chancery Reports.		
Tyler .....	Tyler (Vt.)		
Tyler, Ej.....	Tyler on Ejectment and Adverse Enjoyment.		
T. & H. Prac.....	Troubat and Haly's Pennsylvania Practice.		

## U

Unof. ....	Unofficial (Reports).
U. S.....	United States.
U. S. App. ....	United States Appeals.
U. S. Comp. St. 1901.	United States Compiled Statutes 1901.
U. S. Comp. St. Supp. 1903.....	Supplement 1903 to the United States Compiled Statutes of 1901.
U. S. Law Mag....	United States Law Magazine (N. Y.)
U. S. Month. Law Mag. ....	United States Monthly Law Magazine.
Utah .....	Utah.

## V

Va. ....	Virginia.
Va. Cas. ....	Virginia Cases.
Va. Law J.....	Virginia Law Journal, Richmond.
Van Fleet, Coll. Attack .....	Van Fleet on Collateral Attack.
Van Ness, Prize Cas.	Van Ness' Prize Cases (U. S.)
Vattel, Law Nat....	Vattel's Law of Nations.

Vern. ....	Vernon's English Chancery Reports.
Ves. ....	Vesey, Junior, English Chancery Reports.
Ves. Jr.....	Vesey, Junior, English Chancery Reports.
Ves. Sr.....	Vesey, Senior, English Chancery Reports.
Vict. ....	Queen Victoria (as 5 & 6 Vict.)
Vin. Abr.....	Viner's Abridgment.
Vroom .....	Vroom (N. J.)
V. S.....	Vermont Statutes.
Vt. ....	Vermont.

## W

Wag. St. ....	Wagner's Statutes (Mo.)
Wait, Act. & Def....	Wait's Actions and Defenses.
Wait's Prac.....	Wait's New York Practice.
Walk. ....	Walker (Miss.)
Walk. (Pa.) ....	Walker (Pa.)
Walk. Ch.....	Walker's Chancery (Mich.)
Walk. Pat.....	Walker on Patents.
Wall. ....	Wallace (U. S.)
Wall. Jr.....	Wallace, Junior (U. S.)
Wall. Sr. ....	Wallace, Senior (U. S.)
Ware .....	Ware (U. S.)
Warv. Abst.....	Warvelle on Abstracts of Title.
Wash. ....	Washington.
Wash. (Va.).....	Washington (Va.)
Washb. Easem.....	Washburn on Easements and Servitudes.
Washb. Real Estate.	Washburn on Real Property.
Washb. Real Prop..	Washburn on Real Property.
Wash. C. C.....	Washington Circuit Court (U. S.)
Wash. Law Rep....	Washington Law Reporter (D. C.)
Wash. T. ....	Washington Territory.
Watts .....	Watts (Pa.)
Watts & S.....	Watts & Sergeant (Pa.)
W. Bl. ....	Sir William Blackstone's English King's Bench Reports.
Webst. Dict.....	Webster's Dictionary.
Webster in Sen. Doc. ....	Webster in Senate Documents.
Webst. Int. Dict....	Webster's International Dictionary.
Wedgw. Dict. Eng. Etymology .....	Wedgwood's Dictionary of English Etymology.
Wel., Hurl. & G....	Welsby, Hurlstone, and Gordon's Reports (1-9 English Exchequer Reports).
Wend. ....	Wendell (N. Y.)
West Coast Rep....	West Coast Reporter.
West. Law J.....	Western Law Journal, Cincinnati (Ohio)
West. Law Month..	Western Law Monthly (Ohio)
West. L. M.....	Western Law Monthly (Ohio)
Whart. ....	Wharton (Pa.)
Whart. Ag.....	Wharton on Agency.
Whart. Cr. Ev.....	Wharton on Criminal Evidence.
Whart. Cr. Law....	Wharton's American Criminal Law.
Whart. Cr. Pl. & Prac. ....	Wharton's Criminal Pleading & Practice.
Whart. Ev.....	Wharton on Evidence in Civil Issues.
Whart. Law Dict...	Wharton's Law Dictionary (or Law Lexicon).
Whart. Law Lexicon .....	Wharton's Law Dictionary (or Law Lexicon).

## TABLE OF ABBREVIATIONS.

XV

Whart. Neg.....	Wharton on Negligence.	Wkly. Law Gaz....	Weekly Law Gazette (Ohio)
Whart. St. Tr.....	Wharton's State Trials (U. S.)	Wkly. Notes Cas....	Weekly Notes Cases (Pa.)
Wheat. ....	Wheaton (U. S.)	Wkly. Rep.....	Weekly Reporter, London (English).
Wheat. Int. Law....	Wheaton's International Law.	Wm. ....	William (as 9 Wm. III).
Wheeler, Am. Cr. Law .....	Wheeler's Abridgment of American Common Law Cases.	Wm. BL.....	Sir William Blackstone's English King's Bench Reports.
Wheeler, Cr. Cas....	Wheeler's Criminal Cases (N. Y.)	Wm. Rob.....	William Robinson's English Admiralty Reports.
White's Recop.....	White's Recopilacion (Land Laws of Spain and Mexico).	Wms. Ex'rs .....	Williams on Executors.
White & T. Lead. Cas. Eq.....	White and Tudor's Leading Cases in Equity.	Wm. & Mary.....	William and Mary (as 2 Wm. & Mary. c. 1).
White & W. Civ. Cas. Ct. App.....	White & Willson's Civil Cases Court of Appeals (Tex.)	Woodb. & M.....	Woodbury & Minot (U. S.)
Willcox .....	Willcox (Pa.)	Wood, Inst.....	Wood's Institutes of the (Common) Laws of England.
Will. ....	William (as 1 Will. IV).	Wood, Landl. & Ten.	Wood on Landlord and Tenant.
Will. Eq. Jur.....	Willard's Equity Jurisprudence.	Wood, Llm.....	Wood on Limitation of Actions.
Willes .....	Willes' English Common Pleas Reports.	Woods .....	Woods (U. S.)
Williams (Vt.) ....	Williams (Vt.)	Wood's Civ. Law...	Wood's Institutes of the Civil Law of England.
Williams, Ex'rs ...	Williams on Executors.	Woodw. Dec.....	Woodward's Decisions (Pa.)
Wills, Cir. Ev.....	Wills on Circumstantial Evidence.	Woolw. ....	Woolworth (U. S.)
Willson, Civ. Cas. Ct. App. ....	Willson's Civil Cases Court of Appeals (Tex.)	Worcest. Dict.....	Worcester's Dictionary.
Willson, Tex. Cr. Law .....	Willson's Revised Penal Code, Code of Criminal Procedure, and Penal Laws of Texas.	Wor. Dict. ....	Worcester's Dictionary.
Wils. ....	Wilson (Ind.)	Works, Courts ....	Works on Courts and Their Jurisdiction.
Wils. ....	Wilson's English Common Pleas Reports.	Works, Pr.....	Works' Practice, Pleading, and Forms.
Winch .....	Winch's English Common Pleas Reports.	Wright .....	Wright (Ohio)
Winch .....	Winch's Entries.	Wright (Pa.) .....	Wright (Pa.)
Winfield, Words & Phrases .....	Winfield's Adjudged Words and Phrases, with Notes.	W. S. ....	Wagner's Statutes (Mo.)
Winst. ....	Winston (N. C.)	W. Va. ....	West Virginia.
Winst. Eq. ....	Winston's Equity (N. C.)	Wyo. ....	Wyoming.
Wis. ....	Wisconsin.	Wythe .....	Wythe's Chancery (Va.)
Wkly. Dig.....	Weekly Digest (N. Y.)		
Wkly. Law Bul....	Weekly Law Bulletin (Ohio)		

Y

Yeates .....Yeates (Pa.)  
Yerg. ....Yerger (Tenn.)  
York. Leg. Rec....York Legal Record (Pa.)  
Younge & Col. Ch..Younge & Collyer's English Chancery Reports.

Z

Zab. ....Zabriskie (N. J.)



# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 3.

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#### DEPOSITOR.

See "General Depositor."

Gen. St. 1876, c. 96, declaring that any person or "depositor" of wheat in an elevator shall be treated as having made a bailment of the wheat and not a sale, should not be limited to persons making an actual physical deposit of the grain, but, inasmuch as the issuing of warehouse receipts by a warehouseman for his own grain actually in store transfers the title and legal possession to the holder of the receipts and makes the warehouseman the holder's bailee, the word "depositor" must be construed to include all persons actually holding grain in store, whether deposited by themselves, or by others to whose rights they have succeeded. *National Exch. Bank v. Wilder*, 24 N. W. 699, 701, 34 Minn. 149.

A "voluntary deposit" is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former or of a third party. The person giving is called the "depositor," and the person receiving the "depository." Rev. Codes N. D. 1899, § 4001; Civ. Code S. D. 1903, § 1353; Rev. St. Okl. 1903, § 2825.

#### In a bank.

A "depositor" is one who pays money into a bank to be placed to his credit and to be subject to his check. *Commonwealth v. Sponsler*, 16 Pa. Co. Ct. R. 116, 119.

A "bank depositor" is one who delivers to, or leaves with a bank, money subject to his order. *Anheuser-Busch Brewing Ass'n v. Clayton* (U. S.) 56 Fed. 759, 761, 6 C. C. A. 108.

A "depositor" is a beneficiary of a fund held by the bank as trustee. *Kimball v. Norton*, 59 N. H. 1, 6, 47 Am. Rep. 171.

3 Wds. & P.—1

"Depositors" in a bank, in the usual meaning of the word, are those who put their money on deposit in the usual course of business. Those who deposit it under special agreement or contract are but creditors of the bank under their contracts. In *re Brandywine Bank's Estate*, 1 Ches. Co. Rep. 431, 432.

The term "depositors," as used in Act 1862, § 10, providing that the capital stock of savings banks shall be a security to depositors who are not stockholders, was intended to include deposits for which certificates of deposit had been issued, as well as those made upon open account and subject to check. *Murphy v. Pacific Bank*, 62 Pac. 1059, 1061, 130 Cal. 542.

Originally a "deposit" was a thing delivered for gratuitous safe-keeping, and it remained the property of the owner, but it is now used to designate a certain kind of loan, for money deposited in the ordinary way becomes the property of the bank or banker, and the deposit is a debt. Such loans always imply that the money on deposit is lying in the bank on hand ready to meet the demand of the owner, and that it is kept there for convenience, and hence a bank which has made another bank the creditor on which it may draw is not a "depositor." *State Sav. Bank v. Foster*, 76 N. W. 499, 500, 118 Mich. 268, 42 L. R. A. 404.

One whose money is intermingled with the general funds of a bank to an ascertained amount, who is acknowledged by the bank to be a creditor to that amount, who is under no obligation to permit the money to remain there, is a "depositor." *Catlin v. Savings Bank*, 7 Conn. 487, 492.

#### DEPOSITORY.

Depositories are not public officers of the United States, but are instruments or

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agencies to keep the public funds. They are agencies *sui generis* and *sui juris*. Banks which have been made the depositories of money received from the treasurer or collector of taxes in the districts fixed by law for collectors to pay immediately to them are not regarded as "public officers" of the state, in the sense of that term as used in Code, §§ 148-171. A bank can hardly be called an officer. It cannot well be tried for misdemeanor, and be punished under section 156 of the Code, and the entire chapter appears to be dealing with individuals, not banks. *Colquitt v. Simpson*, 72 Ga. 501, 510.

## DEPOSITUM.

Depositum "is a bare naked bailment of goods delivered by one man to another to keep for the use of the bailor." Per *Holt, C. J.*, in *Coggs v. Bernard*, 2 Ld. Raym. 909, 912.

Depositum "is the term used in the civil and common law to designate a naked bailment without reward and without any special undertaking." *Foster v. Essex Bank*, 17 Mass. 479, 498, 9 Am. Dec. 168.

A "depositum" is a naked bailment of goods, to be kept for the bailor without reward, and to be returned when he shall require it. It is a contract by which one of the contracting parties gives a thing to another to keep, who is to do so gratuitously, and obliges himself to return it when he shall be requested. *Johnson v. Reynolds*, 8 Kan. 257, 261.

## DEPOT.

See, also, "Station."

"Webster defines 'depot' to be a place of deposit for storing goods; a warehouse; a storehouse. Worcester defines it as 'a place where any kind of goods is deposited; a storehouse; a warehouse.'" *State v. Edwards*, 19 S. W. 91, 92, 109 Mo. 315.

A bill of lading exempting the carrier from liability for loss or damage by fire or the elements "while at depots," only refers to depots at which the cars may be stopped while in transit, and before the freight reaches its destination. *E. O. Stanard Milling Co. v. Whitelme Central Transit Co.*, 26 S. W. 704, 708, 122 Mo. 258.

### As building or warehouse.

See "Building (In Criminal Law)"; "In Depot"; "Warehouse."

### As freight or passenger station.

See "Freight Depot"; "Regular Depot."

"Depot" is generally understood to be the place where a carrier is accustomed to

receive merchandise, deposit it, and keep it ready for transportation or delivery. *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514, 520.

As applied to railroads, a "depot" is a place where passengers are received and deposited, and where freight is deposited for delivery. *Maghee v. Camden & A. R. Transp. Co.*, 45 N. Y. 514, 520; *State v. New Haven & N. Co.*, 37 Conn. 153, 163 (cited and approved in *Plunkett v. Minneapolis, S. S. M. & A. R. Co.*, 48 N. W. 519, 79 Wis. 222; *Fowler v. Farmers' Loan & Trust Co.*, 21 Wis. 77, 79).

The term "depot" may be properly applied to a building erected alongside a railroad track within which there was a telegraph office with telegraphic instruments and a ticket office, which building was occupied by the company's station men and agent, who operated the telegraph, sold tickets for the company to passengers, operated the switch and water tank, and handled freight and baggage, there being a platform between the building and the railroad track at which trains stopped and received and discharged passengers and freight, though the accommodations were quite limited. *Peters v. Stewart*, 39 N. W. 380, 381, 72 Wis. 133.

One definition of "depot" is a "railroad station." The term, as used in the statute directing railroads receiving goods for transportation into their warehouses or depots to forward them in the order in which they are received, and making them liable for losses occasioned by a failure to do so, embraces the entire station of the railroad, so that a railroad must forward property received for shipment in the order in which it is received, though merely received on a platform used for handling that kind of property. *Hill & Morris v. St. Louis Southwestern R. Co. of Texas (Tex.)* 75 S. W. 874, 876.

Within the act of Connecticut of 1806 providing that no railroad shall abandon any depot or station on its road, after the same has been established for 12 months, except by the approval of the railroad commissioners, a "depot" is a station at which trains stop, not merely for wood and water, but for the transaction of the ordinary business of receiving and delivering freight and passengers. *State v. New Haven & N. Co.*, 37 Conn. 153, 163.

A "depot" is a railway station—the building for the accommodation and protection of railway passengers or freight. This is the only meaning of the word as applied to a railroad, so that Gen. St. c. 94, art. 1, § 45, giving to the owner of a coal bank within three miles of any railroad the right to establish a road to the most convenient and suitable depot on such railroad, gives no

right to the establishment of a road to a point on the railroad at which there is no established depot. *Karnes v. Drake*, 44 S. W. 444, 445, 103 Ky. 134.

The term "depot" may mean a house for the storage of freight and the accommodation of passengers, or it may mean a place where railroad trains regularly come to a stop for the convenience of passengers and for the purpose of receiving and discharging freight, or it may include all of these things. The term "depot" usually includes not only the idea of a stopping place, but also that of a building, or something of that kind, for the convenience of passengers and freight. *Arkansas Cent. R. Co. v. Smith* (Ark.) 71 S. W. 947, 948.

In a mortgage given by a railroad company of its franchises, real estate, right of way, and depots, the term "depots" is not necessarily limited to a place provided for the convenience of passengers while waiting the arrival or departure of trains. It applies also to the buildings used for receipt and storage of freight, which when received is to be safely kept until forwarded by the cars of the company, or delivered to the owner or consignee. *Humphreys v. McKissock*, 11 Sup. Ct. 779, 781, 140 U. S. 304, 35 L. Ed. 473.

A station at a coal bank where trains merely stop to take or leave cars for purposes connected with its trade is not a "depot" within a contract that defendant was to build but one other depot between two certain fixed points. *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437, 449.

A building used by passengers on a railroad may properly be designated by the word "depot" as well as by the word "passenger station." Either is certain to a common intent. *Louisville & N. R. Co. v. Commonwealth* (Ky.) 33 S. W. 939.

Where a covenant in a deed of a right of way to a railroad required the railroad to establish and maintain a depot for freight and passengers, evidence is admissible to explain what was intended by the term "freight and passenger depot," as there are freight and passenger depots all the way from mere flag stations, where there are no buildings at all, to the most modern depot with all its equipments and conveniences. But it was held that an umbrella shed cannot be called a "depot" for passengers. *Murray v. Northwestern Ry. Co.*, 42 S. E. 617, 622, 64 S. C. 520.

#### Same—Flag station.

A mere flag station is not a depot. *Hurt v. St. Paul, M. & M. Ry. Co.*, 40 N. W. 613, 614, 39 Minn. 485; *Anderson v. Stewart*, 76 Wis. 43, 44 N. W. 1091, 1092.

#### Same—Surrounding grounds.

Depot "does not necessarily mean a single building, but means the entire grounds used by a railroad company for its business purposes with the public at that station." *Pittsburg, Ft. W. & C. R. Co. v. Rose*, 24 Ohio St. 219, 229.

The term "depot" means a railroad station. "It is sufficiently broad to embrace within its meaning a passageway used for the convenient and safe egress and ingress of passengers. It is not restricted in its signification to the house or structure used also for their convenience in this respect, but includes a walk leading from the building or house, affording shelter to the passengers, to the car, and other approaches thereto." An allegation in an action that the railroad company had failed to properly light its "depot" held to be supported by evidence that it failed to properly light a passway. *Galveston, H. & S. A. Ry. Co. v. Thornsberry* (Tex.) 17 S. W. 521, 523.

In Act March 9, 1889, § 1, providing that every corporation, company, or person operating a railroad within the state shall place in each passenger depot of such company, located at any station in this state at which there is a telegraph office, a blackboard on which such company or person shall post the fact whether each scheduled passenger train is on time or not, by the words "passenger depot" was not meant merely a station house built for the accommodation of passengers, but the grounds prepared and used as depot grounds for the benefit of persons traveling on the particular railroad, and used by the company at such point in operating it as a common carrier of passengers. *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 818, 133 Ind. 69, 18 L. R. A. 502.

#### As place for military stores.

"Depot," as used in a contract with the government to transport supplies from certain posts, depots, and stations, is to be construed as meaning "a place where military stores or supplies are kept, or troops assembled." *United States v. Caldwell*, 86 U. S. (19 Wall.) 264, 268, 22 L. Ed. 114.

#### DEPOT GROUNDS.

"Depot grounds" are where passengers get on and off trains, and where goods are loaded and unloaded, and all grounds necessary and convenient and actually used for such purpose by the public and by the railroad company. This includes the switching and making up of trains and the use of the side tracks for the storing of cars, and the place where the public require open and free access to the road for the purposes of such business. *Grosse v. Chicago & N. W. Ry. Co.*, 65 N. W. 185, 91 Wis. 482; *Fowler v. Farmers' Loan & Trust Co.*, 21 Wis. 77,



78 (citing *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 Wis. 160, 85 N. W. 296; *Plunkett v. Minneapolis, S. S. M. & A. Ry. Co.*, 79 Wis. 222, 48 N. W. 519).

"Depot grounds" and "yard limits" are synonymous terms. It is well known that in large cities these grounds extend for several miles. The question of frequent or infrequent use for switching purposes does not control. The question is, are they reasonably necessary to that purpose, or liable to become so? In *McGrath v. Detroit, M. & M. R. Co.*, 57 Mich. 555, 24 N. W. 854, the court said: "The existence or extent of these grounds is not to be determined by the continued actual use thereof. When station grounds are laid out, their contemplated future use is not infrequently of more consideration than it actually demands at the time in determining their shape or extent; and, when these grounds are appropriated and set apart by the company, it would neither be safe nor wise to allow their limits to be curtailed or extended by a jury in a proceeding where they collaterally come in question." *Rabidon v. Chicago & W. M. Ry. Co.*, 73 N. W. 886, 387, 115 Mich. 390, 39 L. R. A. 405.

A part of the main line of road, where there was but a single track in the neighborhood of the depot more than a hundred yards beyond the switch, and beyond where a cattle guard was subsequently placed, was no part of the "depot grounds," within a statute exempting a railroad from a duty to fence such grounds, though long trains, in switching, ran out to the place. *Blair v. Milwaukee & P. du C. R. Co.*, 20 Wis. 254, 260.

"Depot grounds," as used in Rev. St. 1810, as amended by Laws 1881, c. 193, requiring railroads to be fenced except depot grounds, should be construed to include the railroad grounds used in connection with a building in which there was a telegraph office, with telegraphic instruments, a ticket office, and a place for eating and sleeping, and which building was occupied by the company's station men and agent, who operated the telegraph, sold tickets for the company to passengers, operated the switch and water tank, and handled the baggage and freight, there being a platform between the building and the track at which trains stopped and received and discharged passengers and freight. *Peters v. Stewart*, 89 N. W. 380, 381, 72 Wis. 133.

In an action to recover the value of a span of horses killed upon a railroad track, on the ground that the railroad company had neglected to fence its line of road at the point where the horses got upon the track, defendant contended that the place of the accident was part of its depot grounds, and as such not bound to be fenced under the

statute. The evidence showed that there had been at one time a station house near the point in question, but for several years the company had kept no agent there, that the station building had been closed up and had gone to decay, that there were no grounds for a depot outside the usual right of way, and that the company had put in cattle guards 350 feet south of the station building and 721 feet north of it, and beyond this point the road was fenced. It was held that the court properly refused to hold as a question of law that such ground was "depot grounds," and that the jury were warranted in finding that a place near the north cattle guard was not a part of the company's depot grounds. *McDonough v. Milwaukee & N. R. Co.*, 40 N. W. 806, 807, 73 Wis. 223.

Where a railroad company, at a place where it had maintained a flag station and side track, took up its fence and put in cattle guards after the laying out of the town plat, but did not keep any depot master or clerk, nor sell any tickets to the town, which consisted of two houses and a store, but merely took up freight there when flagged, as it did at any point on that portion of the road, it could not escape the liability for horses killed there for want of a fence, on the ground that such place constituted depot grounds. *Anderson v. Stewart*, 44 N. W. 1091, 1092, 76 Wis. 43.

Depot grounds on the right of way of a railroad  $2\frac{1}{2}$  miles from any town, and not located on any highway, there being neither station, station agent, depot building, nor platform for receiving or discharging freight or passengers, but only a side track used for the convenience of loading and unloading a single commodity, are not "depot grounds" within the meaning of a statute exempting railroad companies from liability for failure to fence such property. *Jaeger v. Chicago, M. & St. P. Ry. Co.*, 43 N. W. 732, 733, 75 Wis. 130.

"Depot grounds," within the meaning of a statute excepting depot grounds from the requirement that a railroad shall fence its right of way, includes flag stations at which trains are regularly stopped whenever there is freight, passengers, or express to be taken, though there is no depot erected thereon. *Schneekloth v. Chicago & W. M. R. Co.*, 65 N. W. 663, 664, 108 Mich. 1.

## DEPRAVITY OF HEART.

An instruction that if defendant purposely killed deceased after reflection, with a wickedness and depravity of heart toward the deceased, etc., the defendant was guilty of murder in the first degree, is sufficient as a statement of the highest degree of malice. *Lang v. State*, 4 South. 193. 195. 84 Ala. 1, 5 Am. St. Rep. 324.

## DEPRECIATE.

"Depreciating," as used in a power authorizing a sale of securities upon their depreciation in value, is the present participle of the verb "depreciate," used intransitively, which verb, as defined by Webster, means "to fall in value; to become of less worth; to sink in estimation." As used in the power, it applied only to what might happen in the then future. *National Bank of Illinois v. Baker*, 27 Ill. App. 356, 359.

## DEPRIVE.

"Deprive" conveys the idea of taking away that which one has, or withholding that which one may have. To take something from; to keep from acquiring, using, or enjoying something; to take away, end, injure, or destroy. *State ex rel. Star Pub. Co. v. Associated Press*, 60 S. W. 91, 100, 159 Mo. 410, 51 L. R. A. 151, 81 Am. St. Rep. 368.

A deprivation or taking of property, which is prohibited by the Constitution unless due compensation is made, includes anything that affects or limits the free use and enjoyment of one's property, or of the easements or appurtenances thereto. *Myer v. Adam*, 71 N. Y. Supp. 707, 710, 63 App. Div. 540.

In Const. art. 1, § 6, the word "deprive" is used in its ordinary and popular sense, and relates simply to divesting or forfeiting, alienating, and taking away property. It applies to property in the same sense that it does to life and liberty, and no other. Prohibiting the sale of property, except in pursuance of a license, is in no sense depriving the person of it. *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 467 (per Johnson, J., dissenting).

In Const. art. 1, § 6, providing that a person shall not be deprived of his property, and that it shall not be taken for public use, without due process of law, the meaning of the word "deprive" is the same as the word "taken," and when property is not seized and directly appropriated to public use, though it be subjected, in the hands of the owner, to greater burdens than before, it is not taken within the meaning of the prohibition. *Grant v. Courter* (N. Y.) 24 Barb. 232, 238.

In the Constitution, declaring that a citizen cannot be "deprived" of his life, liberty, or property, unless by the judgment of his peers or the law of the land, "deprive" means take. It cannot be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it. *Sharpless v. City of Philadelphia*, 21 Pa. 147, 167, 59 Am. Dec. 759.

The constitutional provision is that no person shall be deprived of life, liberty, or property without process of law. This clause nowhere declares that in the exercise of the admitted functions of government private property may not receive remote and consequent injury. No person can claim that in the exercise of the proper functions of government his property shall not be diminished in value. The point is the owner shall not be deprived of his property without due process of law. If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, it cannot be seriously claimed this provision in the Bill of Rights has been infringed. So the act regulating warehouses, and fixing the rates of charges thereof, though it may diminish the value of such property, in that it deprives the owner of so much of the income therefrom as he has been in the habit of deriving from extortionate and unreasonable charges, is not a deprivation of his property, and does not infringe the Constitution. *Munn v. People*, 69 Ill. 80, 88.

The term "deprive," as used in the fourteenth amendment of the Constitution of the United States, does not prevent the regulating by statute of the use, or even the price of the use, of private property under all circumstances. Property does become clothed with a public interest when used in a manner to make it a public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *Munn v. Illinois*, 94 U. S. 113, 123, 24 L. Ed. 77.

An indictment for the theft of cattle under Pen. Code, art. 749, declaring that if any person shall willfully take into possession, and drive, use, or remove from its accustomed range, any live stock without the consent of the owner, and with intent to defraud the owner, he shall be deemed guilty of theft, is not defective for using the word "deprive" instead of "defraud," where it was alleged that the animals were fraudulently taken. *Shubert v. State*, 20 Tex. App. 320, 330.

### Pre-existing right implied.

In Gen. St. 1875, § 28, providing that the husband of any decedent "shall not be deprived" of his right as tenant by the curtesy nor of the possession or control of the estate of his deceased wife, nor of the income thereof, during the settlement of her estate, the words "shall not be deprived" imply a pre-existing right, and apply as well to possession, control, and income as to the words "his right as tenant by the curtesy." *Appeal of Staples*, 52 Conn. 421, 423.

**DEPRIVE OF LIFE.**

"Deprive of life," as used in an indictment for murder charging that the defendant did deprive deceased of his life, was equivalent to the word "kill." *Walker v. State*, 14 Tex. App. 609, 627.

**DEPUTY.**

See "Special Deputy."

The term "deputy" means "one who is appointed, designated, or deputed to act for another." *Willis v. Melvin*, 53 N. C. 62, 63.

A deputy is one who by appointment exercises an office in another's right, having no interest therein, but doing all things in his principal's name, and for whose misconduct the principal is answerable. *Carter v. Hornback*, 40 S. W. 893, 139 Mo. 238; *Willis v. Melvin*, 53 N. C. 62, 63; *People v. Barker*, 35 N. Y. Supp. 727, 729, 14 Misc. Rep. 360; *Piland v. Taylor*, 18 S. E. 70, 113 N. C. 1; *In re Tillyou*, 57 App. Div. 101, 110, 67 N. Y. Supp. 1097, 1104.

Webster defines a deputy to be one appointed as a substitute of another, and empowered to act for him, in his name and on his behalf. An agent can only bind his principal when he does the act in the name of his principal, but a deputy may do the act and sign his own name, and it binds the principal. A deputy, however, is in law deemed an agent. When the officer or principal is dead, and that fact is known, or he is otherwise disqualified to act for himself, he cannot act by a deputy or agent. *Herring v. Lee*, 22 W. Va. 661, 667.

A deputy has power to do every act which his principal might do, and he cannot be restrained to some particulars of his office, for that would be repugnant to his being deputy. *Steinke v. Graves*, 52 Pac. 386, 387, 16 Utah, 293.

"A deputy is said to be one who occupies in right of another, and for whom, regularly, his superior shall answer." "A deputy has not any estate or interest in the office, but is as servant to the officer." "A deputy cannot regularly have less power than his principal." *Erwin v. United States* (U. S.) 37 Fed. 470, 475, 2 L. R. A. 229 (citing 7 Bac. Abr. 316 [L]).

A "deputy," as defined by Bouvier, is one authorized by an officer to exercise the office or right which the officer possesses for and in the place of the latter. Comyn's Dig. tit. "Officer" (D, 3), says: "It is said that a deputy has power to do every act which his principal might do, but that a deputy cannot make a deputy, as this imports an assignment of all his authority, which is not assignable." In Bacon's Abridgment, "Officer" (L), it is laid down "that offices of

inheritance for years, and those which require a superintendency, and no particular skill, may regularly be exercised by deputies. Thus, a sheriff, though he is an officer, made by the King's letters patent, and though it be not said that he may execute his office *per se vel sufficientum deputatum suum*, yet he may make a deputy, which is an undersheriff, against whom action may be brought by the parties aggrieved." A judicial officer cannot make a deputy unless he hath a clause in his patent to enable him, because his judgment is relied on in matters relating to his office which might be the reason of the making of the grant to him; neither can a municipal officer depute one in his stead if the office be to be performed by him in person, but when nothing is required but the superintendency in the office he may make a deputy. Bouvier says that in general "municipal officers cannot appoint deputies unless the office is to be exercised by the municipal officer in person." *Willingham v. State*, 21 Fla. 761, 776.

A deputy is an assistant to an officer, and he must be one whose acts are of equal force with that of the officer himself. The deputy must act in pursuance of law, perform official functions, and take oaths before acting. Opinion of Justices, 12 Fla. 651, 652; *People v. Barker*, 35 N. Y. Supp. 727, 729, 14 Misc. Rep. 360.

A deputy is a clerk with all the powers of the principal. An assistant does not mean a deputy. Clerks and other public officers have assistants who are not deputies. (Per Bibb, J.) A deputy is an assistant, and there may be other assistants who are not deputies. "Assistant" is a more comprehensive word than "deputy," and includes those who aid the principal, whether sworn or not, while "deputy" embraces only the sworn class. (Per Mills, J., dissenting.) *Ellison v. Stevenson*, 22 Ky. (6 T. B. Mon.) 271, 276, 279.

The word "deputy," in Const. art. 11, § 8½, relating to officers, includes employés and all the subordinates of the county officers. Thus the copyist in a recorder's office is a deputy, and may be appointed without examination by the civil service commission of the city and county of San Francisco. *Garnett v. Brooks*, 69 Pac. 298, 299, 136 Cal. 585.

By the public officers' law it is provided that every deputy shall be appointed by his principal, etc. If there is but one deputy, he shall, unless otherwise prescribed by law, possess the powers and perform the duties of his principal during the absence or inability to act of his principal, or during a vacancy in his principal's office. The function of a deputy possessing the powers, as he does, to act as if he were the actual incumbent of his principal's office implies a correlative duty and right on the part of

the principal to exercise an unfettered personal selection in the appointment of such subordinate, and also a corresponding freedom in exercising the power of removal, and such is its meaning when used in statute providing that the act relating to removal of honorably discharged veterans from office shall not apply to any private secretary, chief clerk, or deputy. Within this meaning, a deputy tax commissioner, whose duties are prescribed by the statute, and for the performance of which he is responsible to the public, and which, while performed under the direction of the commissioners, do in any way interfere with the duties of the commissioners themselves, is not a deputy. *People v. Barker*, 35 N. Y. Supp. 727, 729, 14 Misc. Rep. 360.

Civil Service Law (Laws 1902, p. 805, c. 270, § 21) provides that no person holding a position by appointment in the state or city, who shall have served the term required by law in the voluntary fire department of a city, shall be removed except for incompetency or misconduct shown after a hearing on due notice, and that nothing in the section shall apply to the position of "deputy" of any official or department. Held, that the word "deputy," as used in the exception of the statute, referred to persons holding a strictly confidential relation to the appointing power, and did not apply to or include a deputy tax commissioner in the department of taxes or assessments in the city of New York, who was a veteran fireman, so as to authorize his removal without a compliance with such section. *People v. Wells*, 83 N. Y. Supp. 789, 790, 86 App. Div. 270.

The office of assistant clerk of the city is provided for in the charter, and he is expressly given all the powers, duties, and responsibilities of his principal, except that by implication, at least, he cannot certify to or affix the corporate seal to copies of the files and transcripts of records. His appointment by the clerk must be confirmed by the council, which also determines his salary, and he may be required to give a bond for the faithful performance of his duties, and is responsible to the municipality for their proper performance. He is in fact a deputy, although officially styled "assistant clerk." *Kelly v. City of Minneapolis*, 79 N. W. 653, 654, 77 Minn. 76.

#### As officers.

See "Officer."

#### DEPUTY CLERK.

As clerk, see "Clerk."

#### DEPUTY CONSTABLE.

A "deputy constable" possesses the whole power of his principal, and of right acts in

his name. *Simpson v. Morris* (Pa.) 3 Yeates, 104, 107.

#### DEPUTY CONSUL.

"Deputy consul" and "consular agent," when used in the title relating to diplomatic and consular officers, shall be deemed to denote consular officers subordinate to such principals, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively, the former at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively. U. S. Comp. St. 1901, p. 1150.

#### DEPUTY POSTMASTER.

The term "deputy postmaster" in Const. art. 2, § 9, providing that no person shall hold more than one lucrative office at the same time, but the office of deputy postmaster, when the compensation shall not exceed ninety dollars per annum, shall not be deemed lucrative, applies to the office of postmaster as not designated. *Bishop v. State*, 48 N. E. 1038, 1039, 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. Rep. 270.

#### DEPUTY SHERIFF.

A deputy sheriff is an officer within the meaning of the law punishing the embezzlement of public money. *State v. Brooks*, 42 Tex. 62, 66.

A deputy sheriff is one appointed to act for the sheriff, and not in his own name, person, or right. He cannot legally act, as in serving an execution, in his own name, but such acts must be in the name and by the authority of the sheriff, in whose stead he acts. He is the deputy of the sheriff, and not of the office of sheriff, as distinct from the person holding the office. *Wilson v. Russell*, 31 N. W. 645, 4 Dak. 376.

Deputy sheriffs are of two kinds: (a) A general deputy, or undersheriff, who, by virtue of his appointment, has authority to execute all the ordinary duties of the office of sheriff (Com. Dig. tit. "Viscount," 542, B. 1); one who executes process without special authority from the sheriff, and may even delegate authority in the name of the sheriff or its execution to a special deputy. (b) A special deputy, who is an officer *pro hac vice*, to execute a particular writ on some certain occasion, but acts under a specific and not a general appointment and authority. *Allen v. Smith*, 12 N. J. Law (7 Halst.) 159, 162.

The deputy is an officer coeval in point of antiquity with the sheriff. The creation of deputies arise from an impossibility of the sheriff's performing all the duties of his office in person. The powers of the deputy have consequently been ascertained at an

early date. The general criterion by which to test his authority is declared in the case of *Levett v. Farrar*, Cro. Eliz. 294, in which the court said that if a writ be directed to the sheriff by the name of his office, and not by a particular name, and doth not expressly command him to execute it in person, the undersheriff may execute it. *Tillotson v. Cheetham* (N. Y.) 2 Johns. 63, 70.

#### DEPUTY STATE CONSTABLE.

The phrase "deputy state constable" is equivalent to the phrase "deputy consul of the commonwealth," which is the designation used in the statutes. *Commonwealth v. Intoxicating Liquors*, 97 Mass. 63, 66.

#### DEPUTY TO CONGRESS.

Baldwin, J., in his opinion in the case of *Cherokee Nation v. Georgia*, considers that the words "deputy to Congress," occurring in the twelfth article of the Hopewell treaty with the Indians, providing that the Indians should have a right to send a "deputy of their choice \* \* \* to Congress," might mean either a person having a right to sit in that body, since at that time it was composed of delegates or deputies from the states, or it might mean an agent or minister. In either event, he could not represent an independent or foreign nation; for if he sat in Congress as the deputy from any state it must be one having a political connection with the confederacy; if as a diplomatic agent, it could not be as an agent of an independent nation, for all such have an unquestioned right to send such agents when and where they please. *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 38, 8 L. Ed. 25.

#### DEPUTY TREASURER.

Money was deposited in a bank in the name of "A., deputy treasurer." Held, that the words "deputy treasurer," in such connection, had the same import as the word "agent," and was merely an acknowledgment by A. that he held the money for some one else, and the person for whom he held the money not being divulged, as between the bank and A., the money belonged to A., and it was not entitled to justify a refusal to pay A.'s checks on that ground alone. *Citizens' Nat. Bank v. Alexander*, 14 Atl. 402, 404, 120 Pa. 476. See, also, *Patterson v. Marine Nat. Bank*, 18 Atl. 632, 130 Pa. 419, 17 Am. St. Rep. 778.

#### DEPUTY UNITED STATES MARSHALL.

As United States officer. see "United States Officer."

#### DERANGE.

The term "deranged," as applied to persons, includes all forms of mental unsound-

ness, except the natural born idiot. *Hiett v. Shull*, 15 S. E. 146, 147, 36 W. Va. 563.

#### DERELICT.

See "Quasi Derelict."

A "derelict" is defined by Judge Story to be a "boat or vessel found deserted or abandoned on the seas, whether it arose from accident or necessity or voluntary dereliction." *The Hyderabad* (U. S.) 11 Fed. 749, 754; *Rowe v. The Brig* (U. S.) 20 Fed. Cas. 1281, 1282; *Montgomery v. The T. P. Leathers* (U. S.) 17 Fed. Cas. 641, 643.

The term "derelict" is used in the maritime law to designate a vessel found entirely deserted or abandoned at sea. *Evans v. The Charles* (U. S.) 8 Fed. Cas. 838.

Derelicts are boats or other vessels forsaken or found on the seas, without any person in them. *The Fairfield* (U. S.) 30 Fed. 700, 701; *Montgomery v. The T. P. Leathers* (U. S.) 17 Fed. Cas. 641, 642; *Flinn v. The Leander* (U. S.) 9 Fed. Cas. 275; *Baker v. Hoag*, 7 N. Y. (3 Seld.) 555, 559, 59 Am. Dec. 431.

A derelict is a ship wrecked at sea which has been abandoned by the crew, without hope of recovery or intention on their part to return. *Cromwell v. The Island City*, 66 U. S. (1 Black) 121, 128, 17 L. Ed. 70; *Rowe v. The Brig* (U. S.) 20 Fed. Cas. 1281, 1282; *Cromwell v. The Island City* (U. S.) 6 Fed. Cas. 859, 860; *Tyson v. Prior* (U. S.) 24 Fed. Cas. 489; *The Aquila*, 1 C. Rob. 37, 41; *The Ann L. Lockwood* (U. S.) 37 Fed. 233, 237; *The B. C. Terry* (U. S.) 9 Fed. 920; *The Emulous* (U. S.) 8 Fed. Cas. 705, 707. A temporary abandonment for the purpose of providing more effectual means of saving it does not constitute a derelict. For this purpose the abandonment must be final, without the intention of returning and resuming possession. *Lewis v. The Elizabeth and Jane* (U. S.) 15 Fed. Cas. 478, 479. If the boat is simply abandoned by the crew temporarily for the purpose of obtaining assistance and returning, it is no derelict. *Cromwell v. The Island City*, 66 U. S. (1 Black) 121, 128, 17 L. Ed. 70; *Rowe v. The Brig* (U. S.) 20 Fed. Cas. 1281, 1282.

In maritime law the abandonment of a steamboat by the master to the care and protection of the master and crew of another steamboat, for the purpose of procuring assistance and safety, is not a case of derelict. *Montgomery v. The T. P. Leathers* (U. S.) 17 Fed. Cas. 640, 642.

When a vessel is found at sea deserted, abandoned by the master, without intention of returning and resuming the vessel, it is, in the sense of the law, "derelict," and the finder who takes possession with the intention of saving her gains a right of possession, which he can maintain against the true own-

er. The owner does not renounce his right to the property, and this is not presumed to be his intention, and the finder does not acquire the property, but the owner does abandon temporarily his right of possession, which is transferred to the finder, who becomes bound to preserve the property in good faith, and to bring it to a place of safety for the owner's use, and he acquires the right to be paid for his services a reasonable and proper compensation out of the property itself. *The Bee* (U. S.) 3 Fed. Cas. 41, 44.

A derelict is a wreck which has been abandoned by all parties; generally applied to shipping. Goods cannot be taken and title therein acquired by finding as derelict, while they are floating in the water, having escaped from the custody of the crew of the wrecked steamer, with full knowledge on their part, unless they have been absolutely abandoned, such goods being still in the constructive possession of the owner of the vessel, in the same manner as goods in a house which is on fire, and which has not been abandoned because of the peril. *United States v. Stone* (U. S.) 8 Fed. 232, 243.

A vessel loaded with a cargo of slaves, who revolt and throw the crew overboard, is a derelict. *Winn v. The Leander* (U. S.) 9 Fed. Cas. 275.

A bark which has broken from her anchorage in the arm of the sea, drifted on a rock beach in a heavy storm, made fast to trees by the captain and crew, filling with water during the night, deserted the next day by all hands, who took with them the ship's papers, compasses, side lights, and their personal effects, and then goes adrift again some days later, and is found drifting 14 miles from her anchorage, with no one on board, is a derelict. *The Canada* (U. S.) 92 Fed. 193, 198.

## DERELICTION.

See "Presumed Dereliction."

### As abandonment of goods.

Dereliction by the civil law is the voluntary abandonment of goods by the owner, without the hope or purpose of returning to the possession. *Jones' Adm'r's v. Munn*, 12 Ga. 469, 473 (citing 1 Bro. Civ. Law, 239; *Wood's Civ. Law*, 156).

Dereliction or renunciation of property requires both the intention to abandon and external action. Thus the casting overboard of articles in a tempest to lighten the ship is not dereliction, as there is no intention of abandoning the property in case of salvage, nor does the mere intention of abandonment constitute dereliction without a throwing away or some external act. *Livermore v. White*, 74 Me. 452, 456, 43 Am. Rep. 600.

### As land gained from sea.

Dereliction is land gained from the sea when the sea shrinks back below the usual high-water mark. *Linthicum v. Coan*, 2 Atl. 826, 827, 828, 64 Md. 439, 54 Am. Rep. 775.

Dereliction is a rescission of the waters of the sea, a navigable river, or other stream, by which land that was before covered with water is left dry. In such case, if the alteration takes place suddenly and insensibly, the ownership remains according to former bounds, or, if it is gradual and imperceptible, the dereliction or dry land belongs to the riparian owner through whose shore or bank the water has receded. *Warren v. Chambers*, 25 Ark. 120, 121, 91 Am. Dec. 538, 4 Am. Rep. 23.

Dereliction or reliction is land added to a front tract by the permanent uncovering of the waters; the laying bare of the bottom, by the retirement of the waters, as contradistinguished from a filling up of the bottom by deposits causing the waters to recede. Dereliction, as used in the English law, meant when the sea shrank back below the usual water mark, and remained there. In those cases the law is held to be that, if this be by little and little, it should go to the owner of the land adjoining. It is recognized by the Louisiana law as a mode of acquiring property, but the mere temporary subsidence of the waters occasioned by the seasons, coming in the winter and staying to the spring, going in the summer and gone in the autumn, does not constitute dereliction in the sense of an addition to the contiguous land, susceptible of private rights as riparian rights. *Sapp v. Frazier*, 26 South. 378, 380, 51 La. Ann. 1718, 72 Am. St. Rep. 493.

## DERIVE.

In the compact between Virginia and Kentucky in reference to lands ceded to Kentucky, providing that all private rights and interests of land within the said district, "derived from the laws of Virginia prior to such separation," shall remain valid and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state, such phrase "appears to have been employed to express the direct and immediate concessions and sales by the state." *Beard v. Smith*, 22 Ky. (6 T. B. Mon.) 430, 437.

In Rev. St. § 2364, providing that on judgment for divorce the court may divide the estate, both real and personal, of the husband, and so much of the estate of the wife as shall have been "derived from the husband," the words "property derived from the husband" refer not only to property directly transferred from him to her, but also such as was substantially derived, mediately or im-

mediately, from the husband. *Gallagher v. Gallagher*, 61 N. W. 1104, 1105, 89 Wis. 461.

## DEROGATION OF COMMON RIGHT.

A statute is in derogation of common right which imposes special burdens upon individuals or upon one class of the community not shared by others. *Barber Asphalt Pav. Co. v. Watt*, 26 South. 70, 72, 51 La. Ann. 1345.

## DESCEND.

See "Estate Descended."

The words "descend," "inherit," and "inheritance," in the statutes of the state in reference to the estates of decedents, ordinarily relate to real estate; but while this is true, it is in the power of the Legislature to give them a different inflection and expand their meaning. The words "descend," "inherit," and "inheritance," in their broad meaning, are frequently applied to personal property. *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

### As ascend.

The word "descend" means ordinarily to go down, but in the law relating to the devolution of property rights "descend" may mean "ascend," as "descending in the ascending line." *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

### As go to.

The word "descend," in a will devising testator's property to certain persons, but, if he left no child or children, then directing that the property was to descend to others, was construed to have been used in the sense of the words "go to." *Brooks v. Kip*, 35 Atl. 658, 660, 54 N. J. Eq. 462; *Stratton v. McKinne* (Tenn.) 62 S. W. 636, 640; *Borgner v. Brown*, 33 N. E. 92, 94, 133 Ind. 391.

"Descend," as used in an antenuptial contract providing that certain property shall remain in the wife, but if there be issue of the marriage then said property shall descend to such child or children, share and share alike, according to the law of the state of Tennessee, is not used in its technical sense, but means shall "go to" or "be vested" in such child or children, share and share alike, or equally, as is provided in the laws of Tennessee in cases of descent or distribution. *Aydlett v. Swope* (Tenn.) 17 S. W. 208, 209.

### As pass by devise.

V. S. 2613, provides that the probate court may appoint trustees in cases not otherwise provided for, when the use of property, real or personal, descends to a person for life. In construing the word "descends"

in this statute, the court observes that it is a canon of construction that every word of the statute must be given effect, if possible, and that if words, taken in their technical sense, would make a statute inoperative in whole or in part, they will be taken in their popular sense. In view of this rule, it is held that the word "descends" as used in the statute includes estates for life which pass by devise, and is not limited to those passing by operation of law on the death of the ancestor intestate. *Mitchell v. Blanchard*, 47 Atl. 98, 99, 72 Vt. 85.

"Descend," as used in a will providing that, after the death of testator's children, the trust created by the will should cease and determine, and the several tracts or parcels of land and premises should go and descend, freed and discharged from all trusts, to the respective right heirs of his children in fee simple, does not express descent in the legal sense, but devolution by force of the devise. It is the same as if testator had said "go down to the children." *Ballentine v. Wood*, 9 Atl. 582, 585, 42 N. J. Eq. (15 Stew.) 552.

Testator's will provided "the share of my property received by J., he may have and use the profits from during his natural life, and at his death descend to his children." Held, that the word "descend" was used in the sense of "go" or "belong" to, and at the death of J. such children took the estate by virtue of the will. *Tate v. Townsend*, 61 Miss. 316, 319.

Testator bequeathed a sum of money, a slave, and other chattels to his wife, to hold during her natural life, and at her death to descend to her granddaughter. Held, that the term "descend" thus used in the will was legatory, and meant that the granddaughter took a vested remainder, and not a contingent interest as successor to the wife. *Timberlake v. Parish's Ex'r*, 35 Ky. (5 Dana) 345, 347.

### As pass by operation of law.

The word "descend" ordinarily defines the vesting of the estate by operation of law in the heirs immediately upon the death of the ancestor. *Potts v. Kline*, 34 Atl. 191, 192, 174 Pa. 513.

Testator's will, after devising the residue of his real estate to his daughters, and the survivors of them, until death or marriage, provided as follows: "After the marriage or death of my surviving daughters, the estate herein devised shall descend to those persons who will then be entitled to take the same as my heirs." Held, that the word "descend" denoted the vesting of the estate by operation of law in the heirs immediately on the death of the ancestor, and manifested the intention of the testator to have been that, after the particular estates which he had given should have failed, the law should

take its course, and his estate go to his heirs as if he had made no further disposition. *Dove v. Torr*, 128 Mass. 38, 40 (citing *Bullock v. Downes*, 9 H. L. Cas. 1; *Mortimer v. Slater*, 7 Ch. Div. 322; *Mortimore v. Mortimore*, 4 App. Cas. 448).

"Descend," as used in a will giving property to a certain person to descend to his female children and grandchildren and to their heirs forever, does not operate to work a "descent" in the legal strict sense of the term, as inheritance is through operation of law. Its employment, therefore, no other meaning being apparent, is to be taken as indicating the desire of testator that his property shall follow the same channel into which the law would direct it. The devise can only mean that the grandchildren only whose parents are dead shall take with the living children, for only in case of the death of its parent can the grandchild become the heir at law of its grandfather, and take from him by descent. Property cannot descend from a grandparent to a grandchild whose parents are living. *Halstead v. Hall*, 60 Md. 209, 211.

A will directing that, after a certain time fixed, the estate devised should "descend" to those persons who may then be entitled to take the same as the testator's heirs, meant that at that stage the law should take its course and the estate go to the testator's heirs as if he had made no further disposition, since the word "descend" ordinarily denotes the vesting of the estate of the deceased person, by operation of law, immediately on the death of the ancestor. *Wood v. Bullard*, 25 N. E. 67, 71, 151 Mass. 324, 7 L. R. A. 304.

"Descend," as used in a will devising testator's real estate, and bequeathing his personal property in trust for his wife for life, and directing a division among his heirs on her death, except the share which would by law descend to his daughter, is to be construed to mean to pass or to be transferred. *Childs v. Russell*, 52 Mass. (11 Metc.) 16, 21.

"Descend," as used in the expression in a will providing that at "her death the same to descend to such of her children as were then living," refers to the course the property would take by descent. *Harrington v. Gibson*, 60 S. W. 915, 916, 109 Ky. 752.

The word "descend" has a well-defined meaning in law, as the following definitions of the word "descent" will show: "Descent is what takes place when land, or some interest in land or other realty, belonging to a person, passes on his death, intestate, to some one related to him. Descent is opposed to what takes place when land, on the death of a person, passes to some one else by virtue of a gift or limitation to him as *persona designata*." *Rap. & L. Law Dict.* Again: "Descent is frequently used to distinguish the vesting of title in any one, by

mere operation of law, from purchase, which may be either devise or grant. In the former case the person is said to take by descent or as heir, while a grantee or devisee is said to take by purchase or as a purchaser." *Abbott, Law Dict.* The above definitions of the word "descent" clearly establish that when the statute declares that in case the adopted child dies without issue the property shall descend, not to his next of kin, but to that of the adopting parent, it means that in case the adopted child dies intestate it should so descend, for otherwise it would pass by devise, and could not descend. *Spangenberg v. Guiney*, 3 Ohio Dec. 163, 165, 2 Ohio N. P. 39.

#### As a word of inheritance.

"Descend," as used in a clause of the will declaring that one-half of the estate shall descend to E.'s heirs and assigns, and the other half to descend to G.'s heirs and assigns, must be construed as a word of inheritance, vesting in the first taker as a fee, since, if it be construed that E. and G. were simply to take life estates, there would be nothing to descend to their heirs. Also the use of the word "assigns" in this connection lends force to this construction, for it contemplates that E. and G. might have the right to transfer the property. In re *Browning*, 16 Atl. 717, 718, 16 R. I. 441, 3 L. R. A. 209.

A will directed that deceased's executor invest a sum of money in real estate for M. W., and that the title to the same be made to her, with the restriction that she should not have power to sell or incur the same in any way, but might rent, use, or occupy the same, and on her death it was to "descend to her heirs"; and further provided that an annuity should be given to one of the brothers of the testator until July 1, 1882, or to his wife in the event of his death, and directed that at the time named \$5,000 should be invested for their benefit, and after their death "the said \$5,000 is to be paid to the children of my said brother Henry, share and share alike. If my said brother H. and his wife both die before the 1st day of July, 1882, the said \$5,000 is not to be paid until the said 1st day of July, 1882, at which time, if they are both dead, the said children shall be entitled to the same." Held that, construing both clauses of the will together, "descend to her heirs," used in the clause first quoted, is not employed by way of words of purchase, or to express a devise, but merely to express the idea that the testator expected and intended his bounty would, upon M. W.'s death, pass by descent to her heirs. *Wedekind v. Hallenberg*, 10 S. W. 368, 371, 88 Ky. 114.

The word "descend" is inapplicable to any estate less than a fee. *Johnson v. Morton*, 10 Pa. (10 Barr) 245, 248.



**As a word of purchase.**

The word "descend," as used in a deed conveying property to another for and during her natural life, and to descend to her heirs in equal portions, means to pass from the grantee to her heirs, and is of the same effect as if the deed read "to her during her natural life, and to her heirs." *Taney v. Fahmley*, 25 N. E. 882, 126 Ind. 88.

"Descend" has been held to mean the same as "to go to," and, as used in the habendum clause of a deed providing that the land shall descend to W. on the death of the first takers, is a word of purchase and not of limitation, and does not show that it was the intention to vest the first takers with the fee, in the face of the express statement that they are to take only a life estate. *Doren v. Gillum*, 35 N. E. 1101, 1102, 136 Ind. 134.

Land was devised to the testatrix's two nephews in common during life, with the provision that immediately after their decease the same should descend to their children in equal shares, or their heirs, yet so that the children of each only divide the share that belonged to their father. Held, that the use of the term "descend" in such devise did not indicate an intention on the part of the testatrix that the children should take as heirs of their parents, and not by way of remainder, especially when taken in connection with the preceding clause, by which a life estate was given to two other nephews, it being provided therein that on the death of either life tenant the undivided half belonging to the one so dying should go to and be enjoyed in equal shares by his children, or to their heirs. *Appeal of Keim*, 17 Atl. 463, 464, 125 Pa. 480.

In a clause of a will providing that the property herein devised to my several children is to remain their own during their natural lives, and to descend to their bodily heirs, if any, the word "descend" is used in the sense of "going to," and will not be understood to vest the fee in the children, as rendering the words "bodily heirs" words of limitation. *Stratton v. McKinnie* (Tenn.) 62 S. W. 636, 640.

"Descend," as used in the provisions of a will as follows: "The above named real estate, one-third to descend to his wife if living, the remainder to go to my children"—means "go," and is not a limitation on the fee devised. *Borgner v. Brown*, 33 N. E. 92, 94, 133 Ind. 391.

**DESCENDANT.**

See "Immediate Descendants or Issue"; "Lineal Descendants."

"Descendants," as used in the act of 1765 directing that an intestate's estate shall descend to his children or their descendants,

if any, means all legitimate children, whether they were born in wedlock, or were made legitimate by subsequent marriage by their parents and recognition according to statute. *Jackson's Adm'r v. Moore*, 33 Ky. (8 Dana) 170, 173.

Within the provision of the Code that the estate of an illegitimate dying intestate without children, husband or wife, or mother, shall go equally to his brothers and sisters by his mother, or descendants of such brothers and sisters, the words "descendants of such brothers and sisters" mean legitimate descendants only, and will not include illegitimate ones. *Giles v. Wilhoit* (Tenn.) 48 S. W. 268, 270.

The word "descendants," in a will providing that, if a certain one of testator's sons should leave no other issue or descendants than one son then living, the former's power of disposition should be limited to a certain sum, is not used as a word of purchase, the testator evidently having imagined that the word "issue" might be mistakenly read for "children," and he therefore followed it in the disjunctive—"or descendants." *Appeal of Barry* (Pa.) 10 Atl. 126, 127.

The use in the Penal Code of any word expressive of relationship, state, condition, office, or trust of any person, as the "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they," in reference thereto, includes both males and females. *Pen. Code Tex. 1895*, art. 22.

**As children.**

The word "descendant," as used with reference to persons taking the estate of a deceased person, has not the same precise technical signification as the words "heirs of the body," and may be and is often used by testators as synonymous with "children." *Schmaunz v. Goss*, 132 Mass. 141, 144.

**As grandchildren.**

By a will testator's property was devised to his brothers and sisters surviving at his death, and the descendants of such as should then be dead, such descendants to take the share or portion which would have otherwise belonged to such deceased parent. At the time of his death six of his brothers and sisters were dead, and had left children and grandchildren. The broad import of the term "descendants" is sometimes narrowed where there is ground for judging that it was intended in a restricted sense. Thus, the word "issue," which is coextensive with "descendants," and includes every degree, has been restricted to the sense of "children." In this case we may reasonably conclude the testator intended to regard each deceased sister and brother as a stock of descent, and, while using the word "descendants" in the sense of children and the descendants of chil-

dren, still had regard to representation. On a strict construction, perhaps, only children would take, but as it was used it included the grandchildren of the deceased brother or sister. *Barstow v. Goodwin* (N. Y.) 2 Bradf. Sur. 413, 416, 417.

#### **As heir or next of kin.**

"Descendant," as used in a bill to restrain the depredation of the graves, monuments, etc., of plaintiff's ancestors, while an anytonym of "ancestor," cannot be construed as a synonym of "heir"; and therefore the allegation that the ancestors of the plaintiff were buried in the yard could not be held to be equivalent to an allegation that the plaintiff's parents were buried, or that the plaintiff was the heir of the persons buried. *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 536, 30 Am. St. Rep. 699.

Children are, eo nomine, descendants, but descendants are not necessarily children. A descendant is a person who is descended from another; that is, one who proceeds from the body of another, however remotely, and includes every person descended from the stock referred to. It is coextensive with "issue," but does not embrace others not of issue, and is not to be understood as "next of kin," or "heirs at law," for these phrases comprehend persons in the ascending as well as the descending line, and they also include collaterals; but it means the issue of the body of the person named, of every degree. *Rates v. Gillett*, 24 N. E. 611, 612, 132 Ill. 287.

Testator's will directed a certain fund to be invested and held in trust for the maintenance and support of certain slaves and their descendants. Held, that the word "descendants" was equivalent to "next of kin," or those who would take under the statute of distribution; and a contention that the word caused the creation of a perpetuity was without merit. *Walker v. Walker*, 25 Ga. 420, 428.

"Descendants," as used in a will, means the issue of the body of the person named in every degree, as children, grandchildren, and great-grandchildren, and it does not include the next of kin as heirs of law generally, such as brothers and sisters. *Hamlin v. Osgood* (N. Y.) 1 Redf. Sur. 409, 417.

Where a will provided that at the death of the testator's wife the estate should go to and be divided "amongst my children and their descendants," the word "descendants" will not be limited in meaning so as to include only those persons who have proceeded in some degree from the body of a child of the testator, so as to exclude from the devise those who, though heirs at law of any deceased child, were not the direct or remote issue of such child; and hence where one of the children died prior to the death of the testator's widow, leaving surviving

a widow, the remainder created will be construed to vest immediately on testator's death in his surviving children, subject to the life estate of the testator's widow, so as to give an interest to the son's widow. *Knight v. Pottgiesser*, 52 N. E. 934, 935, 176 Ill. 368.

Where a will devises to one a life estate, with remainder "to his descendants, if any, in fee, according to the laws of descent and distribution," a mother and the brother and sister of the half blood of the devisee cannot claim the remainder in fee as descendants and heirs at law of the devisee. *Tichenor v. Brewers' Ex'r*, 98 Ky. 349, 352, 33 S. W. 86, 87 (quoting Webster, Rap. & L. Law Dict., and Bouv. Dict.).

#### **As issue.**

The term "descendants," used in speaking of the descendants of a deceased person, means issue. *Prettyman v. Conaway* (Del.) 32 Atl. 15, 17, 9 Houst. 221.

A will provided that, on the death of one having a life interest in a trust fund, the interest theretofore received by her should pass to her sister, "or to her descendants in case of her death." Held, that the word "descendants" was the equivalent of "issue," and, being used with reference to personalty, was a word of purchase. In re *Wain's Estate*, 42 Atl. 299, 300, 189 Pa. 631.

The word "descendants," as used in a provision of a will providing that if any of said grandchildren shall die previous to the decease of my daughter, leaving descendants, "then I direct that such issue shall take the share to which their parents would have been entitled, said share to be received by said grandchildren or their descendants free from any control or claim of any husband," is used interchangeably with "issue" as used in such provision. *Cochrane v. Kip*, 46 N. Y. Supp. 148, 152, 19 App. Div. 272.

#### **As issue of any degree.**

Descendants are "those who have issued from an individual, including children, grandchildren, and their children to the remotest degree—issue of any degree." *Huston v. Read*, 32 N. J. Eq. (5 Stew.) 591, 599. "Descendants," says Bouvier, "are those who have issued from an individual, and include his children, grandchildren, and their children to the remotest degree." *Bryan v. Walton*, 20 Ga. 480, 512; *Bates v. Gillett*, 24 N. E. 611, 612, 132 Ill. 287; *Van Beuren v. Dash*, 30 N. Y. 393, 415.

The word "descendants" used in a will does not mean next of kin or heirs generally, but means the issue of the persons named, of every degree, as children, grandchildren, and great-grandchildren. *Tompkins v. Verplanck*, 42 N. Y. Supp. 412, 415, 10 App. Div. 572.

Bouvier defines "descendants" as "those who have issued from an individual, and includes his children, grandchildren, and their children to the remotest degree. The descendants form what is called the 'direct descending line.' The term is opposed to that of 'ascendants.'" Those who are denominated "descendants" do not comprise all of those who come to the title by descent. *Jewell v. Jewell*, 28 Cal. 232, 236.

A "descendant" is one who descends as offspring, however remotely; correlative to "ancestor" or "ascendant." The term includes the most remote lineal offspring, and is practically synonymous with "issue" in its legal meaning; hence it excludes collateral relations, nor does it include relatives in the ascending line. The word "descendant," in section 13, c. 78, Code 1899, means one who proceeds from the body of another, however remotely, and is coextensive with "issue," but does not embrace others not of issue.—*Waldron v. Taylor*, 45 S. E. 836, 338, 52 W. Va. 284.

"Descendants" does not mean "next of kin" or "heirs at law" generally, as these terms comprehend those as well in the ascending as in the descending line, and collaterals; but it means—what the word obviously imports—the issue of the body of the person named of every degree, as children, grandchildren, and great-grandchildren. Brothers and sisters cannot take under the term "descendants." *Hamlin v. Osgood* (N. Y.) 1 Redf. Sur. 409, 411.

In *Williams, Ex'rs*, p. 376, it is said: "Under this description is comprised every individual proceeding from the stock or family referred to by the testator." In 2 *Jarman, Wills*, 632: "Descendants are issue of every degree." And, where a legacy was left to the descendants of F., the great-grandchildren were held entitled to share with the grandchildren. *Levering v. Orrick*, 54 Atl. 620, 622, 97 Md. 189 (citing *Crossley v. Clare*, *Ambl.* 397).

"Descendants," as used in Act 1850, defining the rights of husband and wife, section 11, declaring that, on dissolution of the community by the death of a husband, one-half of the community property shall go to the surviving wife and the other half to the descendants of the deceased husband, means all persons who are children and grandchildren of the ancestor, and their children to the remotest degree. *Jewell v. Jewell*, 28 Cal. 232, 236.

The words "child, children or descendants," in a will in which testator devises land to his daughter and her heirs and assigns forever, providing that she dies leaving lineal heirs of her body, but, in case she dies leaving no "child, children, or descendants," the lands shall go to others, shows that testator had reference to descendants indefinitely, and

not the children alone of the beneficiary, and therefore the will passes an estate tail, and not an executory devise. *Holden v. Wells*, 31 Atl. 265, 266, 18 R. I. 802. See, also, *In re Gormley's Estate*, 25 Atl. 814, 815, 154 Pa. 378.

The word "descendants," as used in a devise of a home to the testator's son and his wife in trust, the purpose being to provide a home for the family during the life of the son and his wife, "and of the survivor of them, and at the death of the survivor to divide the trust fund among their descendants by stocks," is not synonymous with the word "children," but the word "descendants" includes children, comprising issue of every degree, and does not evince an intent that the remainder should vest at the death of the life tenant, rather than at the death of the testator. *Neillson v. Brett*, 40 S. E. 32, 33, 99 Va. 673.

"Descendants," in its ordinary sense as well as its legal sense, includes the issue of the body of the testator of every degree, no matter how remote. Consequently, as the numbers constituting the class of descendants must vary according to the point of time at which the determination is to be made, it becomes necessary to determine the period at which the testator intended that those who then answered to the designation of descendants would be entitled to receive the gift; and where, in a will, the word "descendants" is used, and another clause provides that such descendants and the widow may sell real property, and in still another provision the word "descendants" is used synonymously with "children," the word "descendants" will be construed to relate to the time of the death of the testator. *In re Collins*, 24 N. Y. Supp. 226, 228, 70 Hun. 273.

#### As issue of living person.

The word "descendant," according to its lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living, the word being the correlative of "ancestor"; but as used in a will giving a life estate to the testator's daughter, with power to appoint it thereafter to her child or children, or his, her, or their descendant or descendants, will be construed to embrace all the persons in the line of descent from any child or children of the daughter, whether living or dead. *Hillen v. Iselin*, 39 N. E. 368, 371, 144 N. Y. 365.

#### As lineal descendant.

A "descendant," as usually understood, is an heir in the direct descending line. In *Baker v. Baker*, 74 Mass. (8 Gray) 101, it was held that the word "descendants" in a will cannot be construed to include any but lineal heirs, unless there are clear indications in the will of the testator's intention to extend

the meaning. Our laws of descent used the words with the same signification. Thus, in Rev. St. 1881, § 2469, it is provided that "if any intestate shall die without lawful issue, or their descendants, alive, one half the estate shall go to the father and mother of such intestate as joint tenants, and the other half to the brothers and sisters, and to the descendants of such as are dead, as tenants in common." The word "descendant" in Rev. St. 1881, § 2571, reading, "Whenever any estate, real or personal, shall be devised to any descendant of a testator, and such devisee shall die during the lifetime of the testator, leaving a descendant who shall survive such testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee as if such devisee had survived the testator, or died intestate," does not apply to a brother of a testator. It refers, we think, exclusively to a lineal descendant, as a child or grandchild. *West v. West*, 89 Ind. 529, 631.

"Descendant," as used in 2 Rev. St. (3d Ed.) p. 126, § 44, providing that whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property shall vest in the surviving child or other descendant of the legatee or devisee, means "lineal descendant," and not any person upon whom property might descend, and is not equivalent to the term "relation." It means direct lineal descendants of the testator. *Armstrong v. Moran* (N. Y.) 1 Bradf. Sur. 314, 317.

"Descendants," as used in Rev. St. 1879, § 2190, giving a widow the right, when her husband dies without a child or other descendants in being capable of inheriting, in lieu of dower, to elect to take one-half of his property, means those who descend in a direct line from the husband, as children, grandchildren, etc., and does not apply to collateral or ancestral kinship. Webster defines "descendant" as "one who descends, as offspring, however remotely; correlative to 'ancestor.'" *Brawford v. Wolfe*, 15 S. W. 426, 427, 103 Mo. 891.

The word "descendants," when used in a devise of property to testator's descendants, will only be construed to include lineal heirs, unless it clearly appears from the will that testator used the word in a different sense. *Baker v. Baker*, 74 Mass. (8 Gray) 101, 119.

"Descendants," as used in Rev. St. p. 869, § 22, providing that when any estate shall be devised or bequeathed to any other person, being a child or other descendant of the testator, etc., and such devisee or legatee shall die during the life of the testator, leaving a child or children who shall survive the testator, the legacy shall not lapse, but shall

vest in such child or children, descendant or descendants, from such devisee or legatee, cannot be construed to include nephews and nieces of a testator, but only extends to the child, grandchildren, etc., who descend from him in a direct line. *Van Gieson v. Howard*, 7 N. J. Eq. (3 Halst. Ch.) 462, 463.

#### As nearest descendants.

St. 1857, § 1, declares that the estate of a deceased person shall go to those of a particular class and their descendants, and if there be no descendants, then, etc. Held, that the word "descendants" as there used meant descendants nearest in degree. *Daboll v. Field*, 9 R. I. 266, 289.

#### As personal representative.

See "Personal Representative."

#### DESCENDIBLE.

The word "descendible" and "devisable" are convertible terms, so that where a contingent remainder is descendible it is also devisable. *Collins v. Smith*, 31 S. E. 449, 451, 106 Ga. 525.

#### DESCENT.

See "Collateral Descent"; "Immediate Descent"; "Mediate Descent"; "Title by Descent."

Descent, devise, or otherwise, see "Otherwise."

"Descent" is the title whereby a person, upon the death of his ancestor, acquires the estate of the latter as his heir at law. *Starr v. Hamilton* (U. S.) 22 Fed. Cas. 1107, 1111 (quoting *Bouv. Law Dict.*); *Meadowcroft v. Winnebago County*, 54 N. E. 949, 950, 181 Ill. 504; *Bennet v. Hibbert*, 55 N. W. 93, 96, 88 Iowa, 154; *Springer & Taylor v. Fortune* (Ohio) 2 Handy, 52, 56; *Barclay v. Cameron*, 25 Tex. 233, 242; *Freeman v. Allen*, 17 Ohio St. 527, 530.

"Property of lands by descent," says Lord Bacon, "is where a man hath lands of inheritance, and dieth not dispossessed of them, but leaves it to go (as the law causeth it) upon the heirs." This is called a "descent in law." *Hamilton v. Homer*, 46 Miss. 378, 395.

Descent, or hereditary succession, is where the title to land which is acquired by the man on the death of his ancestor is established by right of representation as his heir at law. In re *Donahue's Estate*, 36 Cal. 329, 332 (citing *Bl. Comm.* 201, note 1).

Descent is the process by which property is passed from father to son, or from ancestor to descendant. *Shippen v. Izard* (Pa.) 1 Serg. & R. 222, 224.

Descent, in its common-law sense, means an estate which came to a person by law in

right of blood. *Brower v. Hunt*, 18 Ohio St. 311, 338.

Descent is hereditary succession to an estate in realty. "Descent" usually applies to the devolution of real estate. *Adams v. Akerlund*, 168 Ill. 632, 639, 48 N. E. 454, 457 (citing *Bouv. Law Dict.*).

The term "descent," as used in reference to the acquisition of title to real estate, means the acquirement thereof by a man "from his ancestor without writing." *Priest v. Cummings* (N. Y.) 20 Wend. 338, 349.

St. 1831, § 4, providing that, when any person shall die intestate, without issue, possessed of a title to any real estate, by purchase with the estate of, or by "descent from the mother," it shall go to a living brother or sister of the mother of such person, cannot be construed to mean "descent from the maternal grandfather," or taking the share of the deceased parent. *Case v. Wildridge*, 4 Ind. 51, 53.

As used in St. 1822, providing that when the title to any estate of inheritance, as to which the person having such title shall die intestate, "came by descent, gift, or devise" from the parent or other kindred of the intestate, and should such intestate die without children such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be, means immediate descent, gift, or devise, and makes the immediate ancestor, donor, or deviser the sole stock of descent. *Gardner v. Collins*, 27 U. S. (2 Pet.) 58, 85, 7 L. Ed. 347.

#### **Devise distinguished.**

The word "descent," in its technical legal meaning, denotes the transmission of real estate, or some interest therein, on the death of the owner intestate, by inheritance, to some person according to certain rules of law. In such meaning it is distinguished from "transmission by devise," which is technically by purchase, and also from the transmission of personal property, the title of which passes to the administrator, and, after the payment of all debts and claims against the estate, is governed by certain rules of distribution. *Hudnall v. Ham*, 49 N. E. 985, 987, 172 Ill. 76.

"Descent" signifies when lands had by right of blood fall onto any one after the death of his ancestors, or a descent is a means whereby only death derived him title to certain lands. This is the noblest, worthiest means whereby lands are derived from one to another, because it is right, and vested by the act of law and right of blood unto the worthiest and next of the blood and kindred of the ancestor. If an estate is derived even from a father in any other shape than the course of descent would take, it is taken by purchase and not by descent. The test of

the rule is to strike out of the will the particular devise to the heir, and then if, without that, he would take by descent exactly the same estate which the devise purports to give him, he is in by descent and not by purchase." *Springer v. Fortune* (Ohio) 2 Cin. R. 52, 55.

Title is acquired by "descent" when the title is vested in a man by the single operation of law. A title by devise is a title by purchase, and not by descent. *Allen v. Bland*, 33 N. E. 774, 134 Ind. 78.

#### **Mediate and immediate distinguished.**

"According to the principles of the common law of England, as well as the act of descents of this state, descents are either lineal or collateral, and both may be either mediate or immediate. The immediate lineal descent at common law is from the father to his son; the immediate collateral descent is from one brother to another; the mediate, when one derives his inheritable blood to another by the medium of a third person; as in lineal descent, if a son claims as heir to his grandfather or great-grandfather, it shall be mediate patre, though the father be dead at the time of the descent; so in a collateral descent from a nephew to an uncle, or from an uncle to a nephew, it shall be made mediate patre." *Garner v. Wood*, 17 Atl. 1031, 1032, 71 Md. 37 (quoting *Stewart's Lessee v. Jones* [Md.] 8 Gill & J. 1).

A descent may be said to be mediate or immediate in regard to the mediate or immediate descent of the estate or right, or it may be said to be mediate or immediate in regard to the mediateness or immediateness of the pedigrees or degrees of consanguinity. Thus a descent from a grandfather, who dies in possession, to the grandchild, the father being then dead, is in the former sense in law an immediate descent. On the other hand, with reference to the line of pedigree or consanguinity, a descent is often said to be immediate where the ancestor from whom the party derives his blood is immediate, and without any intervening link or degree, and mediate when the kindred is derived from him mediate altero, another ancestor intervening between them. Thus a descent in lineals from father to son is in this sense immediate, but a descent from a grandfather to a grandson, the father being dead, or from uncle to nephew, the brother being dead, is deemed mediate. *Furenes v. Mickelson*, 53 N. W. 416, 417, 86 Iowa, 508.

#### **Transmission of personality.**

Descent is hereditary succession to an estate in realty. "Descent" usually applies to the devolution of real estate. The word "inheritance" is often used synonymously with "descent," and refers to the devolution of real property. *Adams v. Akerlund*, 48 N. E. 454, 457, 168 Ill. 632.

As used in a statute providing that it shall be lawful for any married female to receive by gift, grant, demise, bequest, or descent, and hold to her sole and separate use as if she were a single female, real and personal property, and the rents and issues and profits thereof, the word "descent" cannot be construed to apply to personal property, though it may be given that meaning sometimes to effectuate the intention. Its meaning in this case would not be extended by the necessity of giving it some effect, for here the word applies to the real estate mentioned. *Horner v. Webster*, 33 N. J. Law (4 Vroom) 387, 400.

"Gift, devise, or descent" may be used in a will to indicate the manner of the devolution of both the real and personal property, or of personalty alone. *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

## DESCRIBE—DESCRIPTION.

### See "Sufficient Description."

In the statute relating to ejectment, and requiring the property to be described in the summons, the term "described" means the same as "described with confident certainty," for to "describe" a thing or place, and to "describe it with confident certainty," would seem to mean the same. *Board of Education v. Crawford*, 14 W. Va. 790, 803.

"Description," within the meaning of the mechanic's lien law requiring claimant to file a true description of the property, means such a statement as to its character as will not only identify the property with reasonable certainty as between the parties, but which will be notice to strangers purchasing the property, and relying on the face of the description in the claim for their notice. *Mechanics' Planing Mill v. Nast*, 7 Mo. App. 147, 149.

"Describing a way," as used in Rev. St. c. 18, § 1, providing for the laying out of a highway by the county commissioners on presentation of a petition describing a way, should be construed to mean a statement of the places where the way is desired to commence and terminate, and its general course between them. *Hayford v. Aroostook County Com'rs*, 3 Atl. 51, 52, 78 Me. 153.

In an indictment for forgery, a description, "the president, directors and company of the Bank of St. Albans," as the party intended to be defrauded, is a good description of an artificial person. *State v. Phelps*, 11 Vt. 116, 119, 34 Am. Dec. 672.

Where land is conveyed by a deed bounding it on a way or street, by such description the grantor and his heirs are estopped from denying that there is a street or way to the extent of the land on the side of which the street is described. Such conveyance is not

merely a description, but an implied covenant that there is such a street. It probably entered into the consideration of the purchase. *Parker v. Smith*, 17 Mass. 413, 416, 9 Am. Dec. 157.

The term "description," as used in Ky. St. 1899, § 4241, providing that the auditor's agent shall file in the clerk's office a statement containing a description and value of property to be assessed as omitted property, does not require a particular description or the exact amount of cash, notes, bonds, mortgages, choses in action, etc., that the owner may have in his possession or may have had in the years past. The information on which the court is expected to act under this law must be from the nature of the case somewhat general. *Commonwealth v. Collins* (Ky.) 72 S. W. 819, 820 (citing *Commonwealth v. Singer Mfg. Co.* [Ky.] 21 S. W. 354).

It is one of the essential elements in the description of real property in a conveyance that it must be sufficiently certain to furnish the means for identification of the premises intended to be conveyed. *McRoberts v. McArthur*, 62 Minn. 310, 311, 64 N. W. 903.

### Insufficient description distinguished.

"Description," as used in the statute providing that parol testimony may be admitted for the purpose of fitting land to the description contained in a deed, means descriptions which are legal in themselves, but which, in the absence of parol testimony, might be applied to more than one piece of real estate. Thus the court says: "The question is whether the word 'description' is to be taken in its ordinary and legal signification—that is, a description which has a legal susceptibility of being aided by testimony so as to identify the land—or whether it means a description which in law is no description whatever," is sometimes called an "insufficient description," the court holding itself unable to conceive of any principle on which the latter proposition could be supported. *Lowe v. Harris*, 17 S. E. 539, 544, 112 N. C. 472, 22 L. R. A. 379.

### As substantial representation.

In Act 1870, § 24, providing that any person who has invented any new and useful art, machine, manufacture, or composition of matter not known or used by others in this country, and not patented or "described in any printed publication" in this or any foreign country before his invention or discovery thereof, may obtain a patent therefor, "described" means such a description and drawings as contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practice the invention as they would be enabled to do if information was derived from a prior patent. *Downton v. Yaeger*

Milling Co., 3 Sup. Ct. 10, 12, 108 U. S. 466, 27 L. Ed. 789 (citing *Seymour v. Osborne*, 78 U. S. (11 Wall.) 516, 20 L. Ed. 33.

#### Of mining claim.

A description is a sketch or account of anything in words; a portraiture or representation in language. It is a representation by visible lines, marks, colors, etc.; the act of representing a thing by words or signs, or the account or writing containing such representation; and, as used in conveyances of real estate and in legal instruments in writing, it is the language which depicts the thing under consideration. Black's Law Dictionary defines it as: (1) A delineation or account of a particular subject by a recital of its characteristic accidents and qualities. (2) A written enumeration of items composing an estate, or of its condition, or of titles or documents, like an inventory, but with more particularity, and without involving the idea of an appraisement. (3) An exact written account of an article, mechanical device, or process which is the subject of an application for a patent. (4) A method of pointing out a particular person by referring to his relationship to some other person or his character as an officer, trustee, executor, etc. (5) That part of a conveyance, advertisement of sale, etc., which identifies the land intended to be affected. And hence, as used in a verification to a declaratory statement of a mining claim that the "description" of said lode as given in the location notice is true and correct, it meant merely the delineation or account of the mining claim by the recital of its metes and bounds, or courses and distances, and its geographical position, and did not refer to the whole location notice, so that the affidavit was insufficient. And the description as used in Gen. Laws, div. 5, § 1477, providing that any person who shall discover any mining claim shall make a declaratory statement "describing" such claim, means a description of the claim and of a discovery or location as well. *McCowan v. Maclay*, 40 Pac. 602, 603, 16 Mont. 234.

### DESERT.

Dr. Johnson says that to "desert" is to abandon, to forsake. Crabb, in his book on Synonyms, says that the words "desert," "abandon," and "forsake" are synonymous, and continues: "We 'abandon' those who are entirely dependent for protection and support; they are left in a helpless state, exposed to every danger. A child is 'abandoned' by his parent. We 'desert' those with whom we have entered into coalition; they are left to their own resources. We 'forsake' those with whom we have been in habits of intimacy; they are deprived of the pleasures and comforts of society. To 'abandon' is totally to withdraw ourselves from an object; to lay aside all care for it; to leave it altogether to itself. To 'desert' is to with-

draw ourselves at certain times, when our assistance and co-operation are required, or to separate ourselves from that to which we ought to be attached." *Pidge v. Pidge*, 44 Mass. (3 Metc.) 257, 264.

"Deserted," as used in Rev. St. 1881, § 5132, providing that a married woman may obtain provision for the support of herself and infant children where the husband shall have deserted his wife and children without cause, conveys the same idea as the word "abandoned," in a pleading alleging that the husband, without cause, abandoned plaintiff and children. That is an act of willfully leaving the wife with the intention of causing a palpable separation, a cessation of cohabitation. The words "deserted" and "abandoned" convey the full idea of the act of desertion. *Carr v. Carr*, 33 N. E. 805, 6 Ind. App. 377.

The words "deserted her," as used in an agreed statement of facts that a pauper was married to a certain person who deserted her, should be construed in their ordinary legal sense, which means that such person utterly forsook and abandoned the pauper, and quit and left her with a view of not returning to her. *Town of Pittsford v. Town of Chittenden*, 3 Atl. 323, 325, 58 Vt. 49.

The intention of a husband to permanently separate himself from his wife would be, in a legal phrase, an "intention to desert her." *Whinyates v. Whinyates* (N. J.) 41 Atl. 363.

### DESERTER.

A "deserter," within the meaning of the treaty between the United States and England, authorizing the arrest of deserters from English vessels, is one who leaves his vessel without leave, and without intention to return. It would describe a seaman who signs articles for a voyage, and fails to get on board in time to comply with the provisions of his contract. In *re Sutherland* (U. S.) 53 Fed. 551, 552.

The word "deserter" is generally used to mean a person who has deserted from the United States army. The offense of desertion is one purely of military character, cognizable only by a court-martial, and hence does not constitute a crime so as to render words charging a person with being a "deserter" liable to an action of slander without proof of special damage. *Hollingsworth v. Shaw*, 19 Ohio St. 430, 432, 2 Am. Rep. 411.

### DESERTION (In Divorce Law).

See "Obstinate Desertion"; "Utterly Desert"; "Willful and Malicious Desertion"; "Willful Desertion."

Desertion is a breach of matrimonial duty, and is composed, first of the actual

breaking off of the matrimonial cohabitation, and, secondly, an intent to desert in the mind of the offender; and both must combine to make the desertion complete. *Bailey v. Bailey* (Va.) 21 Grat. 43, 47; *Morrison v. Morrison*, 20 Cal. 431, 432; *Latham v. Latham* (Va.) 30 Grat. 307, 320; *Gill v. Gill* (Md.) 49 Atl. 557, 558; *Harris v. Harris* (Va.) 31 Grat. 13, 28; *Burk v. Burk*, 21 W. Va. 445, 450; *Alkire v. Alkire* (W. Va.) 11 S. E. 11, 12; *Stein v. Stein*, 5 Colo. 55, 56.

Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in without cause for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other. *Eisenberg v. Eisenberg* (Pa.) 18 Wkly. Notes Cas. 146, 148 (citing *Ingersoll v. Ingersoll*, 49 Pa. [13 Wright] 249, 250, 88 Am. Dec. 500); *Middleton v. Middleton*, 41 Atl. 291, 293, 187 Pa. 612 (citing *Ingersoll v. Ingersoll*, 49 Pa. 249, 88 Am. Dec. 500); *Raver v. Raver*, 1 Pa. Dist. R. 177, 180.

Willful desertion is the voluntary separation of one of the married parties from the other, with intent to desert. Rev. Codes N. D. 1899, § 2740.

Desertion, in the law of divorce, is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. *Droege v. Droege*, 55 Mo. App. 481, 482.

In *Schouler on Husband and Wife*, § 516, it is said: "According to the latest authorities, it may be laid down that legal desertion, in the present sense of our divorce acts, imports three things: (1) An actual cessation of cohabitation for the period specified; (2) the willful intent of the absent spouse to desert; (3) desertion by that spouse against the will of the other. Unless these three things concur, there is no legal desertion established such as to justify a divorce." *Barnett v. Barnett*, 61 N. E. 737, 739, 27 Ind. App. 466. See, also, *Taylor v. Taylor*, 28 N. J. Eq. (1 Stew.) 207.

The term "desertion," as used in the law of divorce, contemplates a voluntary separation of one party from the other, without justification, with the intention of not returning. *Williams v. Williams*, 130 N. Y. 193, 29 N. E. 98, 14 L. R. A. 220, 27 Am. St. Rep. 517.

"Desertion," under the statute, is the willful abandonment of one party by the other, without cause and against the will of the party abandoned, for the period of two years. If the husband's conduct is so cruel towards the wife that she cannot live with him with safety to her health or without peril to her life, or if she has good reason to believe she cannot, and abandons her home, she does not thereby commit the crime of de-

sertion. *Kikell v. Kikell*, 25 Neb. 256, 41 N. W. 180 (citing *Warner v. Warner*, 20 N. W. 558, 54 Mich. 492).

"Desertion," as used in the Massachusetts divorce law, is an abnegation on the part of the husband of all the chief duties and obligations resulting from the marriage contract and distinguishing it from others. There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home. His willful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is "desertion" within the meaning of the statute. And such conduct is not relieved by the fact that from time to time he contributes to her support and that of her children. *Magrath v. Magrath*, 103 Mass. 577, 579, 4 Am. Rep. 579.

To constitute "desertion," the deserting party must forsake the other willfully, intending to abandon, and must obstinately continue in such state of separation for the statutory period. *Cass v. Cass*, 31 N. J. Eq. (4 Stew.) 626. Nor are both separation and non-support sufficient. *Howell v. Howell*, 48 Atl. 510, 511, 64 N. J. Eq. 191.

To constitute a "desertion," there must be an abandonment against the will of the abandoned party, and persisted in for the statutory period, or what is equivalent to such abandonment. *Plimley v. Plimley*, 35 N. J. Eq. (8 Stew.) 18, 19.

In our state a "desertion," so as to justify a divorce, must be a willful and obstinate purpose in the wife to abandon her husband and not associate herself with him, and if, during the period, she manifests a disposition to resume their relations, the continuity of the period of desertion, which is absolutely essential, falls. *Loux v. Loux*, 41 Atl. 358, 359, 57 N. J. Eq. 561.

Desertion is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other. Desertion is a willful termination of the married relation by one of the married parties without lawful or reasonable cause, or refusal without reasonable cause to renew the married relation after the parties have been separated. *Ogilvie v. Ogilvie*, 61 Pac. 627, 629, 37 Or. 171.

"Desertion," as used with reference to a wife, consists in her refusing to live with her husband according to his desire. *Newing v. Newing*, 18 Atl. 166, 45 N. J. Eq. (18 Stew.) 498.

"Desertion," as a cause for divorce, exists when either party, without cause or consent, withdraws from the residence of the



other. *Bealor v. Hahn*, 11 Atl. 776, 117 Pa. 169.

"Desertion," within the meaning of the statute making a willful desertion for three years with total neglect a ground of divorce, means, when applied to the husband, the act of willfully absenting himself from the society of his wife, with the intention to continue to live apart in spite of her wish, and without any intention to return to cohabitation. It is not alone a specific act, but a continuing course of conduct. *Tirrell v. Tirrell*, 45 Atl. 153, 72 Conn. 567, 47 L. R. A. 750.

The word "desertion," as used in Gen. St. 1878, c. 69, § 5, providing that desertion by husband or wife shall be a ground for an action to bar the right of curtesy or dower, is used in the same sense as in a statute making it a ground for divorce, and imports such a willful abandonment by one party of the other, without any sufficient cause or excuse, as constitutes good ground for divorce. It involves violation of marital duty and obligation on the part of the one guilty of the act of desertion, and is therefore wrongful and unlawful. *Weld v. Weld*, 7 N. W. 267, 27 Minn. 330.

Although a wife leaves her husband's house through his fault, yet if he afterwards sincerely solicits her to return, and she deliberately and persistently refuses to do so, her conduct constitutes "desertion," within the meaning of the divorce act. *Hooper v. Hooper*, 34 N. J. Eq. (7 Stew.) 93, 97.

The refusal of the wife to accompany her husband on a change of his residence, followed by actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, would constitute sufficient evidence of desertion to authorize a divorce. *Hardenbergh v. Hardenbergh*, 14 Cal. 654, 657.

#### Abandonment synonymous.

The word "desertion," as used in connection with the marital relation, is synonymous with "abandonment." *People v. Crouse*, 83 N. Y. Supp. 812, 813, 86 App. Div. 352.

"Abandonment" is synonymous with "desertion," as used in a statute making desertion a cause for divorce. They are different words to express the same meaning. *Stoddard v. Stoddard* (Ill.) 11 Chi. Leg. N. 162.

"Desertion" and "abandonment" are used interchangeably. They mean the same thing. It is said that to establish desertion three things must be shown: first, cessation of life together; second, the intention not to resume such relation; and, third, the absence of complainant's consent to separation. Separation by mutual consent of husband and wife is not desertion of either. *State v. Weber*, 43 Mo. App. 500, 504.

#### Absence.

Mere absence is not desertion. *Taylor v. Taylor*, 28 N. J. Eq. (1 Stew.) 207; *Rogers v. Rogers*, 18 N. J. Eq. (3 C. E. Green) 445, 446; *Howell v. Howell* (N. J.) 48 Atl. 510, 511.

In legal contemplation, there is no "desertion" by a husband where he is driven by stress of pecuniary difficulties to absent himself from his wife and home in an effort to better provide for his family, an intent to sever and abandon his domestic relationship being necessary to constitute desertion. *Walton v. Walton*, 25 South. 166, 168, 76 Miss. 662, 71 Am. St. Rep. 540.

In the Illinois law of divorce, the terms "desertion" and "absence" are treated as synonymous terms, and hence absence is desertion, as the term "desertion" is used making such act a ground for divorce. *Elzas v. Elzas*, 49 N. E. 717, 719, 171 Ill. 632; *Fritz v. Fritz*, 28 N. E. 1058, 138 Ill. 436, 14 L. R. A. 685, 32 Am. St. Rep. 156 (citing *Carter v. Carter*, 62 Ill. 439).

#### As cruel and inhuman treatment.

See "Cruelty."

#### Nonsupport.

Nonsupport alone is not sufficient to constitute desertion. *Proudlove v. Proudlove* (N. J.) 46 Atl. 951, 952; *Cook v. Cook*, 13 N. J. Eq. (2 Beas.) 263, 264; *Howell v. Howell*, 48 Atl. 510, 511, 64 N. J. Eq. 191.

#### Refusal of sexual intercourse.

Refusal of sexual intercourse does not constitute desertion. *Fritz v. Fritz*, 28 N. E. 1058, 138 Ill. 436, 14 L. R. A. 685, 32 Am. St. Rep. 156.

Desertion "does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation; so that mere refusal by a wife of sexual intercourse with her husband for five years consecutively, though unjustified by considerations of health or physical disability, does not constitute desertion." *Southwick v. Southwick*, 97 Mass. 327, 329, 93 Am. Dec. 95.

The word "desertion," in reference to the right to secure a divorce for the desertion of a husband or wife, is used in the sense of "abandon," to the extent that the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her, and is not constituted by the cessation of sexual intercourse alone. *Anonymous*, 28 Atl. 467, 468, 52 N. J. Eq. (7 Dick.) 349.

The refusal of the wife, without justifiable cause, to permit her husband to have sexual intercourse with her during a period of time exceeding two years, is "desertion"

within the meaning of the law, and furnishes grounds for divorce. *Fritts v. Fritts*, 86 Ill. App. 31, 37.

#### Separation.

The term "desertion," in the law of divorce, means more than a mere separation. *Davis v. Davis* (N. J.) 30 Atl. 20; *Middleton v. Middleton*, 41 Atl. 291, 293, 187 Pa. 612; *Proudlove v. Proudlove* (N. J.) 46 Atl. 951, 952; *Loux v. Loux*, 41 Atl. 358, 359, 57 N. J. Eq. 561; *Ingersoll v. Ingersoll*, 49 Pa. (13 Wright) 249, 251, 88 Am. Dec. 500; *Warner v. Warner*, 20 N. W. 557, 558, 54 Mich. 492.

Separation is not desertion. Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, willfully and maliciously persisted in, without cause, for two years. The guilty intent is manifested when, without cause or consent, either party withdraws from the residence of the other. *Ingersoll v. Ingersoll*, 49 Pa. (13 Wright) 249, 251 (approved in *Eisenberg v. Eisenberg*, 1 Pa. Co. Ct. R. 590, 593).

A separation between husband and wife implies the consent of both parties, and is not synonymous with "desertion," the very idea of which is to leave without consent of the other, and in violation of duty. *Stoddart v. Stoddart* (Ill.) 11 Chi. Leg. N. 162.

In a prosecution for perjury, defendant was charged with having sworn in a divorce suit that his wife had willfully deserted him. His testimony was that they separated; that she refused to return. It was contended that the jury should have been instructed as to the difference between "separation" and "desertion," and that a defendant indicted for perjury, who swore that his wife was guilty of desertion, cannot be convicted by proof that defendant swore that himself and his wife separated. It was held that such instruction was not necessary, since the wife testified that the separation was because of her absolute refusal to live with her husband, or to come where he was after he had left his former home, there being no distinction between a separation accompanied by such refusal, and the statutory definition of "desertion." *Hereford v. People*, 64 N. E. 810, 816, 197 Ill. 222.

Departure or absence of one party from the family dwelling place, caused by cruelty or threats of bodily harm, from which danger would be reasonably apprehended from the other, is not desertion by the absent party. Separation by consent with or without the understanding that one of the parties will apply for a divorce, is not desertion. Absence or separation, proper in itself, becomes desertion whenever the intent to desert is fixed during such absence or separation. Consent to a separation is a revocable act, and if one of the parties afterwards in good faith seeks a reconciliation and restoration, but the other refuses it, such re-

fusal is desertion. If one party deserts the other before the expiration of the statutory period required to make the desertion a cause of divorce, returns, and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuses such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal. The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto it is desertion. If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him. Civ. Code Mont. 1895, §§ 136-142.

#### Same—Compulsory.

Cruelty, on the part of either spouse, carried to such an extent as to drive the other from home, will constitute desertion on the part of the spouse inflicting such cruelty. *Barnett v. Barnett*, 61 N. E. 737, 739, 27 Ind. App. 466.

To render the withdrawal of a wife from the house of the husband such an abandonment as to constitute a "desertion" in legal estimation, it must appear that she left her husband and remained away from him of her own accord, without his consent and against his will, for the full statutory period. The abandonment is not voluntary where it is compelled by personal violence, coarse language, and constant neglect; and such an abandonment cannot be made the ground of divorce. *Meldowney v. Meldowney*, 27 N. J. Eq. (12 C. E. Green) 328, 329.

The leaving and abandoning of a husband's home by the wife when his conduct towards her is so cruel that she cannot live and cohabit with him with safety to her health, or without peril to her life, or if she has good reason to believe she cannot, does not constitute desertion. In such case she does not leave her husband or her home in consequence of any willfulness on her part, but is compelled by the cruelty of her husband, and against her will, so to do. The desertion in such case is on his part, and not on hers. He as completely commits the crime of "desertion" when by his cruel conversation and conduct he compels her, for safety, to leave him and his home, as when he willfully and without cause leaves and abandons her. *Warner v. Warner*, 20 N. W. 557, 558, 54 Mich. 492.

The marriage contract does not furnish an absolute guaranty to the wife that the husband shall at all times be able to relieve her from all efforts to support the family, and separation attributable to the husband's inability to earn support for the wife does not constitute a desertion entitling her to a

divorce. *Bennett v. Bennett*, 43 Conn. 313, 318.

#### Same—By mutual consent.

A mere separation by mutual consent is not desertion by either party. *Latham v. Latham* (Va.) 30 Gratt. 307, 321; *Alkire v. Alkire* (W. Va.) 11 S. E. 11, 12; *Barnett v. Barnett* (Ind.) 61 N. E. 737, 739. "Desertion," as applied to a severance of the relations between husband and wife, means the absenting of one of the spouses from the other against the will of such other; hence if a married woman left her husband with his consent and remained away, that was not desertion, but merely a voluntary separation. *Lea v. Lea*, 90 Mass. (8 Allen) 418, 419.

A separation by mutual consent cannot be desertion; neither can desertion be inferred against either from the mere unaided fact of their not living together, though protracted absence, with other circumstances, may establish the original intent. If the husband, after deserting his wife, repents and offers to return, and she rejects his proposal, the statutory period having elapsed, this, at the date of the refusal, becomes desertion by the wife. A desertion ends with the determination of the intent to desert. It ends when the erring party offers to return and is prevented by the other party. The very idea of a "desertion" is to leave without the consent of the other, and is not synonymous with "separation," for a separation implies consent of both parties to be affected thereby. "Desertion" and "abandonment" are different words to express the same thing. The word "desert" means to part from, to end a connection with, to forsake, to abandon, to leave without permission, to forsake in violation of duty. *Stoddard v. Stoddard* (Ill.) 11 Chi. Leg. N. 162.

Where a wife left her husband at his suggestion, and there was subsequent correspondence in which both parties suggested conditions for a return, though no satisfactory agreement was reached, the separation would not justify the granting of a divorce. *Middleton v. Middleton*, 41 Atl. 291, 293, 187 Pa. 612.

A divorce on the ground of desertion will not be granted where the parties have met in friendly relations within two years of the filing of the petition, and defendant within that time has given plaintiff money and repeatedly requested her to live with him. *Davis v. Davis* (N. J.) 30 Atl. 20.

The voluntary separation of a husband and wife for mutual dislike, incompatibility of temper, incongeniality, or other cause, however long continued, will not constitute "desertion" on either side, within the meaning of a statute authorizing divorce therefor. It will become a desertion, however, from the time when a renewal of the marriage ties is

sincerely sought, or, in other words, from the period when the mutual acquiescence in the separation is put to an end by the overtures of one of the parties. *Hankinson v. Hankinson*, 33 N. J. Eq. (6 Stew.) 68, 70.

#### DESERTION (In Maritime Law).

"Desertion is, by the law maritime, an unlawful and willful abandonment of a vessel, during her voyage, by her crew, without an intention of returning to their duty. It is not a mere unauthorized absence from the ship without leave." *The Union* (U. S.) 24 Fed. 537, 539.

"'Desertion,' in the sense of the maritime law, means, not a mere unauthorized absence from a ship without leave, but an unauthorized leaving or absence from a ship with an intention not to return to the service, or, as it is often expressed, *animo non revertendi*; that is, with an intention to desert." *Coffin v. Jenkins* (U. S.) 5 Fed. Cas. 1188, 1190; *Per Story, J., in Cloutman v. Tunisian* (U. S.) 5 Fed. Cas. 1091, 1093.

Desertion is the quitting of a vessel by a seaman, not only without leave or permission, but without justifiable cause, and with the intent not to return again to the ship's duty. *The Mary C. Conery* (U. S.) 9 Fed. 222, 223.

"Desertion" by a sailor, during a voyage, such as will work a forfeiture of all wages previously due, must be, not merely an absence without leave or in disobedience of orders, but a desertion with an intention to abandon the ship; and if, after desertion, a seaman offers to return to duty in a reasonable time, and offers amends and repents of the offense, the master is bound to receive him back, unless his previous misconduct would justify a discharge. *The George* (U. S.) 10 Fed. Cas. 201, 204.

#### DESERVING.

The word "deserving," as used in a will giving the surplus of testator's estate, after payment of legacies, to be distributed to such persons, societies, or institutions as the executors might consider most deserving, denotes worth or merit, without regard to condition or circumstance, and is in no sense of the word limited to persons in need of assistance, or to objects which come within the class of charitable uses. *Nichols v. Allen*, 130 Mass. 211, 218, 39 Am. Rep. 445.

In a will bequeathing property to selectmen in trust for the special benefit of the worthy, deserving poor of a certain town, the phrase "worthy, deserving poor" was not an indeterminate and uncertain one, but one which the selectmen might well determine. *Beardsley v. Selectmen of Bridgeport*, 3 Atl. 557, 558, 53 Conn. 489, 55 Am. Rep. 152.

The use of the word "deserving" in a bequest to a trustee, to be used as in his judgment he may think best in aid of the deserving, aged native-born in a certain town needing such aid, does not render the will indefinite, since the word must be construed in connection with the phrase "needing aid," and coupled with that phrase, and donation of money, it means practically the same thing as the "aged poor." *Fay v. Howe*, 69 Pac. 423, 424, 136 Cal. 599.

## DESIGN.

See "Formed Design"; "Premeditated Design."

Designed for exportation, see "Export—Exportation."

The word "design" contemplates the causative act of omission, done or suffered willfully or knowingly. *The Strathdon* (U. S.) 89 Fed. 374, 378.

**Absence of overpowering passion implied.**

The expressions "premeditation," "deliberation," "design," "determination," distinctly formed in the mind, used in the charge of a prosecution for murder, all imply the absence of overpowering passion. *State v. Ah Mook*, 12 Nev. 369, 381.

**As designate.**

17 Stat. 599, providing that no article or thing "designed or intended for the prevention of conception" shall be carried in the mail, should not be construed "as intended to describe the intent, which must be an element of the crime against the United States, but simply as descriptive of the article made contraband, and the phrase must be understood to indicate as contraband in the mail any article or thing designed in a manner calculated to secure its use by one for the purpose of preventing conception. The same conclusion may be arrived at by giving the word 'designed,' as used in this statute, the signification of 'designated,' which is one of the ordinary meanings of the word." *United States v. Bott* (U. S.) 24 Fed. Cas. 1204, 1205.

**As intend.**

"Design" is a purpose or intention, combined with plan, or implying a plan in the mind. *State v. Grant*, 53 N. W. 120, 121, 86 Iowa, 216; *Ernest v. State*, 20 Fla. 383, 388; *Hogan v. State*, 36 Wis. 226, 244.

In an indictment charging that the defendant fraudulently and deceitfully kept in his possession six quires of paper, which was a material devised, adopted, and designed by him for forging and making false counterfeit notes in imitation of those issued by banks and banking companies, the term "designed" was intended to point out the particular purpose to which the instrument or material

might be applied. It is not sufficient to constitute an allegation of defendant's criminal intent. *Commonwealth v. Morse*, 2 Mass. 128, 131.

In an accident insurance policy providing that the insurance should not extend to any case of death or personal injury, unless the claimant should establish by direct and positive truth that the death or injury was not the result of design, either on the part of the deceased or of any other person, the term "design" means the design that intended the actual result accomplished, and not the design of the act itself, which act resulted in the killing of one contrary to the design of the act. The design mentioned in the policy must be considered a design on the part of one killing the insured to kill such insured, and if at the time he fired the pistol shot he did not intend to kill insured, or did not know that the man he was shooting was the insured, death was not the result of design. *Utter v. Travelers' Ins. Co.*, 32 N. W. 812, 813, 65 Mich. 545, 8 Am. St. Rep. 913.

Where a partnership contract provided that one of the partners might purchase, sell, and charter the vessels "designed for the trade," the loss or profit to be charged or credited to the general account, a ship which was built for the trade, but was sold immediately upon being launched, without actually having engaged in the trade, was within the terms of the contract, and the profits of such sale were partnership profits. *Foster v. Goddard* (U. S.) 9 Fed. Cas. 534, 542.

The words "designed to distinguish such ballots," in Pol. Code, §§ 1206, 1207, providing that when any ballot bears upon it any impression, device, color, or thing designed to distinguish such ballot from other ballots it shall be rejected, operate to require the impression, device, color, or thing to be expressly for the purpose of marking the ballot; and therefore the statute does not authorize the rejection of a ballot for discoloration, not designed, but resulting from the use of ink by the elector in scratching his ballot. *Wyman v. Lemon*, 51 Cal. 273, 274.

"Designed to mislead the voter," as used in Act 1875, p. 51, § 1, providing that the caption or head lines on ballots shall not in any manner be "designed to mislead the voter" as to the name or names thereunder, means not truly indicating the political character or party affiliations of the persons to be voted for, or representing by the words used in the caption that the ballot is the ticket of one party when in truth and in fact the persons whose names are contained in the body of the ballot represent another and different party. Where the caption of ballots contain the word "Republican," "Independent," or "Greenback," it cannot be said as a matter of law that the ballots were designed to mislead the voter. *Turner v. Drake*, 71 Mo. 285, 287.

**Negligence.**

A policy providing that the insurer would be liable for any loss by fire originating in any cause except the "design in the insured," does not include a loss which was produced by the mere negligence or laches of the assured in leaving the property exposed to the peril, where he did not co-operate, directly or indirectly, with those who produced the loss. Design imports plan, scheme, intention carried into effect; and therefore a loss, to be by the design of the assured, must be by incitement, connivance, or co-operation of the assured, directly or indirectly, with the persons who were the agents in the act; and the fact that the insured was negligent in leaving the premises derelict, and thus exposed them to the wanton or criminal acts of intruders, was not sufficient to make the loss one by the design of the assured, since the negligence of the assured cannot be the approximate cause of the loss where he had no co-operation, knowledge, or part in the act causing the loss. *Catlin v. Springfield Fire Ins. Co.* (U. S.) 5 Fed. Cas. 310, 314.

In a policy insuring against loss by fire not caused by the design of the insured, "design" does not include negligence. There are cases of gross neglect which are in law deemed equivalent to a fraudulent purpose or design, founded on the consideration of doing nothing when the slightest care on the part of the insured would prevent a great injury. Judge Shaw supposes a case where the insured in his own house sees the burning coals in the fireplace roll down on his wooden floor, and does not brush them up. This would be nonfeasance, and evidence of a culpable recklessness and indifference to the rights of others. And where a husband of a wife admitted to be insane is the owner of buildings insured by the defendants, and the care of the wife is intrusted to the husband, and she burns the buildings while thus insane, the insurer is liable for the loss where there is no such negligence shown on the part of the husband as will evince a corrupt design or a fraudulent purpose on his part. *Gove v. Farmers' Mut. Fire Ins. Co.*, 48 N. H. 41, 43, 97 Am. Dec. 572, 2 Am. Rep. 168.

**Premeditation implied.**

"Design" means "intent," and both words essentially imply premeditation. *Perugi v. State*, 80 N. W. 593, 597, 104 Wis. 230, 76 Am. St. Rep. 865; *Ernest v. State*, 20 Fla. 383, 388; *Hogan v. State*, 36 Wis. 226, 244.

The definitions of "murder in the third degree" and of "manslaughter" use the words "without design to effect death," thus positively excluding such a design, and a design so excluded is necessarily the premeditated design of murder in the first degree. *Hogan v. State*, 36 Wis. 226, 244.

The design necessary to constitute murder in the first degree is a design to kill will-

fully; that is, of purpose, with the intent that the act by which the life of the party is taken should have that effect deliberately; that is, with cool purpose and with premeditation; that is, the design must be formed before the act by which the death is produced is performed. *Dale v. State*, 18 Tenn. (10 Yerg.) 551, 552.

**As plan of building.**

In a by-law of a land company that no land should be sold or leased without a pledge to build speedily, design of buildings to be approved by directors, "design" was not used in its strictly technical sense, such as architects might understand it, but it only refers to the general plan, and not to the details of construction of the building. *Devries v. Cone*, 34 Atl. 822, 823, 82 Md. 186.

Where land is conveyed by a land company, with the provision that buildings to be erected shall be according to a "design" approved by the directors of the land company, on the destruction of the building so built the grantee would have a right to rebuild according to the original design; that is, without any such changes as would substantially affect the general plan approved by the directors. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 386, 389, 36 L. R. A. 393.

**DESIGN (In Copyright).**

See "Improved Design"; "Novel Design"; "Useful Design."

A "design," in the view of the patent law, is that characteristic of a physical substance which by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the tout ensemble—in that indefinable whole that awakens some sensation in the observer's mind. Impressions thus imparted may be complex or simple; in one a mingled impression of gracefulness and strength, in another the impression of strength alone. But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character. *Pelouze Scale & Mfg. Co. v. American Cutlery Co.* (U. S.) 102 Fed. 916, 918, 43 C. C. A. 52.

The word "design," as used in federal copyright act as a term of art, is used in its popular acceptance, meaning the giving of a visible form to the conceptions of the mind or to the invention; in other words, it is that fac simile or working out of the ideas so that they may be comprehended by the senses. *Binns v. Woodruff* (U. S.) 3 Fed. Cas. 421, 424.

"Designs," as used in Rev. St. § 4929, relating to copyrights for patterns for designs, fall in line with mechanical patents, and require the exercise of the inventive faculty. *Henderson v. Tompkins* (U. S.) 60 Fed. 758, 764 (citing *Smith v. Whitman Saddle Co.*, 148 U. S. 674, 18 Sup. Ct. 768, 37 L. Ed. 606).

#### DESIGNEDLY.

In an indictment for obtaining goods by false pretenses, the word "knowingly," in connection with the word "falsely," by which it is immediately followed, is sufficiently comprehensive without using also the word "designedly." The pretense could not be "knowingly" false without at the same time being "designedly" false. The word "knowingly" is at least the equivalent of the words "designedly" and "unlawfully," and therefore, the latter being sufficient without the former, the former must be sufficient without the latter. *State v. Halida*, 28 W. Va. 499, 504.

#### DESIGNATE.

See "To Be Designated."

A city charter authorizing the taxation of such property as the city council may "designate" does not require a specific designation of each particular class and kind of property to be taxed, but a designation of "property of any kind subject to taxation under the laws of the commonwealth" is a sufficient designation. *Covington Gaslight Co. v. City of Covington*, 84 Ky. 94, 95, 99.

The word "designate," as used in Act July 2, 1839, requiring that each ticket voted for at an election should designate on the outside the office or offices, and on the inside the name of the person voted for to fill such office or offices, means to show, or point out; to indicate by description, or by something known or determinate. Any clear description of the offices, about which there could be no mistake or apprehension, would be sufficient. In re Election of Prothonotary of Luzerne County, 3 Pa. Law J. 155, 157.

#### As appoint.

The word "designate," when used by the appointing power in making an appointment to office, is equivalent to the word "appoint." *People v. Fitzsimmons*, 68 N. Y. 514, 519.

#### As declare or express.

The word "designate," as used in the statute providing that the jury shall designate by their verdict whether it be murder in the first or second degree, does not imply that it will be sufficient for the jury to intimate or give some vague hint as to the degree of murder of which the defendant is found guilty, but is equivalent to the word "ex-

press" or "declare," and it was evidently intended that the jury should expressly state the degree of murder in the verdict so that nothing should be left to implication; and a verdict of guilty as charged in the indictment, under an indictment charging grand larceny, was insufficient where the statute divided larceny into two degrees, defining each. *McLane v. Territory* (Ariz.) 71 Pac. 938, 939. If it be sufficient for the verdict to designate the degree of the crime only by reference to the indictment, it would be equally good, in such case, simply to find the defendant guilty, without reference to the indictment. *People v. Campbell*, 40 Cal. 129, 139.

#### As mark or point out.

In a statute which provided that on proceedings for the laying out of a road, after the court had appointed surveyors and fixed a time of their meeting, at least two of the applicants for the road should sign and set up notices designating the time or places from and to which the road is to be laid out, "designate" meant to point out or mark by some particular sign or mark. *State v. Green*, 18 N. J. Law (3 Har.) 179, 181.

Rev. St. 1875, p. 214, § 3, provides for the appointment of a committee to locate and describe all natural oyster beds in a certain town, which shall be designated by such committee, and their report be recorded, etc. Held, that the word "designated," as there used, is to be taken as referring merely to the act of the commissioners authorized to determine and inform applicants what grounds they may occupy, and that before the applicant can require any right to the exclusive occupation of the ground it is necessary for him to mark and stake out the place designated. *White v. Petty*, 18 Atl. 253, 57 Conn. 576.

"Designate," according to the dictionary, means to call by a distinctive title; to point out by distinguishing from others; and is so used in Act 24th Gen. Assem., c. 33, § 14, providing that the names of all candidates of any political party shall be placed under the title of such party as designated by them in their certificates of nomination. *Lowry v. Davis*, 101 Iowa, 236, 239, 70 N. W. 190.

#### As select.

"Designate," as used in the Mexican law of 1825, providing that where projects for new settlements, in which one or more persons offers to bring at their expense 100 or more families, shall be presented to the government, and if found conformable with this law it shall be admitted, and the government shall immediately "designate" to the contractors the land where they are to establish themselves, "does not mean that the government will grant them the land, but simply that it will select and designate the place

where a colony may be settled." *Interstate Land Co. v. Maxwell Land Grant Co.*, 11 Sup. Ct. 656, 661, 139 U. S. 569, 85 L. Ed. 278.

Act March 11, 1880 (Supp. Revision, 929), § 86, provides that school trustees shall give notice of the annual meeting, and therein state the object of the meeting, and the amount of money desired to be raised, and that no greater sum than the amount so designated can be raised. Held, that the word "designated," as so used, means to show, to point out, to specify, and does not mean to select or determine upon. *State v. Trustees of School Dist. No. 10*, 18 A. 683, 684, 52 N. J. Law (23 Vroom) 104.

### DESIGNATION.

The term "designation," as used in the by-laws of a mutual benefit society declaring that, if no designation of a beneficiary has been made, the amount which the insured is entitled to receive shall be paid to his heirs, means and refers to the express act of the member specifying and naming some particular person as his beneficiary. *Hanson v. Minnesota Scandinavian Relief Ass'n*, 60 N. W. 1091, 1093, 59 Minn. 123.

The meaning of "designation," as found in the dictionary, includes "appellation." It, according to Webster, is that which designates distinctive title; appellation. According to Worcester, its meaning is "that which serves to distinguish." As used in a statute requiring ballots to be on plain white paper, clear and plain cut, without any ornaments, "designation," mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for and the office for which such persons are intended to be chosen, it is, on account of its associate words, to be construed to intend only designations in the nature of ornamentations, mutilations, symbols, or marks, as distinct from words or writings, and hence ballots having on them, in the body thereof, the words "National Republican Ticket," "Free Suffrage Ticket," are not illegal or contrary to the purposes of the statute. *State v. Saxon*, 12 South. 218, 225, 30 Fla. 668, 18 L. R. A. 721, 32 Am. St. Rep. 46.

In Civ. Code, § 2466, requiring every firm doing business under a fictitious name or "designation, not showing the names of the partners," to file and publish a certificate showing the full names and residences of its members, "designation" is not used in opposition or contrast between the phrase "fictitious name"; the former is supplementary to the latter. *Pendleton v. Cline*, 24 Pac. 659, 660, 85 Cal. 142.

### DESIRABLE.

In a railroad charter authorizing the company, for the purpose of constructing its

road with all desirable appendages, and for putting and keeping the same in repair, to enter upon, take, and hold all real estate and materials necessary for that purpose, the word "desirable" should be construed to mean "necessary." *Prather v. Jeffersonville, M. & L. R. Co.*, 52 Ind. 16, 37.

Under the charter of a corporation organized for the manufacture and dealing in lumber and other articles, and providing that the company may acquire and transfer, purchase and hold, sell or exchange, any real estate or other property that may be deemed "desirable" in the transaction of its business, the corporation has power to purchase its own stock. *Iowa Lumber Co. v. Foster*, 49 Iowa. 25, 28, 31 Am. Rep. 140.

### DESIRE.

A desire, either natural or otherwise, is not a consideration for a contract. It may be a motive for a party entering into a contract, but we take it that it does not constitute a legal consideration. A friendly feeling and a wish and desire to help are always necessarily present in the mind of an accommodation guarantor. *Greer Machinery Co. v. Stains (Tenn.)* 59 S. W. 692, 699.

Under a statute authorizing an information in quo warranto by any person desiring to prosecute the same is meant any person who has an interest to be affected, and the words do not give a private relator the writ in a case of private right involving no individual grievance. *Commonwealth v. Cluley*, 56 Pa. (6 P. F. Smith) 270, 272.

The statute providing that informations in the nature of a quo warranto may be exhibited at the relation of any person desiring to prosecute the same means any person having an interest in the subject of the prosecution; and one claiming the office of a school director, but who is not shown to be a qualified elector of the district, is not in a position to file an information in the nature of quo warranto against the incumbent. *State v. Boal*, 46 Mo. 528, 531.

### As word of intention.

Either of the words "wish," "desire," "command," or "direct," is an apt word to be used in a will to show testator's intent to make a will. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

"Desire," as used in a will declaring, "It is my will and desire," etc., is the equivalent of the word "wish," and indicates an intention of the testator to dispose of the property to which the wish refers; the word "will" being stronger in its meaning than "desire." *McMurry v. Stanley*, 6 S. W. 412, 414, 69 Tex. 227.

**As positive direction.**

In a will reciting that "I desire that at such time as may be agreeable and mutually consented to by my wife and my son, the homestead may be sold and one purchased in lieu thereof by them at a cost not exceeding \$8,000, and any excess in price must be invested and added to my estate," the word "desire" does not bear a sense merely hortatory or precatory, but is equivalent to a positive direction. *Stewart v. Stewart*, 47 Atl. 633, 635, 61 N. J. Eq. 25.

"Desire," as used in a will providing that "on the death of my wife I desire that one-half of the property," etc., does not import a trust or charge or a command. *In re Marti's Estate*, 61 Pac. 964, 965, 132 Cal. 666.

In a will in which the testator desires his trustees to apply the residue of his estate to such of a certain class of charitable institutions as the trustees should deem worthy thereof, "desire" should be construed as a command in a polite form. *Weber v. Bryant*, 37 N. E. 203, 161 Mass. 400.

The words "I desire," in a will in which the testator said, "I desire that all my estate shall be sold and the proceeds invested in first bonds and mortgages," are the equivalent of the words "I will," and amounts to a direction to sell. *Appeal of City of Philadelphia*, 4 Atl. 4, 5, 112 Pa. 470.

The word "desire," when used in a will, does not necessarily imply a command, but is dependent on the language of the will, and, a will attempting to dispose of all real estate, will be held mandatory. *Meehan v. Brennan*, 45 N. Y. Supp. 57, 58, 16 App. Div. 395.

Testator devised to his wife all his estate, real, personal, and mixed, to her sole and separate use, behoof, and control forever, but in a subsequent item provided that it was also his "desire and wish," after his wife's death, that his house and lot should go to his daughter for her sole and separate use. Held, that while the words "wish and desire" were sometimes considered to be precatory words, merely, in wills, and not mandatory, as where they are used as expressing a desire for an act to be done by some person or persons named, no such presumption or construction obtains when the words are used to express the intention and will of the testator, as in the devise quoted, in which case such words are to be treated as mandatory; and hence the testator intended to give his wife only a life estate in the house and the lot, with remainder to the daughter. *Taylor v. Martin* (Pa.) 8 Atl. 920, 922.

In a will in which testator gave a farm to a certain person for his support, and then declared that, if such person should be spared to have family, "I desire" such estate to go to the use of his children, the expression is not merely precatory, but is as mandatory as if

the words "I will" or "I order and direct" had been used. *Oyster v. Knull*, 20 Atl. 624, 187 Pa. 448, 21 Am. St. Rep. 890.

The words "wish and desire," in a will in which testator suggested that it was his wish and desire that all his real estate should be divided between his children, was construed to be not merely the expression of desire on the part of the testator, but to be operative words sufficient to pass the property. *Brasher v. Marsh*, 15 Ohio St. 103, 111.

Testatrix directed her residuary estate to be divided into three equal parts, one of which she devised absolutely to her daughter. In a codicil to her will testatrix declared her "desire that one-half of the share of the property inherited from me by my daughter be placed in trust," designating the trustee. Held, that the word "desire," as used by the testatrix in the codicil, was not a word of mere request, recommendation, or entreaty addressed to the legatee or devisee, but was an order, direction, or command addressed to the executors of the will. *Wood v. Camden Safe Deposit & Trust Co.*, 14 Atl. 885, 886, 44 N. J. Eq. (17 Stew.) 460.

**As creating a trust.**

In a will where testator makes an absolute gift of property, saying that he desires it to be used in a certain way, the word "desire" is sufficient to raise a trust where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 128; *Maught v. Getzendanner*, 5 Atl. 471, 472, 65 Md. 527, 57 Am. Rep. 352; *Lines v. Darden*, 5 Fla. 51, 72; *Curd v. Field*, 103 Ky. 293, 45 S. W. 92; *Riker v. Leo*, 21 N. E. 719, 720, 115 N. Y. 93 (citing 1 Wm. Ex'rs, 88; *Vandyck v. Van Beuren*, 1 Caines, 84); *Cockrill v. Armstrong*, 31 Ark. 580, 589.

Where a testator's will recited that he desired his three sons, in case any of his daughters should be inclined to purchase of them certain land bequeathed to them, should let such daughters have it at the same price they had paid for it, the word "desire" raised a trust. *Vandyck v. Van Beuren* (N. Y.) 1 Caines, 84, 89.

**As wish.**

In Act March 7, 1887 (St. 1887, p. 45) § 8, reciting that it is "desired and required that all growers and manufacturers, traders, handlers or bottlers of California wine, when selling or putting it up for sale or when shipping it to parties sold, shall plainly stencil, brand or have printed where it may be easily seen, 'pure California wine,' and his name or the firm's name both on the label or bottle or package," "desired and required" should be construed as intended to express rather a legislative wish and permission than a mandate. As words of legislative command, they are singularly inappropriate and inconsistent. The word "desired" cannot be ignored in the



construction of the act any more than the word "required," and the former is at least as forcible in its expression of a request as the latter is in its expression of a command. *Ex parte Kohler*, 15 Pac. 436, 437, 74 Cal. 88.

Within a bond providing that it will be redeemed, if desired, 12 years after date, "desired" is the synonym of "wished for" and of "requested," and gives the option of redemption to the holder of the bond, and not to its maker. *Allentown School Dist. v. Derr*, 9 Atl. 55, 56, 115 Pa. 439, 19 Wkly. Notes Cas. 189.

#### DESIRE TO FAVOR.

"Desire to favor," as used in an instruction that "you are not required to find any fact to be proven because you find the same suggested in a verdict, or in the verdict of the party you desire to favor," means "find to have the merits," and the jury could not have understood that their verdict could be bestowed by favor. *Pittsburgh, C., C. & St. L. R. Co. v. Burton*, 37 N. E. 150, 154, 139 Ind. 357.

#### DESPOIL.

"The word 'despoil' involves in its signification violent or clandestine means by which one is deprived of that which he possesses." *Sunol v. Hepburn*, 1 Cal. 254, 268.

#### DESTINATION.

See "Final Destination."

The destination of a vessel, within the meaning of a fire policy insuring it for a voyage to Havana, was construed to mean the inner harbor at Havana, and not the outer harbor or quarantine grounds, which was not a place of safety for vessels. *Dickey v. United Ins. Co.* (N. Y.) 11 Johns. 353, 363.

A bill of lading providing against liability for articles of freight after their arrival at their "place of destination" and unloading at the company's warehouse, and providing that articles arriving at their "place of destination" must be taken away within 24 hours after being unladen, means the place of ultimate destination of the goods, and does not include an intermediate point where the goods were to be delivered from one carrier to a connecting carrier. *Ayres v. Western R. Corp.* (U. S.) 2 Fed. Cas. 275, 277.

Rev. St. c. 91, § 34, giving a person who labors at cutting or driving logs a lien thereon, to continue for 60 days after the logs arrive at the "place of destination," means the place of destination of the logs as a collective whole—that is, the boom into which they are rafted—and not the different destinations to which the aggregate logs in different detachments may be sent for manufacture into lumber. *Sheridan v. Ireland*, 66 Me. 65, 69.

#### DESTINE.

A grant of land made by the Governor of Louisiana was in the following words: "Exercising the authority which the King has granted to us, we destine and appropriate, in his royal name, the aforesaid twelve leagues." These words are of strong and decisive import, and, it is believed, show the intent of the grantor as fully as any that could have been adopted. To "destine" is to set, ordain, or appoint to a use, purpose, estate, or place. We are all destined to a future state. To fix unalterably by a divine decree; to appoint unalterably. The word "appropriate," in the sense used, signifies to set apart for or assign to a particular use in exclusion of all other uses; to claim or use by an exclusive right. No words of a more determinate character to convey a complete title could have been found in any language. The words as used in the original grant mean to grant and deliver as property. *United States v. Philadelphia and New Orleans*, 52 U. S. (11 How.) 609, 660, 13 L. Ed. 834.

#### DESTITUTE.

The words "destitute persons," within the meaning of Rev. St. c. 24, § 24, providing that the overseers are to relieve destitute persons found in their towns and having no settlement therein, includes a person found in distress, although he may prove property of his own not available for immediate relief. A person in jail on execution and actually destitute is entitled to relief, although he refuses to make oath that he is unable to support himself in jail and has not sufficient property to furnish security for his support. *Inhabitants of Norridgewock v. Inhabitants of Solon*, 49 Me. 385.

The words "destitute of property or means of comfortable subsistence" may be used to characterize minor children who have no property, although they earn their own living. *Woods v. Perkins*, 9 South. 48, 43 La. Ann. 347.

#### DESTROY—DESTRUCTION.

See "Sunk or Destroyed"; "Total Destruction"; "Wholly Destroyed."

In Rev. St. § 5353 [U. S. Comp. St. 1901, p. 3639], declaring that every person who plunders or destroys any goods, merchandise, or other effects from or belonging to any vessel in distress shall be punished, etc., "destroys" is used in a popular sense, to include every kind of a deprivation of the owner by demolishing, making way with, or other subversion of his property. *United States v. Stone* (U. S.) 8 Fed. 232, 249.

Under Act July 15, 1897, pl. 297, authorizing transfers of licenses from place to place, on partial or complete "destruction" of the

building, a destruction may exist where the buildings are rendered useless for the purpose intended. The word must necessarily be construed as synonymous with "demolition," "breaking up in parts," "pulling down." In re McCabe, 11 Pa. Super. Ct. 560, 564.

Rev. St. § 4113, provides that the lessee of any building which shall, without any fault or neglect on his part, be "destroyed" or be so injured by the elements as to be unfit for occupancy, shall not be liable to pay rent after the destruction, but shall surrender possession, etc. Held, that the destruction or injury, within the purview of the statute, did not mean the gradual decay which results from the ordinary action of the elements, nor the injury resulting from the ordinary action of human agents, which a lessee is supposed to have in view when he enters into the contract, but that the statute was designed rather to protect the lessee against unexpected and unusual action of the elements, or of human forces causing a total destruction. The word "destroy" has reference to a sudden and total destruction, acting with unusual power, and the term "injury" meant something short of total destruction occasioned in the same manner. *Hilliard v. New York & Cleveland Gas Coal Co.*, 41 Ohio St. 662, 669, 52 Am. Rep. 99. In New York, under a similar statute, a like meaning was given to the word "destroy." *Suydam v. Jackson*, 54 N. Y. 450, 455.

The word "destroy" has on more than one occasion been construed to describe the act which, while rendering useless for the purpose for which it was intended, did not literally demolish or annihilate the thing. In re McCabe, 11 Pa. Super. Ct. 560, 564.

The malicious or mischievous destruction or injury of animals, within the meaning of a statute making it an offense to maliciously or mischievously destroy or injure certain animals, is sufficiently described by an indictment charging a defendant who did maliciously and unlawfully injure, maim, and wound such an animal. *State v. Merrill* (Ind.) 3 Blackf. 346, 347.

#### **As carry away.**

Laws 1855, c. 428, providing that persons whose property is destroyed by mobs shall be compensated therefor, does not necessarily mean the actual, immediate destruction of the property; and it would make no real difference whether the rioters actually destroyed the property on the premises, or whether they took it away and then destroyed it, or whether they destroyed the goods taken by using them. *Solomon v. City of Kingston* (N. Y.) 24 Hun, 562, 564.

#### **As cast away a vessel.**

In Act Cong. March 26, 1804, § 2, providing that if any person shall on the high seas willfully and corruptly cast away, burn, or

otherwise destroy any ship or vessel of which he is owner, in part or in whole, or permit or procure the same to be done, with intent to prejudice any person who has underwritten any policy of insurance thereon, he shall be punished, etc., "destroy" means to unfit a vessel for services beyond the hope of recovery by ordinary means. "This, in extent of injury, is synonymous with 'cast away.' It is a generic term. Casting away is a species of destroying, as burning is; both mean such an act as causes a vessel to perish or be lost so as to be irrecoverable by ordinary means." *United States v. Johns* (U. S.) 26 Fed. Cas. 616, 618.

#### **Destruction by fire.**

The word "destroyed," in an agreement by a lessee of certain fire extinguishers to pay the lessor the value of the property destroyed, was held to include destruction of the property by fire. "The word 'destroyed' is used without limitation, and hence it is difficult to see why destruction by fire should constitute an exception. True, either party might have insured against loss by fire; but when it is considered that it was the business of the plaintiff to hire out fire extinguishers, and in each instance would have to effect separate insurance unless protection against loss by fire could be secured by some special provision in the contract of bailment, it seems but reasonable to conclude that the contract in this case contemplated to cast the burden of loss, in case of destruction by fire, upon the bailee. *Rapid Safety Fire Extinguisher Co. v. Hay-Budden Mfg. Co.*, 75 N. Y. Supp. 1008, 1010, 37 Misc. Rep. 558.

#### **As disable.**

2 Rev. St. p. 665, § 27, defines the offense of mayhem to be the cutting off or disabling any limb or member of another. Held, where an indictment for mayhem charged that defendant did with premeditated design cut, bite, and destroy the thumb of another, the word "destroy" was sufficient instead of "disable," inasmuch as it was more comprehensive, and included everything signified by "disable." *Tully v. People*, 67 N. Y. 15, 20.

#### **Partial destruction.**

"Destroyed," within the meaning of a covenant in a lease that, if the premises are destroyed by fire, the payment of rent and relation of landlord and tenant shall cease at the election of either party, does not characterize a partial destruction of a building by fire which renders a part of it uninhabitable until repaired. *Wall v. Hinds*, 70 Mass. (4 Gray) 256, 268, 64 Am. Dec. 64.

A "destruction" of property, within the meaning of the law of fire insurance, is shown by evidence that the insured building was so damaged as to render it useless for the purpose for which it had been used. "If rendered useless for the purpose for which the

property was used, the plaintiff's right to recover insurance for what was so insured was complete. If what remained of the property so insured was of any value, the insurer was entitled to it." *Manchester Fire Ins. Co. v. Feibelman*, 23 South. 759, 765, 118 Ala. 308.

The term "destruction," in a covenant in a lease to repair damages occurring during the occupancy, the usual wear and tear, providential destruction, and the destruction by fire excepted, is to be construed as meaning a total destruction of the premises, such as will require a "rebuilding" as distinguished from a "repair." There must be such a destruction as will permanently unfit the premises for occupancy. *Spalding v. Munford*, 37 Mo. App. 281, 283.

In an act providing that a person who shall willfully break or destroy or injure the door of any building shall be punished, etc., the words "break or destroy" mean to destroy the completeness of. *State v. McBeth*, 31 Pac. 145, 49 Kan. 584.

Defendants were indicted and convicted for destroying buildings in the nighttime, under a statute providing that "if any person shall in the nighttime maliciously, unlawfully, and willingly burn or cause to be burned or destroyed any houses or buildings," etc., he shall be punished, etc. In construing the statute, the court said: "If the words 'or destroyed' be stricken out of the statute entirely, it is clear that by no rule of construction can its remaining language be made to embrace any injury to a building other than those in which fire is the element used in the work of destruction. But conceding the construction which was contended for in behalf of the state to be correct, namely, that by the insertion of those words into the statute it was meant to include every kind of injury that might be done to a building, whether by fire or otherwise, it would, however, be a strained construction of the words 'or destroyed,' standing alone as they do, and unsustained by anything in the context, to say nothing of the rule which enjoins a strict construction of penal enactments, to hold that these words were intended to embrace within the provisions of this highly penal statute every possible injury, however slight or trivial, that might be done to a building merely because done in the nighttime—such, for example, as the breaking of a door or window, or even to such injuries as those that were done to the building in question by the defendants, by prizing up the end of a smokehouse and taking out three logs, whereby the top was pushed back, so that it nearly fell—when it is manifest, whether we resort to the context as furnishing an index to the scope or design of the authors of the statute, or to the ordinary meaning of the word 'destroy,' that its sole purpose was to include within its provisions such injuries only, whether by fire or otherwise, as would amount either to

a total demolition of a building, or such as would unfit it for the purpose for which it had been erected." *State v. De Bruhl* (S. C.) 10 Rich. Law. 23, 26.

#### Poisoning.

Under Pen. Code, § 654, relating to injuries against property, and prescribing the punishment for unlawfully destroying another's property, one who poisons the horses of another may be prosecuted for destroying property. *People v. Christy*, 20 N. Y. Supp. 278, 279, 65 Hun. 349.

"Destruction or injury of personal property," within the meaning of Gen. St. c. 161, § 85, which provides a punishment for willful and malicious destruction or injury of personal property of another in any manner or by any means not particularly described or mentioned in the chapter, includes poisoning the hens of another, notwithstanding the provisions of section 80 for punishing the poisoning of horses, cattle, or other beasts. *Commonwealth v. Falvey*, 108 Mass. 304, 306.

#### As prevention of use

Property is destroyed, although not touched directly, when the result of construction is to prevent its use, as in *Monongahela Nav. Co. v. Ooon*, 6 Pa. (6 Barr) 379, 47 Am. Dec. 474. The injury results in these cases from the construction of the works of the corporation; but in the case of a valuable country hotel, the business of which was destroyed by the change of travel from wagons to trains as the result of operation of a railroad, plaintiff was held to be remediless, although the value of his property was destroyed. *Jones v. Erie & W. V. B. Co.*, 25 Atl. 134, 137, 151 Pa. 30, 17 L. R. A. 758, 31 Am. St. Rep. 722.

"Destroyed," as used in Const. art. 16, § 8, providing for the payment of damages by corporations for property injured or destroyed in the exercise of the right of eminent domain, was not designed to change, alter, or limit the nature and effect of corporate contracts, but to impose on those having the right of eminent domain a liability for consequential damages; as, for instance, if, in the exercise of a right, the water of a creek or other stream is cut off from the owner below or backed on the owners above, or if, in the lawful use of a highway, the property of an adjacent owner is injured thereby, damages therefor may be recovered. *Edmondson v. Pittsburgh, M. & Y. R. Co. (Md.)* 4 Atl. 404, 406.

#### In relation to instruments.

The cutting of a bank note into two parts, unless done with the intent to destroy the note, is not of itself a destruction of it. While the two parts exist and are retained by the rightful holder, the rights and liabilities of the parties remain precisely the

same as before the division. *Allen v. State Bank*, 21 N. C. 3, 12.

Where, before a marriage, the parties entered into a marriage contract defining the interest the wife should have in the husband's property, and delivered such contract to a trustee to hold for them, and thereafter they demanded and received such contract from the trustee, each declaring that it should be null and void, such act and words were equivalent to a cancellation or destruction of the paper itself. In determining whether a contract has been destroyed, the intention of the parties alone is to be considered, not the mode adopted to signify that intent. In *re Gangwere's Estate*, 14 Pa. (2 Harris) 417, 426, 53 Am. Dec. 554.

#### In relation to wills.

"Destroy," within an act relating to wills, includes burning, canceling, and tearing up. A will burned, canceled, or torn *animo revocandi* is destroyed. *Johnson v. Brailsford* (S. C.) 2 Nott & McC. 272, 278, 10 Am. Dec. 601.

The term "destroying," in Act April 8, 1833, § 13, authorizing the revocation of a will by burning, cancelling, obliterating, or destroying the same, does not include the act of testator in writing the word "obsolete" on the margin of his will without signing the same. *Lewis v. Lewis* (Pa.) 2 Watts & S. 455, 457.

"Destroying," as used in a statute providing that a will may be revoked in certain specified ways or by otherwise destroying it, does not include a cancellation of the will with a pen. *Stephens v. Taprell* (U. S.) 2 Curt. 458.

Destruction of a will, as used in a statute relating to the burning, canceling, obliterating, and destroying a will, is not necessarily annihilation or a change into other forms of matter. Tearing into fragments is unquestionably destruction, though the fragments may be reunited. All the words are used in their popular sense, and thus used they secure the object the Legislature had in view—a complete manifestation of an executed intention to repeal the will. *Appeal of Evans*, 58 Pa. (8 P. F. Smith) 238, 244.

#### DESTRUCTIVE.

The question whether the term "noxious or destructive substance or liquid," in a statute making the administering of such substance criminal, includes the substance or liquid administered, is a question for the jury. *Dougherty v. People*, 1 Colo. 514, 516.

Pen. Code, § 216, providing that every person who, with intent to kill, administers, or causes or procures to be administered, to another, any poison or other noxious or destructive substance or liquid, but by which

death is not caused, shall be punished, does not mean merely such as might, when administered, be hurtful and injurious, but, like a poison, it must be capable of destroying life. It includes substances which act on the system mechanically so as to destroy life, as well as those which are capable of destroying life by their own inherent qualities. Pulverized glass or boiling water are included within "noxious or destructive substance or liquid," for when administered in sufficient quantities they will destroy life; but they are not poisonous. *People v. Van Deleer*, 53 Cal. 147, 148.

"Destructive matter," as used in St. 1 Vict. c. 85, prescribing the punishment for any person who shall cast or throw on or otherwise apply to any person any corrosive fluid or other destructive matter with intent to burn, disfigure, or disable such person, would include boiling water. *Regina v. Crawford*, 2 C. & K. 129.

#### DESUETUDE.

"The instances are numerous of statutes being repealed in fact—a kind of silent legislation. As to the abrogation of statutes by nonuser, there may rest some doubt; for myself, I own, my opinion is that nonuser may be such as to render them obsolete when their objects vanish or their reason ceases. \* \* \* The long desuetude of any law amounts to its repeal. Mr. Woodeson in his second lecture (volume 1, 63) of civil, positive and institutive laws, observes, 'that the last consideration is the period of their existence;' they may be repealed either expressly or by implication founded on disuse. \* \* \* It certainly requires very strong grounds to presume a law obsolete, yet, as the whole community includes as well the legislative power as its subjects, total disuse of any civil institution for ages past may afford just and rational objections against disrespected and superannuated ordinances." *James v. Commonwealth* (Pa.) 12 Serg. & R. 220, 227.

#### DETACHABLE.

A patent called for a coffee or similar mill having a detachable hopper and grinding shell formed in a single piece, and suspended within the box by the upper part of the hopper or a flange thereon. Held, that the word "detachable," as so used, did not necessarily imply that the hopper must possess the capacity of being detached from the top of the box; the object contemplated being rather that the hopper might be easily detachable from the box, since by the terms of the claim the hopper and grinding shell, formed in a single piece, are suspended within the box by the upper part of the hopper or a flange thereon. *Strobridge v. Lindsay* (U. S.) 2 Fed. 692, 693.

in a claim for a patent declaring the same to be the combination of a torpedo, a detachable clip, means for attaching it to the torpedo, and a wire for attaching the clip to the rail, substantially as shown, a removable clip was meant, or one which was not positively attached to, and virtually made a part of, the torpedo shell by riveting or soldering; one which, while it accomplished connection, did not create union. *Bennett v. Schooley* (U. S.) 75 Fed. 392, 394.

## DETACHED.

The word "detached," when used in speaking of an insured building in a fire policy, means "separate or not adjoining another building." *Burleigh v. Gebhard Fire Ins. Co.*, 12 Wkly. Dig. 235.

The word "detached," as used in a fire policy on property described as "buildings adjoining and communicating, \* \* \* and situated detached," is to be construed as meaning that such buildings are detached from other buildings, and not to mean that they are detached from each other. *Broadwater v. Lion Fire Ins. Co.*, 26 N. W. 455, 34 Minn. 465.

### As distant.

Where, in an insurance policy, the dwelling insured is described as standing detached, and the dwelling was 7 feet from any other building, it did stand detached, and an attempt to show that the phrase "standing detached" meant that it was distant 25 feet or thereabouts from any other building was properly rejected. The phrase is not in the slightest degree ambiguous, and extrinsic proof was not admissible to give it a meaning different from its plain import. *Hill v. Hibernia Ins. Co.* (N. Y.) 10 Hun, 26, 30.

A policy of fire insurance issued to plaintiffs stated that the property insured was contained in their frame storehouse with slate roof, situate detached at least 100 feet, etc., on the east side of Lake Champlain. Held, that the words "detached at least 100 feet" should not be construed as mere words relating to the description of the building, but words relating to the character of the risk, and which amounted to a warranty to the effect that no other buildings of such size and character as to constitute an exposure and increase of risk stood within the distance specified. *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220, 223.

### As isolated.

"Detached," as used in St. 7 & 8 Vict. c. 61, § 1, providing that the detached parts of a county should be considered for all purposes as part of the counties of which they are part for election purposes, must be taken to embrace "isolated." *Regina v. Brecon*, 15 Q. B. 813, 825.

## DETAIL.

See "Facts Detailed"; "Matters of Detail."

A statement that one has not heard the particulars of a transaction is contradicted by showing that he had heard the details. The words "particulars" and "details" are in fact synonymous, and in ordinary parlance convey the same meaning. *Baltimore City Pass. Ry. Co. v. Knee*, 34 Atl. 252, 254, 83 Md. 77.

In an agreement of reorganization of a corporation, providing that the bond holders' committee should submit to the certificate holders a detailed plan of reorganization, which should be binding upon all such holders, and requiring the bond holders to dissent within 30 days to the details of the plan, the "details" are the minor particulars necessary to complete the reorganization, but consistent with the original plan, and lawful and honest. In matters of substance nothing might be done under the detailed plan that could not have been done under the original agreement. That was the idea conveyed by the use of the word "detailed." *United Waterworks Co. v. Omaha Water Co.*, 58 N. E. 53, 62, 164 N. Y. 41.

### As selected.

"Detailed," as used in a resolution of the common council of Brooklyn appointing a certain person as a detailed fireman, means, simply, selected. *People v. City of Brooklyn Fire Com'rs*, 8 N. E. 730, 731, 108 N. Y. 370.

### As set apart to particular service.

With relation to military service a "detail" is one who belongs to the army, but is only detached or set apart for the time to some particular duty or service, and who is liable at any time to be recalled to his place in the ranks. A "detail" is distinguished from an "exempt," who is one free from any charge, burden, or duty—is not liable to any service. In *re Strawbridge*, 39 Ala. 367, 375.

"The Century Dictionary defines the verb 'detail' to mean 'set apart for a particular service.'" The word is so used in Acts 1898, c. 123, § 95, directing the police commissioners of Baltimore, at the request of the park commissioners, to detail, from time to time, members of the regular police force for the preservation of order in the parks. *Upshur v. City of Baltimore*, 51 Atl. 953, 955, 94 Md. 743.

## DETAILED REPORT.

Rev. St. § 917, requiring the county commissioners annually to make a detailed report in writing of their financial transactions during the preceding year, will be construed to have been complied with if such report states faithfully the several sources of expenditure

and the sums paid on account of each, although it does not state specifically each item of the sum thus expended. *State v. Washington County Com'rs*, 47 N. E. 565, 568, 56 Ohio St. 631.

## DETAIN.

Hold equivalent, see "Hold."

Gen. St. art. 4, c. 29, § 9, providing that whoever shall unlawfully take or detain any woman against her will with intent to have carnal knowledge of her shall be guilty of a felony, should be construed to include the act of a man who goes into the room of a sleeping girl, removes the bedclothes, and exposes her person and his, without awakening her. *Malone v. Commonwealth*, 15 S. W. 856, 91 Ky. 307.

To take the crutch of a crippled girl, or to hold her by the hand, while pleading with her for carnal knowledge, is a "detention," within the meaning of Ky. St. § 1158, creating the offense of detaining a woman against her will with intent to have carnal knowledge of her. *Paynter v. Commonwealth (Ky.)* 55 S. W. 687, 688.

Code, § 179, authorizing the arrest of defendant on execution in an action for wrongful taking, detaining, or converting property, is to be construed as wrongfully taking, detaining, or converting personal property, and does not apply to real property. *Merritt v. Carpenter*, \*41 N. Y. (2 Keyes) 462, 466, 83 How. Prac. 428, 432.

Post-Office Law, § 21 (4 Stat. 107), declaring that if any person employed in the post-office department shall unlawfully detain any letter he shall be punished, etc., means letters which are in transit and have not reached their place of destination. Letters deposited in the post office to be forwarded, or handed to the mail carrier on his route between post offices, come within the provision. *United States v. Pearce (U. S.)* 27 Fed. Cas. 480, 481.

A party who has purposely taken the property of another, or who, having obtained possession lawfully, refuses to restore it to the owner, does, in contemplation of law and in fact, detain it, even after he has delivered it to another who has no more right to the possession than he has. *Drake v. Wakefield (N. Y.)* 11 How. Prac. 106, 110.

### Imprison distinguished.

"Detained," as used in Act 1842, declaring that no person shall be arrested, held to bail, detained, or imprisoned on process, mesne or final, founded on any contract, express or implied, is not without meaning, and cannot be expunged from the act as super-

fluous, but would apply to one who had been imprisoned for a debt and admitted to the liberties of the prison on bond. *Sedgwick v. Knibloe*, 16 Conn. 219, 222.

### As withholding possession.

In a declaration in detinue, "detain" means that defendant withholds the goods and prevents plaintiff from having possession of them. *Clements v. Flight*, 16 Mees. & W. 42, 49.

There was a detention where a person was in possession of slaves, and so continued, and refused to deliver them on demand, for which detinue would lie. *Tunstall v. McClelland*, 4 Ky. (1 Bibb) 183.

### DETAINER.

See "Forcible Entry and Detainer"; "Unlawful Detainer."

### DETAINMENT.

The words "arrest, restraint, and detention of all kings," in a marine policy insuring against arrest, restraint, and detention of all kings, covers a loss caused by a vessel being unable to enter her port of destination by reason of a blockade, though she proceeds to other ports without attempting to enter the blockaded port. *Schmidt v. United Ins. Co. (N. Y.)* 1 Johns. 249, 262, 3 Am. Dec. 319.

The "restraints and detainment of all kings, princes, or people," within the meaning of a clause of a marine policy in reference to the liabilities of the parties in case of restraints and detainment of all kings, princes, or people, mean the operations of the sovereign power by an exercise of the vis major in its sovereign capacity, controlling or divesting for the time the dominion or authority of the owner over a ship, and not proceedings of a mere civil nature to enforce the private rights claimed under the owner for services actually rendered in a preservation of his property. They do not include the mere detention of an officer in admiralty proceedings. *Bradlie v. Maryland Ins. Co.*, 37 U. S. (12 Pet.) 378, 402, 9 L. Ed. 1123.

"Arrest, restraints, and detainments of kings, princes, or peoples," within the meaning of a marine policy on a cargo of slaves against such arrest, restraints, and detainments, includes the issuing of a writ of habeas corpus by a judicial officer of a government within the control of which the vessel is driven by stress of weather, which results in the slaves being taken from the vessel and set at liberty. *Simpson v. Charleston Fire & Marine Ins. Co. (S. C.)* Dud. 239, 242.

## DETECTIVE.

See "Private Detective"; "Public Detective."

"Detective" is defined by Webster as a person fitted for or skilled in detecting; employed in detecting, as a police detective; a policeman whose business it is to detect rogues by adroitly investigating their haunts and habits. The literal thing understood by the word "detective" in common affairs is a person who is able and has the facilities to detect criminals with a skill not possessed by nonprofessionals. The word "detect," as defined by Webster, is to uncover; to find out; to bring to light; as, to detect a crime, a criminal, or his hiding place. Its synonyms are "to uncover; to find out; lay open; expose." The occupation of detective does not imply, however, that the detective is engaged in a sneaking and prying business, and therefore a charge to such effect is libelous. *Byrnes v. Mathews*, 12 N. Y. St. Rep. 74, 81.

### Authority to make arrests.

"Detective" has no such settled significance attached to it as of necessity imports authority to arrest criminals or persons charged or suspected of committing criminal acts, so that, without proof of authority by the employer of a detective authorizing him to make arrests, the making of such arrest did not come within the scope of authority of a detective, and the master is not liable. *Penny v. New York Cent. & H. R. R. Co.*, 53 N. Y. Supp. 1043, 1045, 84 App. Div. 10.

## DETENTION.

A charter party providing for a certain rate of demurrage for each day of "detention by default of the charterers" cannot be construed to mean the mere lapse of time, for such lapse was not necessarily a default. *Davis v. Pendergast* (U. S.) 7 Fed. Cas. 159, 160.

In a marine insurance policy providing that in case of capture or detention of the vessel the assured should not have a right to abandon therefor until proof should be exhibited of a condemnation on notice of a continuance of the detention at least 90 days, "detention" means an illegal arrest, seizure, etc., such as the underwriters were answerable for, by the general terms of the policy, but could not be construed to extend or enlarge the risk of the underwriters to cases not provided for or covered by the words in the body of the policy. *Archibald v. Mercantile Ins. Co.*, 20 Mass. (3 Pick.) 70, 74.

The word "detention," as used in a marine policy warranting against any loss on account of capture or detention by any belligerent nation, arises when there is no intention to appropriate, and in fact no appropriation to the detainer's use, but where the

property is either simply held as a hostage, as it were, for the payment of ransom, or for the purpose and as a means of obtaining some ulterior object, such as for the suspension of commerce with a port by embargo or blockade, which detains a vessel in that port, or for the exercise of the right of search. *Murray v. Receivers of Harmony Fire & Marine Ins. Co.* (N. Y.) 58 Barb. 9, 15.

Sup. Ct. Rule 29, requiring, on appeal or in proceedings in error, indemnity in an amount sufficient to secure the sum recovered for the "use and detention" of the property, means sum recovered in the original judgment or decree, such as damages and mesne profits in ejectment, damages in dower and replevin, etc., and does not contemplate security for the use and detention of the property pending the appeal. *Omaha Hotel Co. v. Kountze*, 2 Sup. Ct. 911, 925, 107 U. S. 373, 27 L. Ed. 609.

## DETER.

Under a statute providing that, if a defendant has been guilty of fraud by which plaintiff has been debarred or deterred from his action, the period of limitations shall only run from the time of the discovery of the fraud, by the term "deter" is meant to discourage or stop by fear; to stop from acting or proceeding by danger, difficulty, or other consideration which disheartens or countervails the motive for the act. *Printup v. Alexander*, 69 Ga. 553, 556.

## DETERGENT.

"Detergent" means cleansing, and, as used in a specification in a patent for certain soap, was synonymous with the word "soap," since a "detergent soap" is a cleansing soap, it being of the nature of soap to be detergent or cleansing. *Buckan v. McKesson* (U. S.) 7 Fed. 100, 103.

## DETERMINABLE FEE.

See, also, "Base Fee."

The term "determinable fee" embraces all fees which are liable to be determined by some act or event, expressed in their limitation to circumscribe their continuance, or inferred by law as bounding their extent. *Greer v. Wilson*, 9 N. E. 284, 287, 108 Ind. 322; *McLane v. Bovee*, 35 Wis. 27, 36; *Vantongerren v. Heffernan*, 38 N. W. 52, 73, 5 Dak. 180; *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 168; *Weed v. Woods*, 53 Atl. 1024, 1026, 71 N. H. 581 (citing *First Universalist Soc. v. Boland*, 155 Mass. 171, 29 N. E. 524, 15 L. R. A. 231). Thus, where the commissioner of the General Land Office has authority to cancel a pre-emption certificate for cause at any time be-

fore patent issue, there was a limitation on the fee, and its determinable quality is inferred by law within such definition. *Vantongerren v. Heffernan*, 38 N. W. 52, 73, 5 Dak. 180.

If land is given to a man and his heirs "as long as he shall pay 70 shillings annually to A.," or "as long as the church of St. Paul's shall stand," his estate is fee simple determinable, in which case he has the whole estate in him, and such perpetuity of the estate which may continue forever, though at the same time there is a contingency which, when it happens, will determine the estate. *Plowd. 557. United States Pipe Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 762, 62 N. J. Law, 254, 42 L. R. A. 572.

A determinable fee is an estate which may be perpetual, or may be determined by the death of the intestate without surviving lawful issue, and without previous alienation of the land limited over to beneficiaries mentioned. One of the peculiarities of a fee determinable is that it may become a fee simple absolute on the happening of any event which renders impossible the event or combination of events on which such estate is to end. An example given of such determinable fee is where an estate is granted to a man and his heirs until the marriage of B. *Friedman v. Steiner*, 107 Ill. 125, 181.

A qualified, base, or determinable fee is an interest which may continue forever, but is liable to be determined by some act or event circumscribing its continuance or extent. *People v. White* (N. Y.) 11 Barb. 26, 28 (citing 1 Rev. St. 722; 4 Kent Comm. 4, note d; *Id.*, 9; 5 T. R. 107).

A determinable fee is such a one as has a qualification subjoined thereto, and it must be determined whenever the qualification annexed to it is at an end. *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83. Testator's will provided that at the death of testator's wife the estate should go to and be divided amongst testator's children and their descendants. The interest which vested at the death of testator was not a base or determinable fee, subject to be divested as to any devisee by the death of such devisee during the continuance of the life estate, without leaving descendants to take after the death of the widow of the testator. *Knight v. Pottgieser*, 52 N. E. 934, 936, 176 Ill. 368.

A fee is determinable where its continuance is limited in some manner, as where lands are given to a man and his heirs as long as another man shall have heirs of his body. *Richardson v. Noyes*, 2 Mass. 56, 63, 3 Am. Dec. 24.

The term "determinable fee" includes the interest acquired by a county in real estate conveyed by a deed providing that the conveyance is for the use of the people of the county as long as the premises shall be

used for a county site for the courthouse, jail, and clerk's office, but shall revert to the grantor if the county ceases to use it for such purpose. *Gillespie v. Broas* (N. Y.) 23 Barb. 370, 381.

## DETERMINATION.

See "Actual Determination"; "Final Determination"; "Judicial Determination."

The expression "a determination in the trial court" obviously includes a decision of the court upon a trial without a jury, but, according to common parlance and the general understanding, would not include the verdict of a jury. *Code Civ. Proc. § 3343*. It would be a peculiar, if not an unprecedented, definition to describe the verdict of a jury as a determination in a trial court. *Henavie v. New York Cent. & H. R. R. Co.*, 48 N. E. 525, 527, 154 N. Y. 278.

In Code 1874, § 1010, providing that the attorney in an action, suit, or proceeding may be changed at any time before judgment or decree or final determination, the words "action," "suit," and "proceeding" are referred to distributively. Each has its peculiar meaning, and the words "judgment," "decree," and "determination" apply equally to each. Thus, judgment is the final result of action, decree of suit, and determination of proceeding. *Shirley v. Birch*, 18 Pac. 344, 345, 16 Or. 1.

Rev. St. p. 339, § 77, relating to pleading a judgment or determination, means the judgment or determination of a court or officer of special jurisdiction, and none other. *Karns v. Kunkle*, 2 Minn. 318, 317 (Gil. 268, 272).

### Absence of overpowering passion implied.

The expressions "premeditation," "deliberation," "design," "determination," distinctly formed in the mind, used in the charge of a prosecution for murder, all imply the absence of overpowering passion. *State v. Ah Mook*, 12 Nev. 369, 381.

### Deliberation implied.

The words "a design, a determination, to kill, distinctly formed in the mind" in an instruction, imply deliberation. "Certainly they mean a great deal more than the simple impulse to slay which characterizes manslaughter. The word 'determination' in this instruction is not used in any technical sense; in fact, it has no technical sense in which it means less than it does in its popular signification. Webster defines it to be a 'decision of a question in the mind; firm resolution; settled purpose.' Can it be said that a question can be decided, a wavering resolution made firm, or a hesitating purpose set



tled without deliberation?" *State v. Ah Mook*, 12 Nev. 369, 390.

## DETERMINE.

\*See "Finally Determine"; "Fully Determined"; "Hear and Determine."

The verb "determine" is thus defined: To fix all boundaries of; to mark off; to separate; to set bounds to; to fix the determination of; to limit; to bound; to bring to an end; to fix the form or character of; to shape; to regulate; to settle; to prescribe imperatively; to ascertain definitely; to bring to a conclusion; to settle by judicial sentence; to decide. *McCormick v. State*, 42 Neb. 866, 868, 61 N. W. 99.

The word "determined," in a contract for booming logs, providing that defendant's portion of the net expense of booming and of the 10 per cent. of the net cost is to be determined by the proportion which logs bear to the whole amount of logs handled, means simply ascertained or computed. It does not imply any mutual action or agreement by the parties. *Rumford Falls Boom Co. v. Rumford Falls Paper Co.*, 51 Atl. 810, 812, 96 Me. 96.

Within the statute giving police commissioners power to appoint a chief of police for such time as the board shall determine, "determine" means to fix, settle, or decide what that term shall be. In this relation it becomes a time necessarily prospective and future. The clear intent of the command is that the board shall annex to the appointment a time, term, or period through whose duration the consequent duties, privileges, and emoluments are to remain with the appointee. *State v. Police Com'rs*, 14 Mo. App. 297, 303.

"Determine," as used in the statute appointing commissioners in eminent domain proceedings to determine the compensation of the landowners, means to perform a judicial act limited to fixing the compensation; and as no human tribunal is able to determine judicially what the future value will be in some future period of time, it depending on contingencies which are known to God alone, the commissioners are limited to determine what is the present value, and at such point their functions cease, and they are in no manner to be influenced by the future value. *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. Law (2 Har.) 25, 47.

### As assess and levy.

The word "determine," in Rev. St. 1881, § 3348, requiring that the amount of general taxes shall be determined by incorporated towns before the third Tuesday of May, means to assess and levy the tax. *Worley v. Harris*, 82 Ind. 493, 497.

### Become void distinguished.

The word "determined," as used in Act Jan. 31, 1811 (4 Litt. 218), for the better regulation of the proceedings in caveats, and providing that no grant should issue to the plaintiff in any caveat entered or to be entered so as to include the land, or any part thereof, within the survey against which such caveat is or may be entered, until such caveat shall be dismissed, decided, or determined, is generic in its nature, and comprehends every mode of terminating or bringing a thing to an end, though it clearly imports simply that the thing has been terminated or brought to an end. It is not a convertible phrase with "to become void," but the latter differs from the former only as a species differs from its genus, and must, therefore, be included in it; for to say that a thing has become void is that it has in effect been terminated or brought to an end, but the expression applies only to its end or termination in one specific mode. *Sharp v. Curds*, 7 Ky. (4 Bibb) 547.

### As conferring power to set aside or abolish.

The words "adjudge, determine, and award," as used by arbitrators in their award, do not necessarily carry with them the idea of a judgment according to law, so as to enable one of the parties to have the award set aside for errors of law. *Patton v. Garrett*, 21 S. E. 679, 682, 116 N. O. 847.

The word "determine," as used in Laws 1898, c. 182, § 177, giving the common council of cities of the second class authority to determine the number of members of the police department, is defined to mean "to fix or settle definitely; make specific or certain; to decide the state or character of" (Cent. Dict.); "to fix the form or character of; to shape; to prescribe imperatively; to regulate; to settle; to decide" (Webst. Dict.). "I am of the opinion that the word 'determine' cannot be given the meaning 'to abolish,' and the Legislature, by giving the power to the common council to determine the number of members of the police department, did not give it the power to abolish station house keepers." *People v. Ham*, 66 N. Y. Supp. 264, 266, 32 Misc. Rep. 517.

### Declaration of determination implied.

An agreement that a certain number of shares shall be voted in a block, and that the way it should be voted should be determined by ballot, means to ascertain the result by balloting on a proposition by those entitled to cast the ballots, and by necessary implication declares that such vote should be cast in accordance with the result of the ballot. *Smith v. San Francisco & N. P. Ry. Co.*, 47 Pac. 582, 587, 115 Cal. 534, 35 L. R. A. 309, 56 Am. St. Rep. 119.

In a statute providing that the board of education shall determine the studies to be pursued, "determine" means something more than investigating and arriving at a conclusion by mental process, though these are embraced. Official action is contemplated and required to give a practical effect to the word, and the injunction to do this is mandatory upon the board; and, in order that those who must obey should know the will of the board, it is necessary that it should be declared in such a way that it may be known. *State v. Board of Education*, 1 Pac. 844, 847, 18 Nev. 173; *State v. Board of Education*, 35 Ohio St. 368, 384.

#### As end.

Laws 1860, c. 260, § 10, cl. 1, authorizing an appeal from an order which, in effect, "determines the action," held, that such term properly includes an order denying the application for a change of venue properly made, since such application divests the court of any authority to proceed with the case; and, having no authority to proceed, if it refuses to change the venue, the action would be determined unless an appeal is taken therefrom. *Western Bank v. Tallman*, 15 Wis. 92.

#### Finality implied.

"Determine," as used in Act July 27, 1866, § 13, providing that the directors of a certain railroad company should from time to time fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property, does not imply that the action designated by the word should be final, and therefore exempt from government supervision. *Atlantic & P. R. Co. v. United States* (U. S.) 76 Fed. 186, 193.

A submission to a referee authorizing him to hear and determine, without any condition or limitation, any matter of law or matter of fact, should be construed as authorizing the referee to decide all questions of law or of fact arising in the hearing of the cause, and to give a final determination of the controversy. By the submission of the parties to his judgment he is constituted a court of competent jurisdiction to decide finally and in the last resort the rights of the parties, and his award can no more be disturbed than the judgment of any other court of competent jurisdiction in which no appeal is given. *Cutler v. Wall*, 9 R. I. 264.

The provision in Pen. Code, § 1611, that the board of supervisors shall have power to "determine what is a reasonable compensation" to be allowed the sheriff for providing all persons committed to the jail by competent authority with necessary food, clothing, and bedding, is equivalent to "find what is justly due," and the determination of the board is no more final than would have been the finding by the board of the amount which

was justly due if the account had been presented for any other proper county charge. *Fulkerth v. Stanislaus County*, 7 Pac. 754, 755, 67 Cal. 334.

In Greater New York Charter, § 86, providing that, if a riparian owner apply to the land commissioners for a grant of the soil under water, the board of docks shall determine whether it will conflict with the public interests, and report their conclusions to the commissioners, "determine" cannot be construed to mean "finally determined," and therefore the right is merely advisory to the commissioners of the land office. The right to determine, as given by the charter, is not to determine whether the grant shall issue, but to determine whether the issue of the grant will conflict with the rights of the city or be otherwise prejudicial to its interest. *People v. Woodruff*, 68 N. Y. Supp. 10, 12, 57 App. Div. 273.

#### As prescribe.

The distinction between the words "determine" and "prescribe" is far from clear. Mr. Webster defines "prescribe" thus: "To set down authoritatively; to order; to direct; to dictate; to appoint;" while he defines "determine" thus: "To fix permanently; to settle; to adjust." To set down authoritatively, and to fix permanently or to settle, do not admit of a wide distinction. Const. art. 6, § 8, provides that the Attorney General shall receive such compensation as may be "prescribed" by law. Article 4, § 12, provides that the salary of the secretary, treasurer, and auditor of the state shall be "determined" by law. It was held in construing the statutes that the words "determine" and "prescribe" do not admit of a wide distinction, and that the salary of the Attorney General could be reduced during his term of office. "If the framers of our Constitution had intended to provide that the salary of the Attorney General should not be diminished during his term of office, it may be reasonably argued that they would have so provided in that instrument in plain terms; for by the twenty-second section of the same article it is provided, as to the salary of the judges, that the judges shall receive such salary and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Here they intended that the salary should be fixed beforehand, and not altered; and they do not use the word 'prescribe,' but the word 'determine,' as had been used as to state officers. But while the word 'prescribe' is used as to the salary of the Attorney General, the same word is employed a few lines above in speaking of the compensation and tenure of office of the officers of this commonwealth. The use of the word 'prescribe' cannot be construed to mean settled beforehand in such sense as not to leave in the General Assembly the power to change the compensation

during the term." *Field v. Auditor*, 3 S. E. 707, 710, 83 Va. 882.

#### As he suspended.

A policy of life insurance providing that, if the premium was not paid on the days named and in the lifetime of the insured, the policy should "cease and determine," should be construed as meaning that it is suspended; that it ceases to bind the company and to protect the assured without any act or declaration on the part of the company. It does not require a formal forfeiture. It is voidable at the election of the company, and that election can be exercised without notice to the assured for the reason that the policy itself is notice that his rights cease with the nonpayment of the premium. As to him it is a dead policy. *Lantz v. Vermont Life Ins. Co.*, 21 Atl. 80, 82, 139 Pa. 546, 10 L. R. A. 577, 23 Am. St. Rep. 202.

#### As try.

The words "receive, hear, and determine," in Act March 3, 1803, c. 93, § 2, authorizing appeals from the District Courts of the United States to the Circuit Court, and requiring the Circuit Court to receive, hear, and determine such appeals, do not authorize a retrial by jury of a cause which has been tried by jury in the District Court. *United States v. Wonson* (U. S.) 28 Fed. Cas. 745, 749.

The power to hear and determine is an essential ingredient of original jurisdiction, and the authority to examine and correct errors is the distinguishing characteristic of appellate power. To hear and determine a criminal case is to proceed, after bill found, to try the issues of fact and pass sentence. *Commonwealth v. Simpson*. (Pa.) 2 Grant, Cas. 438, 439 (citing 4 Bl. Comm. 270).

#### DETERMINE BEFOREHAND.

"Determining on the killing beforehand," as used in an instruction that if defendant purposely killed the deceased, and the killing was determined on beforehand, even a moment before the fatal blow was struck, the defendant is guilty of murder in the first degree, will be construed as being equivalent to an allegation of premeditation. *Ragsdale v. Meridian Land & Industrial Co.*, 14 South. 193, 195, 71 Miss. 284.

#### DETINET—DETINETIS.

The action of replevin formerly was said to be of two sorts, namely, "in the detinet" or "detinetis"—the former, where the goods are still detained by the person who took them, to recover the value thereof and damages, and the latter, as the word imports, where the goods have been delivered to the party. But the former is now obsolete, and there does not appear in any of the books any

proceeding in replevin which was not commenced by writ requiring the proper officer to cause the goods to be replevied to him or by plaint in the sheriff's court, the immediate process upon which is a precept to replevy the goods of the party levying the plaint, both of which proceedings are in rem—that is, to have the goods again. *St. Martin v. Desnoyer*, 1 Minn. 41, 43 (Gil. 25, 28).

#### DETINUE.

Detinue is a form of action for the recovery in specie of goods taken by wrongfully withholding for value at the time the property is found and decided to be that of the plaintiff. *Penny v. Davis*, 42 Ky. (3 B. Mon.) 313, 314.

"In order to ground an action of detinue, these points are necessary: First, that the defendant came lawfully into possession of the goods, as either by delivery to him or by finding them; second, that the plaintiff have a property in them; third, that the goods themselves be of some value; fourth, that they be ascertained in point of identity." *Jac. Law Dict. tit. "Detinue."* This form of action, and the mode of pleading adapted to it, no longer exist, but the remedy is afforded under a modified form remaining the same. The judgment must still be in the alternative, and the plaintiff cannot elect to have it rendered either for the amount or value of the property. The same rule remains as to the description of the property to be recovered, except so far as reason and justice have served to relax it. The thing must be identified with reasonable certainty. *Guille v. Fook*, 13 Or. 577, 584, 11 Pac. 277, 280.

It was once a doctrine that detinue would not lie where the goods had been taken from the plaintiff's possession tortiously; but that doctrine may be considered as exploded. *Overfield v. Bullitt*, 1 Mo. 749, 750; *Pierce v. Hill* (Ala.) 9 Port. 151, 154, 83 Am. Dec. 306.

"Detinue" is a mode of action given for the recovery of a specific thing and damages for its detention. Though judgment is also rendered in favor of the plaintiff for the alternate value, provided the thing cannot be had, yet the recovery of the thing itself is the main object and inducement to the allowing of the action. The action is not adapted to the recovery alone of the value of the thing detained, nor can it be maintained therefor. *Sinnott v. Felock*, 59 N. E. 265, 267, 165 N. Y. 444, 53 L. R. A. 565, 80 Am. St. Rep. 736 (citing *Caldwell v. Fenwick*, 32 Ky. [2 Dana] 333).

A person having no beneficial interest, but only a special property, in a chattel, may maintain detinue for it, and should, if he recover, have a judgment in the alternative for the entire value of the absolute property,

because a bailee may, in consequence of the privity of contract, be entitled to restitution from possession of a stranger, and because a recovery and acceptance of the assessed value by the bailee is for the bailor, and would bar an action by him for the same, or any subsequent detention; but the enforcement of a judgment for value in favor of a person owning a limited general property, as for life or years, would not bar an action, by the person entitled to the remainder, for a detention by the same party, after the expiration of the estate for life or years; nor would it transfer any other or greater interest in the property than that of the owner of the limited estate. *Glascok v. Hays*, 34 Ky. (4 Dana) 58, 60.

Detinue is an action at common law for the recovery of a particular chattel, or, in the alternative, its value. The writ is framed for, and its precise purpose is to recover, the article in specie, and where this is impossible at the time the action was brought, so that the object of the writ cannot be accomplished, the action will not lie. Thus, if the chattel has been destroyed or has died before action brought, the suit must be dismissed. *Lindsey v. Perry*, 1 Ala. 203; *Caldwell v. Fenwick*, 32 Ky. (2 Dana) 332. But where a slave sued for in detinue died pending the action, a judgment for the slave or for its value was properly rendered against the defendant after such death. *White v. Ross* (Ala.) 5 Stew. & P. 123.

#### Replevin distinguished.

Detinue is an action *ex delicto*, and is for the most part superseded by replevin. It is preferable to replevin where the plaintiff is indifferent whether he recover the goods or the value (1 Poe, Pl. §§ 152, 156, 801). The difference resulting from the form of allegation in replevin is that, where the declaration is in the detinue, the plaintiff, if he recovers, has adjudged to him the right of possession of the goods and chattels, and damages for their detention only, but, where the declaration is in the detinet, the plaintiff, if he be entitled to recover, is entitled to have awarded him as well the value of the goods as damages for their detention. *Brown v. Ravenscraft*, 44 Atl. 170, 173, 88 Md. 216 (quoting from *Benesch v. Weil*, 69 Md. 276, 279, 14 Atl. 666).

#### Trover distinguished.

The action of detinue lies for the recovery of the property itself, with damages for the wrongful detention of it, while the action of trover lies for the recovery of damages for the wrongful conversion of the property. *Richards v. Morey*, 65 Pac. 886, 887, 133 Cal. 437.

### DETRACTION, DUTIES OF.

See "Duties of Detraction."

### DETRIMENT.

Detriment is a loss or harm suffered in person or property. Civ. Code Mont. 1895, § 4271; Civ. Code S. D. 1903, § 2287; Rev. St. Okl. 1903, § 2724.

Sess. Laws 1862, p. 48, § 13, prohibiting the diversion of any stream to the detriment of any miner or others along the line of said stream, is to be construed as meaning a detriment immediately resulting from such diversion, and does not include a detriment to subsequent settlers. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 451.

### DETRITUS.

The word "detritus" is used in the mining law to designate that superficial deposit on the earth's surface which is movable, as contrasted with the immovable mass that lies below. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

### DEVASTAVIT.

Devastavit is a loss suffered to the estate of a deceased person by the negligence of the executor or administrator. *Fox v. Wilcocks* (Pa.) 1 Bin. 194, 2 Am. Dec. 433; *Thomas v. Riegel* (Pa.) 5 Rawle, 266, 282.

Devastavit is the mismanagement of the estate of a deceased person in squandering and misapplying assets contrary to the duty imposed on the executor or administrator. *Clift v. White*, 12 N. Y. (2 Kern.) 519, 531; *Ridgway v. Kerfoot*, 22 Mo. App. 661, 664. Where executors transfer personalty to legatees, leaving claims against the estate unprovided for, they are personally liable therefor as for a devastavit. In re *Oosterhoudt's Estate*, 38 N. Y. Supp. 179, 182, 15 Misc. Rep. 566.

A devastavit occurs whenever an executor or administrator wastes the estate, and consists of any act, omission, or mismanagement by which the estate suffers loss; or it may result from the payment of claims which, by the exercise of proper diligence, the administrator might have ascertained to be unjust and illegal. *Beardsley v. Marsteller*, 120 Ind. 319, 320, 22 N. E. 315.

Devastavit is any act of omission, negligence, or misconduct on the part of an executor or administrator by which loss occurs to the estate. *People v. Pleas* (N. Y.) 2 Johns. Cas. 376.

A devastavit is a violation of duty by the executor or administrator such as renders him personally responsible for mischievous consequences, and which the law styles a devastavit—that is, a wasting of the assets; or a mismanagement of the estate and effects of the deceased in squandering and misapplying the assets contrary to the duty im-

posed on him. *Steel v. Holladay*, 25 Pac. 69, 71, 20 Or. 70, 10 L. R. A. 670.

"Devastavit," as defined by the books and legal lexicographers, is a wasting of the estate; a misapplication of the assets. *Howe v. People*, 44 Pac. 512, 514, 7 Colo. App. 535.

A devastavit by an executor or administrator is a wasting of the assets, and may consist of any act or omission; every mismanagement by which the estate suffers loss. *Ayers v. Lawrence*, 59 N. Y. 192, 197.

A "devastavit" results where an administrator purchases the property of the estate of which he is administrator, for himself. *Jawes v. Boylston*, 9 Mass. 337, 353, 6 Am. Dec. 72.

As to what constitutes devastavit, 2 Lomax, Ex'rs, p. 475, thus states the law: "An executor or administrator is subjected by law to liability personally for various acts of misconduct, amounting to a violation or neglect of duty, and which is called in law a 'devastavit' or wasting of the assets. In law, a devastavit is a mismanagement of the estate and the effects of the deceased, in the squandering and misapplying the assets contrary to the trust and confidence reposed in the executors or administrators, for which they shall answer out of their own pockets as far as they have or might have had assets of the deceased." *McGlaughlin v. McGlaughlin's Legatees*, 43 W. Va. 226, 238, 27 S. E. 378, 383.

#### Neglect to collect debts.

A neglect to collect a debt due an estate, which might with proper exertion be collected, is a devastavit. In *re Sanderson's Estate*, 15 Pac. 753, 759, 74 Cal. 199.

#### Payment of legacies.

Devastavit consists not only of the negligent loss of the assets of an estate by the executor or administrator, but also includes an application of assets in the executor's hands to the payment of legacies and distributive shares after the expiration of a year from the executor's appointment, to the prejudice of a creditor of whose claim he had no notice, without requiring refunding bonds of the legatees or distributees. *Swearingin's Ex'r v. Pendleton's Ex'x* (Pa.) 4 Serg. & R. 389, 394.

### DEVELOP.

A power of attorney, which, in consideration of a prescribed royalty, appointed a party sole agent to "work and develop" the business of such patents, does not give the agent power to grant an exclusive license which would transfer substantially the entire interest in the patent; but it does authorize him to grant nonexclusive licenses to manufacture and sell. *Union Switch &*

*Signal Co. v. Johnson R. Signal Co.* (U. S.) 61 Fed. 940, 943, 10 C. C. A. 176; *Johnson R. Signal Co. v. Union Switch & Signal Co.* (U. S.) 59 Fed. 20, 23.

#### As unfolding.

The word "developed," as used in an indictment alleging that it had been "developed" before the grand jury, which was investigating a charge of bribery, that money had been deposited, and that it became material to the issue to ascertain defendant's knowledge of such money, and the purposes for which it was to be used, did not signify that the fact of the bribery was so fully determined that it would not take testimony to establish it before a petit jury. On the contrary, the word itself, in the connection in which it is used, signifies an unfolding of the crime. *State v. Faulkner*, 75 S. W. 116, 125, 175 Mo. 546.

### DEVIATION.

See "Colorable Deviation."

"Deviation," as used in St. 8 & 9 Vict. c. 20, § 8, authorizing a railroad company to deviate in taking lands for 100 yards from its line, as shown on certain plans, is to be taken with reference to the line of railway only; that is, the line of railway actually laid down shall not deviate more than 100 yards from the line laid down and delineated in the parliamentary plans. *Doe v. North Staffordshire R. Co.*, 16 Q. B. 526, 537.

"Alterations, deviations, or additions," within the meaning of a building contract expressly providing for alterations, deviations, or additions, and the payment for them, include extra work on the building; and therefore an order payable out of the amount due on the builder's contract includes the sum due for such extra work. *Dunn v. Stokern*, 3 Atl. 849, 850, 43 N. J. Eq. (16 Stew.) 401.

#### DEVIATION (In Marine Insurance).

Deviation, in marine insurance, is a voluntary departure from the usual course of the voyage, which departure is not necessary or excusable. It would seem that the only reason why leaving a course of a voyage can be excused is its proceeding from some hazard insured against, or from a reasonable apprehension of encountering peril. *Robinson v. Marine Ins. Co.* (N. Y.) 2 Johns. 89, 95; *Hos-tetter v. Park*, 11 Sup. Ct. 1, 4, 137 U. S. 30, 34 L. Ed. 568. It is a deviation, and from that time the policy is at an end, and the insurer is discharged from all subsequent responsibility. The liability of the insurer ceases from the commencement of the deviation. It is not a deviation which will discharge the underwriters where the ship is

taken from her direct course by an honest mistake of the master. *Brazier v. Clap*, 5 Mass. 1, 9. *Reade v. Commercial Ins. Co.* (N. Y.) 3 Johns. 352, 358, 3 Am. Dec. 495. A "deviation in a voyage," sufficient to avoid a marine policy, means any departure from the usual course of a voyage, or stopping at any place, even in the course of the voyage, which is not permitted by the policy, unless it takes place for some justifiable cause, such as to repair, obtain necessary refreshments, avoid an enemy, or the like. *Coles v. Marine Ins. Co.* (U. S.) 6 Fed. Cas. 65, 66; *Thatcher v. McCulloh* (U. S.) 23 Fed. Cas. 891, 893; *Hostetter v. Gray* (U. S.) 11 Fed. 179, 181; *Bond v. The Cora* (U. S.) 3 Fed. Cas. 838; *Riggin v. Patapsco Ins. Co.* (Md.) 7 Har. & J. 279, 288, 16 Am. Dec. 302; *Murden v. South Carolina Ins. Co.* (S. C.) 1 Mill, Const. 200, 211; *Lawrence v. Ocean Ins. Co.* (N. Y.) 11 Johns. 241, 266.

Strictly speaking, a "deviation" originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk insured against, without just cause. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317, 341, 27 Am. Rep. 455.

Deviation is a departure from the course of a voyage insured, or an unreasonable delay in pursuing the voyage, or the commencement of an entirely different voyage. *Civ. Code Cal.* 1903, § 2694; *Rev. Codes N. D.* 1899, § 4561; *Civ. Code S. D.* 1903, § 1907; *Post v. Phoenix Ins. Co.* (N. Y.) 10 Johns. 79, 83.

Deviation is the increasing or varying of the risk insured against, without necessity or reasonable cause. The term is not limited merely to an increased risk by the vessel going out of her course, but may be any neglect or procedure on her part which tends to increase the risk. *Bell v. Western Marine & Fire Ins. Co.* (La.) 5 Rob. 423, 445, 39 Am. Dec. 542.

A deviation is a varying from the route insured against, without necessity or just cause, after the risk has begun; and the effect of a deviation is to discharge the underwriters, whether the risk is enhanced or not. It is not confined to a departure from or going out of the direct or usual course of the voyage, but it comprehends unusual or unnecessary delay, or any act of the assured or his agents which, without necessity or just cause, incurs or changes the risks included in the voyage. *Audenreid v. Mercantile Mut. Ins. Co.*, 60 N. Y. 482, 484, 19 Am. Rep. 204.

"A deviation of a vessel is not merely the unnecessary going out of the track or course usually taken, but it is also a departure from either the express or implied terms of the contract. It needs not much reasoning or discussion to show that delays

for saving of ships, goods or mariners, producing uncommon risk, cannot be legal excuses on the part of the insured in policies of insurance which are void for any deviation; such delays being breaches of the implied terms of the contract, by exposing to hazards not originally counted on, foreseen, or in the contemplation of the parties. Ships cruising after prizes incur deviation. All excuses for leaving the course or delays must be from necessity, and not with a view to lucrative objects. Putting into port by stress of weather, to stop a leak, obtain provisions, etc.; going out of the track to avoid an enemy, for convoys or other purposes, for the safety of the ship or goods—being beneficial to the insurers, are justifiable." *Warder v. La Belle Creole* (U. S.) 29 Fed. Cas. 215, 217.

A master of a vessel is guilty of deviation, so as to render a carrier liable for damages sustained even in an inevitable accident or by the perils of the sea, when, without reasonable anxiety, either physical or moral, he departs from the usual route of vessels between the ports between which his vessel is plying, and thereby encounters the danger resulting in the loss. And such facts being given, the question as to whether there was a deviation or not is a question of law, and proper to be determined by the court. Accordingly, where a vessel on a voyage for which the usual track was through Long Island Sound took the outer course, and the only excuse therefor was that the ice was not yet all out of Long Island Sound, and peril of thieves in the harbor of New York compelled him to start on the voyage while such obstruction still continued, such change from the usual track constituted a deviation, and rendered the carrier liable for damages sustained in a storm encountered by reason of such change. *Crosby v. Fitch*, 12 Conn. 410, 420, 31 Am. Dec. 745.

To establish a "deviation," as the term is understood in the law of marine insurance, the fact must appear that the risks insured against were increased or varied without necessary or reasonable cause. When the fact whether the risk was increased or altered depends on a variety of circumstances peculiar to the pursuit in which the vessel was engaged, and the evidence is not decisive to prove the fact, the decision of the question belongs to the jury. *Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. (3 Sandf.) 26, 48.

A deviation is a voluntary departure from the vessel's course, without necessary or reasonable cause. There is no rule of admiralty law that the departure of a ship from her course, when required to procure necessary treatment for a sick or injured seaman, invalidates her insurance on the voyage, or that on her cargo. *The Iroquois* (U. S.) 118 Fed. 1003, 1005, 55 C. C. A. 497.

A "deviation," within the meaning of the term as used in marine insurance policies, which is a defense against loss, etc., is a voluntary and inexcusable departure from the usual course; the question whether such departure amounts to a deviation to be determined as a question of fact from the motive, consequences, and circumstances of the act. *Thebaud v. Great Western Ins. Co.*, 50 N. E. 284, 286, 155 N. Y. 516.

The word "deviation," when isolated, means a departure, reasonable or unreasonable, with or without necessity. The words "with liberty to make deviation," in a bill of lading, give the carrier the right to make only such departures from the voyage as are necessary and reasonable. When used in a contract of marine insurance, the word "deviation" includes only unnecessary and unreasonable departures from the voyage. *Swift & Co. v. Furness, Withy & Co.* (U. S.) 87 Fed. 345, 348.

The elementary writers define a deviation to be any unnecessary or unexcused departure from the usual course or general mode of carrying on the voyage. Hence, until the voyage commences, there can be no deviation from the usual course of the voyage. *Fernandez v. Great Western Ins. Co.*, 26 N. Y. Super. Ct. (3 Rob.) 457, 475.

Nothing which conforms to the usual voyage of a vessel can be held a deviation. *Donnell v. Amoskeag Mfg. Co.* (U. S.) 118 Fed. 10, 13, 55 C. C. A. 173.

#### Avoiding capture.

A departure from the usual course of a voyage in order to avoid capture by an enemy's vessel of war would not amount to a deviation. *Post v. Phoenix Ins. Co.* (N. Y.) 10 Johns. 79, 83.

A digression from the course of the voyage to avoid an imminent peril of capture or other disaster, necessarily resulting in the entire loss of the ship or cargo, is not a deviation. *Riggin v. Patapsco Ins. Co.* (Md.) 7 Har. & J. 279, 288, 16 Am. Dec. 302.

#### Capturing of prize.

The term "deviation," in the law of marine insurance, when applied to a purely mercantile adventure, includes the capturing of a prize by the insured vessel, although the least possible time is spent in taking possession of it and exchanging crews. *Wiggin v. Amory*, 13 Mass. 118, 126.

#### Compulsory deviation.

Where a vessel was by compulsion forced from the direct course of her voyage, there was not a deviation. *Savage v. Pleasants*, (Pa.) 5 Bin. 403, 417, 6 Am. Dec. 424.

There is no deviation of a vessel when she is driven out of her course by currents.

*Patapsco Ins. Co. v. Coulter*, 28 U. S. (3 Pet.) 222, 231, 7 L. Ed. 659.

#### Delay.

"Deviation," in marine insurance law, means any departure from, or unnecessary delay in, the course of a voyage, whether at sea or in port. *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436, 447.

The term "deviation," in the law of marine insurance, includes every unreasonable or inexcusable delay in commencing or prosecuting a voyage, whether the delay be in some port or upon the high seas. *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7, 16.

In marine insurance the sole ground upon which a deviation discharges the underwriter is that it varies the risk, and, as it is evident that the risk may be as much varied by a delay in commencing or prosecuting the voyage as a divergence from its prescribed course, it follows that such delay, if unreasonable or inexcused, will discharge the underwriter. *Augusta Ins. & Banking Co. v. Abbott*, 12 Md. 348, 378.

#### Exposure of goods.

Deviation is any change or varying of the risk without necessity or just cause by which the risk is enhanced. It means voluntary acts or acts of neglect not arising from necessity or just cause, and if it does not come within this exception it is wholly immaterial with what motive the act which is a deviation or a departure is done; for if, after the risk is assumed, the risk is enhanced or varied, the deviation discharges the policy. The exposure of goods in a greater degree to the perils of the sea by stowing them on the deck is an enhancement of the risk and a deviation which will discharge the policy. *Atkinson v. Great Western Ins. Co.* (N. Y.) 4 Daly, 1, 21.

#### Saving of life.

For a vessel to go out of her course to save the life of a man will not be considered a deviation. *Bond v. The Cora* (U. S.) 3 Fed. Cas. 838.

#### Stopping at port.

It is not a deviation for a vessel to touch and stay at a port out of the course of the voyage, if such departure is within the usage of the trade, and is within the purposes and for the objects authorized by the usage. *Bentaloe v. Pratt* (U. S.) 3 Fed. Cas. 241, 242; *Hostetter v. Park*, 11 Sup. Ct. 1, 4, 137 U. S. 30, 34 L. Ed. 568 (citing *Coffin v. Newburyport Marine Ins. Co.*, 9 Mass. 436, 437; *Bulkley v. Protection Ins. Co.* [U. S.] 4 Fed. Cas. 614, 617; *Oliver v. Maryland Ins. Co.*, 11 U. S. [7 Cranch] 487, 491, 3 L. Ed. 414; *Columbian Ins. Co. v. Catlett*, 25 U. S. [12 Wheat.] 383, 387, 6 L. Ed. 664; *Gracie v. Marine Ins. Co. of Baltimore*, 12 U. S. [8

Cranch] 75, 83, 3 L. Ed. 492; *Child v. Sun Mut. Ins. Co.*, 5 N. Y. Super. Ct. [3 Sandf.] 28; *Lockett v. Merchants' Ins. Co.* [La.] 10 Rob. 339; *Vallance v. Dewar*, 1 Camp. 503; *Ougier v. Jennings*, Id. 505; *Kingston v. Knibbs*, Id. 508; *Moxon v. Atkins*, 3 Camp. 200; *Salvador v. Hopkins*, 3 Burrows, 1707). A departure from a direct route between two different ports which was in accordance with the usual course of trade would not amount to a deviation. *Thatcher v. McCulloh* (U. S.) 23 Fed. Cas. 891, 893; *Hostetter v. Gray* (U. S.) 11 Fed. 179, 181 (citing *Bentalve v. Pratt* [U. S.] 3 Fed. Cas. 241, 242). The term "deviation," as used in marine insurance to designate a departure of a ship from her course, and which will avoid the policy, does not include the customary departure from the direct course to an intermediate port, as deviation must be construed according to usage. *Bond v. Gonsales*, 2 Salk. 445.

The term "deviation," as used in the law of marine insurance, includes a turning aside of a vessel from her course for the purpose of stopping at a certain port for any purpose not connected with the voyage, though the policy authorizes the vessel to stop at such port for any purpose without such stopping being considered a deviation. *Solly v. Whitmore*, 5 Barn. & Ald. 45, 46.

A policy of marine insurance on a vessel, between two ports, which authorizes the vessel to stop at certain islands, and to discharge, exchange, and take on board the whole or any part of any cargo at such places, without being a deviation, does not include a stopping at such islands for purposes wholly unconnected with the voyage, but such stopping is a deviation sufficient to avoid the policy. *Hammond v. Reid*, 4 Barn. & Ald. 72.

#### Undisclosed limitation of master's discretion.

The term "deviation," as used in the law of marine insurance, includes a limitation on the discretion of the master in making a voyage, which requires him to go by one only of several courses, which limitation is not disclosed to the insurers. *Middlewood v. Blakes*, 7 Term R. 162, 167.

## DEVICE.

See "Gambling or Gaming Device."

Webster defines "device" as a synonym of "contrivance," which is also defined as a thing contrived, invented, or planned; and anything, therefore, which was constructed, planned, or contrived for the purpose of gaming or amusement, is within the statute, and prohibited. *State v. Blackstone*, 22 S. W. 370, 371, 115 Mo. 424.

"Device" is defined as that which is devised or formed by design; a contrivance; a

project; a scheme to deceive; a stratagem or an artifice. *State v. Smith*, 85 N. W. 12, 13, 82 Minn. 342.

The use of the word "device" in a statement by a witness that the sale of brandied cherries is a mere device to evade the law makes the statement a mere conclusion, and the rejection of such evidence is proper. *Petteway v. State*, 35 S. W. 646, 36 Tex. Cr. R. 97.

"Device," as used in an ordinance prohibiting saloon keepers from permitting at or in or about the doors, windows, openings, or in the interior of their saloons any blind, screen, painted or frosted glass, shade, curtain, or "other device," does not include a permanent board partition between the different rooms of a building used for a saloon. *Shultz v. Cambridge*, 38 Ohio St. 659.

"Means or device," in the statute making it criminal for any person to obtain or attempt to obtain any money or property by means of the use of any bogus checks, or by any means or device commonly called a "confidence game," was construed to mean any means or device which is the direct or proximate cause of obtaining the money or property, and the statute does not extend to cases of property or money obtained on the belief of the ability or disposition of the defendant to pay. *Pierce v. People*, 81 Ill. 98, 102.

Within a holding that an injunction against combinations and conspiracies formed with the intent and object of crippling the property and embarrassing the operation of a railroad, and holding that such injunction did not embrace the case of employees who, being dissatisfied with the proposed reduction of their wages, merely withdrew on that account from the service of the receivers, using neither force, threats, persecution, or intimidation toward employees who did not join them, nor any device to molest, hinder, alarm, etc., others who desire to take their places, the word "device" is applicable to cases in which it appears that the parties belonging to a labor organization displayed and maintained certain banners in front of the place of business for the purpose of deterring workmen from remaining in or entering the service. *Arthur v. Oakes* (U. S.) 63 Fed. 310, 320, 11 C. C. A. 209, 25 L. R. A. 414.

Under Pub. Acts 1895, Act No. 200, § 2, providing that it shall not be lawful for any person to use certain specified fishing apparatus or any device of any kind for taking fish, "device" is broad enough to cover hook and line, but, in connection with the other words of the section, will be construed to mean device of like kind. *In re Yell*, 65 N. W. 97, 107 Mich. 228.

The expression "device for transportation," as used in Act June 7, 1879, imposing a tax on every company leasing to or from



another corporation, company, or limited partnership any device for the transportation of freight or passengers, includes palace cars and sleeping cars, as the primary purpose of such cars is the transportation of passengers. *Pullman's Palace Car Co. v. Commonwealth*, 107 Pa. 148, 150.

#### **As distinguishing mark on ballot.**

"It is true, 'device' sometimes means an emblem or pictorial representation, though in the Bible and by Shakespeare it is almost always used in the sense of 'contrivance,' 'plan,' or 'trick.' But these are all secondary or derivative meanings. Webster tells us that the word comes 'from the Latin "dividere,"—to separate; to distinguish.' This is its primary signification, and is that intended by its use in Code, §§ 2687, 2689, providing that ballots shall be without device, and that any ballot having a device on it shall be void. The letters 'O.K.,' written or printed on the outside of the ballots, would serve as fully to destroy the secrecy of the ballot, and give opportunity for intimidation of the voter, as if a cotton ball or an arm and hammer were imprinted there. In either case they fall within the denunciation of the statute, in the purview of which the word 'device' means simply a distinguishing mark." *Baxter v. Ellis*, 15 S. E. 938, 939, 111 N. C. 124, 17 L. R. A. 382.

In Code 1880, § 137, which excludes any device or mark by which one ticket in an election may be known or distinguished from another, "device" should be construed to include a dotted line across the face of the ticket which distinguishes it from other tickets. *Steele v. Calhoun*, 61 Miss. 556, 563.

In the statute prescribing the form of election tickets, and prohibiting the printing of any device thereon, by the word "devise" the statute evidently intended some figure, mark, ornament, emblem, or cipher which would distinguish the ticket from other tickets cast in the election. It intended to secure the secrecy of the ballot, and to preserve the voter from undue influence or restraint in exercising the right of suffrage. The statute is not violated by printing on such tickets, voted at a general election at which presidential electors are chosen, the names of popular candidates for president and vice-president, and the counties in which presidential electors reside. *Owens v. State*, 64 Tex. 500, 509.

The use of stickers or pasters with the name of a candidate printed thereon, and pasted on the face of a ballot, over the printed name of an opponent, is not a cut or device, within Gen. St. c. 1, § 82, prohibiting the use of any ballot containing a cut or device on its face or back to distinguish it from other ballots. *Quinn v. Markoe*, 35 N. W. 263, 264, 37 Minn. 439.

"Device," as used in Rev. St. art. 1694, requiring the rejection of ballots which have any picture, sign, device, or stamp mark on them, does not include a person's name. *Hanscom v. State*, 81 S. W. 547, 549, 10 Tex. Civ. App. 638.

The phrase "impression, device, color, or thing," within the meaning of Pol. Code, §§ 1206, 1207, providing that when any ballot bears upon it any impression, device, color, or thing designed to distinguish such ballot from other ballots, it shall be rejected, when construed with the phrase "designed to distinguish such ballots," is to be taken to mean an impression, device, color, or thing expressly designed as a means of designating the ballot, and does not include a mere discoloration appearing on a ballot, which is not designed, but resulting from the use of ink by the elector in scratching his ballot. *Wyman v. Lemon*, 51 Cal. 273, 274.

#### **As applying to shape of ballot.**

"Device," as used in Act 1879, prohibiting a device from being printed or being made in any manner on election ballots by which one may be known or distinguished from another, means a figure, mark, or ornament of a similar character with the pictures, signs, etc., enumerated in the same connection, and placed on the ticket in the same manner—that is, printed, engraved, stamped, or otherwise placed thereon—and does not mean the giving of the tickets a diamond shape. *State v. Phillips*, 63 Tex. 390, 393, 51 Am. Rep. 646.

#### **Substitute distinguished.**

In Code 1876, § 4207, providing for the punishment of one playing at a game of cards or dice, or some device or substitute for cards or dice, at a tavern, public house, highway, or some other public place, "device" means that which is devised or formed by design—a contrivance or invention—and is not synonymous with "substitute," which means that which is put in the place of another thing, or used instead of something else. As used in the statute, "device" seems to have a somewhat more narrow meaning than "substitute." "Substitute" would embrace whatever might be used in place of cards or dice, whether designed or invented for that purpose or not. *Henderson v. State*, 59 Ala. 89, 90.

#### **DEVICE BY WAY OF SEAL.**

The term "device by way of seal," as used in a statute declaring that instruments entitled to record must be executed with a device by way of a seal, is sufficiently satisfied to entitle an instrument to record where the word "Seal" is written in the place where the seal would have been affixed. *Cochran v. Stewart*, 59 N. W. 543, 544, 57 Minn. 499.

## DEVIL

"Devil" is the name given to a machine used for cleaning cotton. *Whitney v. Carter* (U. S.) 29 Fed. Cas. 1070, 1071.

## DEVILING.

"Deviling," as used by a witness in a prosecution for murder, stating that the defendants were deviling the deceased, was explained to mean such acts as taking his cap from the deceased, placing their hands on his person, threatening to put him in the lock-up, and raising the foot as if to strike him, so as to drive him into a store for protection, etc. *State v. Jimmerson*, 24 S. E. 494, 118 N. C. 1173.

## DEVISABLE.

The words "devisable" and "descendible" are convertible terms, so that, where a contingent remainder is descendible, it is also devisable. *Collins v. Smith*, 31 S. E. 449, 451, 105 Ga. 525; *Varick v. Jackson* (N. Y.) 2 Wend. 166, 183, 19 Am. Dec. 571.

## DEVISE.

See "Beneficial Devise"; "Executory Devise"; "General Devise"; "Lapsed Devise"; "Void Devise."

Charitable devise, see "Charity."

A devise is the direction of a testator of sound mind as to the disposition of his property after death. *Jenkins v. Tobin*, 31 Ark. 306, 309.

A will making a specific devise of testator's property, directing all the rest of his property, both real and personal, to be given to his wife, and directing and empowering his executors to sell all the real estate not devised therein, means "specifically devised." *Provost's Ex'r v. Provost*, 27 N. J. Eq. (12 C. E. Green) 296, 297.

Rev. St. § 2068, provides that a grant or devise made to two or more persons, except as provided for in the following section, shall be construed to create estates in common, not of joint tenancy, unless expressly declared to be in joint tenancy. Rev. St. § 2069, provides that the preceding section shall not apply to mortgages or to devises or grants made in trust, or made to executors or to husband and wife. It was held that a mutual benefit insurance certificate payable to the wife and daughter is in effect a devise, and thus includes a joint tenancy. *Farr v. Trustees of Grand Lodge A. O. U. W.*, 53 N. W. 738, 740, 83 Wis. 446, 18 L. R. A. 249, 35 Am. Rep. 73.

## Bequeath or bequest synonymous.

See, also, "Bequeath."

The term "devise" is the proper term to be used in a will to denote a gift of real property, but, where the context shows that it is used by the testator in a different sense, it will be construed as sufficient to pass personal property, and to be synonymous with "bequeath." *Borgner v. Brown*, 33 N. E. 92, 94, 133 Ind. 391; *Oothout v. Rogers*, 15 N. Y. Supp. 120, 122, 59 Hun, 97; *Cramer v. Cramer*, 71 N. Y. Supp. 60, 61, 35 Misc. Rep. 17; *Kilber v. Miller*, 10 N. Y. Supp. 375, 57 Hun, 14; *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522; *Wyman v. Woodbury*, 33 N. Y. Supp. 217, 220, 86 Hun, 277; *McCorkle v. Sherrill*, 41 N. C. 173, 176; *Pfuehl's Estate* (Cal.) 1 Myr. Prob. Rep. 38, 89.

Although the word "devise" is more specially appropriated to a gift of land, the terms "bequest" and "devise" are used indifferently, and legatees may take under a devise of land if the context of the will shows that such was the testator's intention. *Ladd v. Harvey*, 21 N. H. 514, 528.

In the construction of statutes the words "bequeath" and "devise" shall be held to mean the same thing. Ky. St. 1903, § 467.

Within laws creating a charitable corporation, and authorizing it to take property by devise, and an act providing that devises or bequests to a charitable corporation shall be void unless the will was executed two months before testator's death, the word "devise" includes bequests, and personalty could not be taken under a will made within the time specified. *People's Trust Co. v. Smith*, 31 N. Y. Supp. 519, 522, 82 Hun, 494.

In Gen. St. § 3481, authorizing testators to devise all their estate in lands, tenements, hereditaments, annuities, or rents charged on or issuing out of them, or goods and chattels and personal estate of every description whatsoever, by will and testament, the word "devise" was not used in its technical and legal sense, which is limited to gifts of real estate or real chattels, but was used by the legislators to apply to gifts of both real and personal estate. *Logan v. Logan*, 17 Pac. 99, 101, 11 Colo. 44.

In an act giving a widow an election to renounce the benefit of a devise and bequest, and take dower in the lands and her share of the personal estate, "devise" is a convertible term with "bequest," and will include either a gift by will of land or of personal property. *Evans v. Price*, 8 N. E. 854, 857, 118 Ill. 593.

As used in Act April 13, 1843, subjecting "all legacies given and lands devised" to any person to attachment and levy, the terms "legacies given" and "lands devised" are artistic phrases meaning different things,

and neither includes the other, so that an interest in goods and chattels is different from an interest in lands. *Appeal of Roth*, 94 Pa. 186, 191.

The fact that there was originally no testamentary power over land, so that a will or testament was confined to a disposition of personal estate, seems to have given rise to the term "devise," which was considered as more in the nature of a conveyance than of a testament, and hence was termed a "devise," meaning primarily a dividing or division; a devise in writing being construed as an instrument by which lands are conveyed. "Will" and "testament" had not at first precisely the same meaning as "devise," but in course of time these words came to be implied indifferently to a disposition of land or goods. *Per Tarbell, J., in Clark v. Hornthal*, 47 Miss. 434, 486.

#### **As effective devise.**

The term "devise of lands," as used in *Elm. Dig.* 145, providing that if a husband shall make a devise of lands to his wife for her life or otherwise, and without expressing such devise as intended to be in lieu of dower or not, and such wife shall survive her husband, she shall not be entitled to dower in any lands devised by her husband, unless she shall, in writing, express her dissent to receiving lands so devised to her in satisfaction and bar of the right of dower in the other lands devised by the will, means such a devise as may and can take effect and be enjoyed by the wife; and there is no difference in a devise of lands to which the testator had no title, and a devise of lands which by the law of the state are first subject to the payment of his debts, and wholly absolved by such payment. *Thompson v. Egbert*, 17 N. J. Law (2 Har.) 459, 465.

#### **Descent distinguished.**

See "Descent."

#### **As purchase.**

See "Purchase."

#### **As a testamentary disposition of land.**

Every bequest of personal property is a legacy. The word "devise" is especially appropriate to a gift of lands, and the word "legacy" to a gift of chattels. *In re Karr* (N. Y.) 2 How. Prac. (N. S.) 405, 409.

"Devise," in its technical sense, means a testamentary disposition of land. *Ferebee v. Procter*, 19 N. C. 439, 440; *Fosdick v. Town of Hempstead*, 8 N. Y. Supp. 772, 773, 55 Hun, 611; *Scholle v. Scholle*, 21 N. E. 84, 85, 113 N. Y. 261; *Logan v. Logan*, 17 Pac. 99, 100, 11 Colo. 44; *Pratt v. McGhee*, 17 S. C. 428, 429; *In re Davis' Will*, 79 N. W. 761, 762, 103 Wis. 455.

"Devise" properly means a testamentary disposition of land, and should not be applied

to such dispositions of personality. *Dickerman v. Abrahams* (N. Y.) 21 Barb. 551, 561; *In re Fetrow's Estate*, 58 Pa. (8 P. F. Smith) 424, 427; *Rountree v. Pursell*, 39 N. E. 747, 749, 11 Ind. App. 522.

The word "devise" has a well-defined legal meaning. It is a gift of real property by a person's last will and testament, and the object must therefore be that kind of property. *Bouv. Law Dict.* And although the courts have, in order to give effect to the testator's evident intention, included personal property as covered by the word "devise," when used in a will, such a meaning has never been given to the word in order to restrict or abridge a right or privilege granted, where it was not necessary to carry a clearly expressed intention into effect. *People's Trust Co. v. Smith*, 31 Abb. N. C. 422, 424, 30 N. Y. Supp. 342, 343.

In accurate language, the word "devise" applies to land only. It is, however, sometimes inaccurately applied to personal property. *Oothout v. Rogers*, 59 Hun, 97, 100, 13 N. Y. Supp. 120.

The use of the words "devise" and "devisee" in a codicil of a will indicates that it was in the mind of the testator that his real estate would continue to be real estate when his son arrived at the age of 21 years, if he lived so long. *Chandler v. Thompson*, 48 Atl. 583, 585, 62 N. J. Eq. 723.

"Although in England, under the Saxons, lands were devisable by will at common law, yet at the Conquest, and upon the introduction of a feudal system, the common law underwent a complete change in this respect, and an estate in fee simple in lands was no longer devisable. It became inconsistent with the nature of that system that a tenant should have an unlimited power to devise his lands, for the reason that he might devise to persons incapable of performing feudal services. The power of alienation by devise, except of a chattel interest, is, in England, then, to be traced to the statute of wills of 32 Hen. VIII, c. 1, and 34 Hen. VIII, c. 5." *McCartee v. Orphan Asylum Soc.* (N. Y.) 9 Cow. 437, 517, 18 Am. Dec. 516 (quoting 32 Hen. VIII, c. 1, and 34 Hen. VIII, c. 5).

A devise is a conveyance of land. *Clapp v. Brown* (N. Y.) 4 Redf. Sur. 200, 201.

#### **Testament distinguished.**

A "will," or, as it is properly called, a "devise," of real estate, is of an entirely different and opposite character to a "testament." A devise is a conveyance of land, and not under the same jurisdiction as a testament. 2 Black. Com. 501. The deviser must have reached the age of 21 years; and it is complete or may be executed without the appointment or intervention of an executor or

administrator. *Conklin v. Egerton's Adm'r* (N. Y.) 21 Wend. 430, 436.

### DEVISE BY IMPLICATION.

A "devise by implication" strictly arises where the deviser, meaning to part with his interest, parts expressly with a portion of it only; and the question is whether that which is not in terms given is by the effect of the will, taken all together, disposed of. Where, for instance, an estate is given to B. after the death of A., the question is what is done with it, or whether anything is meant to be done with it, during A.'s life. *Zimmerman v. Hafer*, 32 Atl. 316, 318, 81 Md. 347.

A devise by implication exists where the testator uses words manifesting an intent to give by so strong a probability that the contrary intent cannot be supposed to have existed in his mind. *Hanneman v. Richter*, 50 Atl. 904, 906, 62 N. J. Eq. 365.

### DEVISEE.

See "First Devisee"; "Next Devisee."

A devisee is one who takes by will. Inhabitants of *Elliot v. Spinney*, 69 Me. 31, 32.

A devisee indicates the person getting real estate by will. *Brown v. Merchants' Bank*, 66 Mo. App. 427, 431.

A devisee is a person to whom land or other real estate or chattels real are devised or given by will. *Rogers v. Farrar*, 22 Ky. (6 T. B. Mon.) 421, 424.

A devisee is an assignee in law. *Whitcomb v. Starkey*, 2 Atl. 793, 794, 63 N. H. 607.

Where the constitution and by-laws of a beneficiary insurance association provided that the heirs and legatees of a deceased member should be entitled to a named sum, and such sum should be used for no other purpose, the word "devisee" could not have been intended to bear the technical meaning of one to whom real estate is given by the last will of another, and was therefore used in its primary sense of one "separated" or "designated." *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131; *Lamont v. Grand Lodge Iowa Legion of Honor* (U. S.) 31 Fed. 177, 179.

A testator gave certain property to his children, and then provided, "and in case any of my children shall die after me, and after having attained the age of 21 years, then the share, portion or interest of the child so dying shall go to the heirs, devisees, or legal representatives of the child so dying." Held, that the words "heirs, devisees, or legal representatives" were words of purchase, and not of limitation, and that those persons who answered to the description of heirs, devisees, or legal representatives of

the deceased child of the testator, having regard to the nature and character of the property, were the persons entitled to take under the will. If the deceased child made a valid will, the devisees named in that will would take the share embraced therein. *Drake v. Pell* (N. Y.) 3 Edw. Ch. 251, 270.

A devisee does not hold his devise as a trustee for the creditors of the testator. He is the legal owner of the land which is not charged with the testator's debts, and has the same right to sell as had the testator himself, subject only to the rights given to the creditors by statute. *Smith v. Grant*, 15 S. C. 136, 147.

### As assigns.

See "Assigns."

### As legal representative.

See "Legal Representative."

### Legatee synonymous.

In the construction of statutes, the words "legatee" and "devisee" shall be held to convey the same idea. *Ky. St.* 1903, § 467.

The word "devisee," in connection with a bequest of personalty, will be held synonymous with "legatee." *Wright v. Trustees of Methodist Episcopal Church* (N. Y.) Hoff. Ch. 202, 212; *People v. Petri*, 61 N. E. 499, 503, 191 Ill. 497, 85 Am. St. Rep. 268.

The term "devisee," when used in a will to designate a person to whom a bequest of personal property is made, will be construed to mean "legatee." *People v. Petrie*, 61 N. E. 499, 503, 191 Ill. 497, 85 Am. St. Rep. 268.

### As one taking as heir.

The word "devisee" is sometimes used in common discourse as meaning not necessarily one named in a will or taking by devise, strictly speaking, but as one taking as heir, according to the special limitation in the will, upon the death of the first devisee. *Young v. Robinson*, 5 N. J. Law (2 Southard) 689, 710.

## DEVOLUTION OF LIABILITY.

Code Civ. Proc. § 756, declares that, in case of a transfer of interest or devolution of liability, an action may be continued by or against the original party, unless the court directs, etc. Held, that the term "devolution of liability" contemplated a case wherein there was a transfer, not only of the interest of the defendant in the property in controversy, but also an assumption of the burdens relating thereto. There was therefore no devolution of liability on a receiver, appointed on the dissolution of a corporation, with regard to its debts, since such receiver did not become liable for such debts. *Owen v.*

Homeopathic Mut. Life Ins. Co., 10 N. Y. Supp. 75, 56 Hun, 455.

## DEVOLUTIVE APPEAL

A devolutive appeal is one which does not suspend the execution of a judgment appealed from. *State ex rel. Schwan v. Allen*, 26 South. 434, 436, 51 La. Ann. 1842.

## DEVOLVE.

An estate is said to "devolve" on another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive signification, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. *Francisco v. Aguirre*, 29 Pac. 495, 497, 94 Cal. 180; *First Nat. Bank of San Jose v. Menke*, 60 Pac. 675, 677, 128 Cal. 103.

## DEVOTE.

Const. § 267, providing that no person shall hold an office of profit without personally "devoting his time" to the performance of the duties thereof, should be reasonably construed as requiring the official to give his own time and personal services to the performance of the duties of his office, but does not prohibit a temporary absence from public office, where such absence is not detrimental to its interests and does not evidence neglect of official duty. *Fairley v. Western Union Tel. Co.*, 18 South. 796, 797, 73 Miss. 6.

The words "devoted solely to the appropriate objects of the institution," in Code, § 797, exempting from taxation property of religious institutions which is devoted solely to the appropriate objects of the institution, do not characterize a town lot held by a religious company under a deed of gift, containing no conditions, and which has not been used by the company for any of the purposes for which it is organized, and which the company has not determined to use in the future for any such purposes. *Kirk v. St. Thomas' Church*, 30 N. W. 569, 570, 70 Iowa, 287.

## DHOLL.

A "dholl" is a round skein of yarn, wound together and tied up, about 30 inches long and 5 inches in diameter, thick at one end and narrow at the other. *The Dunbritten* (U. S.) 73 Fed. 352, 355, 19 C. C. A. 449.

## DIABETES.

"Diabetes" is commonly known as a disease of the kidneys, though primarily a dis-

ease of nutrition, and not necessarily affecting their structure in its early stages. It is a very serious disease, of doubtful curability. *New York Life Ins. Co. v. Fletcher*, 6 Sup. Ct. 837, 840, 117 U. S. 519, 29 L. Ed. 934.

## DIAGNOSIS.

A "diagnosis" is said to be little more than a guess, enlightened by experience. *Swan v. Long Island R. Co.*, 29 N. Y. Supp. 337, 338, 79 Hun, 612 (citing *Griswold v. New York Cent. & H. R. Co.*, 115 N. Y. 61, 64, 21 N. E. 726, 12 Am. St. Rep. 775).

## DIAMONDS.

"Diamonds," as used in Tariff Act August 27, 1894, par. 467, covers only miners', glaziers', and engravers' diamonds not set, and does not include any other diamonds cut but not set. *United States v. Frankel* (U. S.) 68 Fed. 186, 188.

## DICTATE—DICTATION.

In a technical sense, "dictation" means to pronounce orally what is destined to be written at the same time by another. *Prendergast v. Prendergast*, 16 La. Ann. 219, 220, 79 Am. Dec. 575.

To "dictate," as defined by 5 Foultier, 350, is to present, word by word, what is designed to be written by another; hence he concludes that a will cannot be made by signs or interrogations. This able writer does not say what, or whether any, variance is fatal. We know that there have been decisions in some courts of France requiring the utmost precision in the amanuensis, but we are not to adopt this doctrine in its utmost extent. It is desirable to have, as much as possible, every word taken down from the testator's mouth; but we cannot adopt the unqualified proposition that the slightest variance is fatal, as, for example, the substitution of the pronoun "which" instead of "that." *Hamilton v. Hamilton* (La.) 6 Mart. (N. S.) 143, 145.

A person cannot be said to have written a will at the dictation of another when he did not understand the language of such other, but receives his instructions from the testator through an interpreter. *Bordelon's Heirs v. Baron's Heirs*, 11 La. Ann. 676, 679.

To "dictate to" is to tell another what to write; to indict; to teach; to show another something with authority; to declare with confidence; and a "dictator" is one whose credit or authority enables him to direct the opinion or conduct of another. If a son had such power and authority over his father as to be able to direct him how to make his will, and exerted that power to cause him to make a will in which the son is the principal legatee, it was the use of undue influence, and

would destroy the will. *Marshall v. Flinn*, 49 N. C. 199, 205.

## DICTUM.

A "dictum" is an opinion expressed by the court, but which, not being necessarily involved in the case, lacks the force of an adjudication. *Rush v. French*, 25 Pac. 816, 825, 826, 1 Ariz. 99; *In re Woodruff* (U. S.) 96 Fed. 317, 321; *State v. Clarke*, 3 Nev. 566, 572.

"Dicta" are opinions of a judge which do not embody the resolution or determination of the court, and made without argument or full consideration of the point, are not the professed deliberate determinations of the judge himself; obiter dicta are such opinions uttered by the way, not upon the point in question pending, as if turning aside for the time from the main topic of the case to collateral subjects. *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Brown v. Chicago & N. W. Ry. Co.*, 78 N. W. 771, 772, 102 Wis. 187, 44 L. R. A. 579.

Where a judge who writes the opinion of the court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point or principle is obiter dictum. *Hart v. Stribling*, 25 Fla. 433, 435, 6 South. 455; *L. Bucki & Son Lumber Co. v. Fidelity & Deposit Co.* (U. S.) 109 Fed. 393, 400, 48 C. C. A. 436.

"According to the more rigid rule," says Bouvier, "an expression of an opinion, however deliberate, upon a question, however fully argued, if not essential to the disposition that was made of the case, may be regarded as a dictum. But it is, on the other hand, difficult to see why, from a philosophical point of view, the opinion of the court is not as persuasive, on all the points which were involved in the cause, that it was the duty of the counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point." Such dictum, if it is a dictum, should be regarded as a "judicial dictum," in contradistinction to mere "obiter dictum"; that is, an expression originating with the judge alone, while passing by the way, in writing an opinion, as an argument or illustration drawn from some collateral question. Mere obiter dicta are not always reprehensible; on the contrary, some of the most sacred canons of the common law had their origin in the mere dicta of some wise judge. To be valuable, however, they must of course be right. An opinion of an appellate court, to be of value to a trial court, must deal with the facts presented and the questions involved and discussed at the bar, even though some of them are only indirectly involved in the determination of the question upon which the case turns, so that an expression of the court, while dealing with the case in this way, cannot be regarded as mere

obiter dictum. *Buchner v. Chicago, M. & N. W. Ry. Co.*, 19 N. W. 56, 57, 58, 60 Wis. 264.

It frequently happens that, when assigning its opinion on a question before it, the court discusses collateral questions and expresses decided opinions on them. Such opinions, however, are frequently given without much reflection, and without previous argument at the bar; and, moreover, they do not enter into the adjudication of the point before the court. They have only that authority which may be accorded to the opinions, more or less deliberate, of the individual judge who announces it. *Rush v. French*, 25 Pac. 816, 825, 826, 1 Ariz. 99.

The Supreme Court of the United States has held that, in order to make an opinion a decision, there must have been an application of a judicial mind to the precise question necessary to be determined to fix the rights of the parties. Thus where in an opinion it is stated, while, in view of what has been stated above, it may be unnecessary at present to determine the next question raised in this case, as it is one of great importance and will frequently arise, it may as well be decided now as hereafter, the statement of law which follows will be treated as a dictum. *In re Woodruff* (U. S.) 96 Fed. 317, 321.

The fact that a decision might have been put upon a different ground, existing in the case, does not place it in the category of a dictum. *Clark v. Thomas*, 51 Tenn. (4 Heisk.) 419, 421.

It cannot be said that a decision of the court on a certain point is dictum, where that point was properly presented and decided in the regular course of the consideration of the case, merely because something else was found in the end which disposed of the whole matter. Therefore where, in an action by a railroad company for a default in the payment of interest on the companies' bonds received by the state in exchange for state bonds, the company set up the unconstitutionality of the exchange of the bonds, and the court decided that there was statutory authority for such exchange, such decision was not dictum, though the suit was eventually dismissed on entirely different grounds. *Florida Cent. R. Co. v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327.

Where a question was presented and discussed in a case, and the opinion of the court or the majority of the court expressed on it, which question was presented by the instructions, the opinion was not obiter dictum, though the decision of such question might have been omitted. It frequently happens that the decision of a single point in a case will determine the affirmance or reversal of the judgment in that case, but it does not follow that the court may not proceed to examine and decide other points which the record presents; and indeed the latter course is

more satisfactory to all parties concerned, and saves the necessity of again resorting to the inferior court. *Kane v. McCown*, 55 Mo. 181, 199.

The mere dictum of a judge is not the decision of a court. There is nothing authoritative in a case except what is required to be decided to reach the final judgment, and what, by the judgment, becomes *res adjudicata* between the parties as to the subject-matter of the suit. *Love v. Miller*, 53 Ind. 294, 21 Am. Rep. 192. "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it. Old Judge"—taken from the title-page of a work on "Obiter Dicta," published by John D. Allen; New York, 1885. *Hart v. Stribling*, 6 South. 455, 456, 25 Fla. 433.

## DIE.

A die is a piece of metal on which is cut a device which by pressure is to be placed upon some softer body. *Rubber Coated Harness Trimming Co. v. Welling*, 97 U. S. 7, 10, 24 L. Ed. 942.

## DIE BY THE HAND OF JUSTICE.

"Death by the hands of justice" is a well-known phrase, denoting an execution, either public or private, of a person convicted of crime, in any form allowed by law. The moral guilt of the party executed has nothing to do with the definition. Socrates, though he took the poison from his own hand, 'died by the hands of justice' in this sense of the term." *Breasted v. Farmers' Loan & Trust Co.*, 8 N. Y. (4 Seld.) 299, 303, 59 Am. Dec. 482.

To "die by the hands of justice" is dying by the execution of the sentence of the law. *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506, 507.

To "die by the hands of justice," as used in a life policy wherein it is provided that the same shall be void if the insured die by the hands of justice, means to die by some judicial sentence imposed for the commission of some felony. *Spruill v. North Carolina Mut. Life Ins. Co.*, 46 N. C. 126, 127.

## DIE BY HIS OWN HAND OR ACT.

### Accidental self-destruction.

Accidental or unintentional self-killing is not within a condition forfeiting a policy for taking one's own life. *Keels v. Mutual Reserve Fund Life Ass'n (U. S.)* 29 Fed. 198, 201.

A contract of insurance, providing that the policy should be void in case the assured

should die by his own hands, should be so construed as to excuse any such cases as accident or delirium, and to cases in which the self-destruction is clearly shown to have been accidental or involuntary. *Van Zandt v. Mutual Ben. Life Ins. Co.*, 55 N. Y. 169, 177, 14 Am. Rep. 215.

A condition in a policy of life insurance that it shall be void if the insured shall "die by his own hand" has no application where the insured killed himself by accident, or if the insured destroys his life while of unsound mind, if his mind is so impaired by disease that he does not comprehend the wrong character of the deed, though he may have sufficient mental capacity to know the physical consequences of the act. *Michigan Mut. Life Ins. Co. v. Naugle*, 29 N. E. 393, 395, 130 Ind. 79.

A life policy providing that it shall be void if the assured "die by his own hand" means a criminal act of self-destruction, where the mind and hand concur in producing death. It refers to the voluntary, sane act of the assured. Considering the condition availing the policy in case the insured die by his own hand literally, it would include a death caused by his own hand even by accident or mistake, as in case of an accidental discharge of a firearm while held by him, or the taking by mistake of poison under the belief that it was proper medicine. *Scheffer v. National Life Ins. Co.*, 25 Minn. 534, 536.

The phrase "die by his own hand," as used in a policy of life insurance providing that in case the insured should die by his own hand the policy should be void, is synonymous with "suicide," and does not include suicide by an insane man in a fit of insanity. It means a felonious death, a case of *felo de se*, and not a case of death without legal or moral blame—the result of accident, mistake, or disease. The madman, who in a fit of delirium commits suicide, as much dies by his own hand as does the individual who accidentally and unintentionally takes his own life. They each die by their own hands, but without moral responsibility or legal blame. One is no more within the conditions of the policy than the other. The phrase "die by his own hand" may include all cases of death by the person on whose life the policy is effected, or it may receive limitations. The authorities concur in this, that the expression does not embrace all cases of death by one's own hand. If the insured kill himself by drinking poison, not being aware that it was poison, or by snapping a loaded pistol, ignorant that it was loaded, or by leaping from a window in the delirium of a fever, it is conceded that he did not die by his own hand within the meaning of the clause under consideration, though he might literally die by his own hand; that is, by his own act. *Eastabrook v. Union Mut.*

Life Ins. Co., 54 Me. 224, 225, 89 Am. Dec. 743.

In an action on a life policy which provided that the policy should be void "if the assured shall die by his own hand or act," he having hanged himself, the court said: "It is now too well settled to admit of question that this clause is not to be construed as comprehending every possible case in which life is taken by the party's own act. For instance, all the authorities concur in the view that an unintentional or accidental taking of life is not within the meaning and intention of the clause. Thus if, by inadvertence or accident, a party shoots himself with a gun or pistol, or takes poison by mistake, or in a sudden frenzy or delusion tears a bandage from a wound and bleeds to death, in the literal sense of the term he "dies by his own act"; yet all the decisions agree that a reasonable construction of the proviso, according to the plain and obvious intention of the parties, would exclude such cases from its operation. \* \* \* Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414, 417, 421.

A policy of insurance providing that it should be void if the insured should "die by his own hand" means voluntary and intentional self-destruction by the insured, but has no application to a case in which death resulted from accident, or without intention or expectation, even though it was caused by the hand of the accused. Death resulting from accident, or from an act which, at the time it was entered on or engaged in, was not expected or intended to produce that result, cannot be said to be within the meaning of the policy. Where, from a cause over which the insured had no control, a state of mental and physical weakness resulted, and while in that state he took an overdraft of whisky, without any expectation or intention of destroying his life, he did not "die by his own hand," but by accident. Northwestern Mut. Life Ins. Co. v. Hazelett, 4 N. E. 582, 585, 105 Ind. 212, 55 Am. Rep. 192.

A policy containing a condition avoiding it in case the insured should "die by his own hand or act, voluntary or otherwise," is not avoided by a death purely accidental, caused by poison taken by the insured through mistake or ignorance, he being sane at the time. Penfold v. Universal Life Ins. Co., 85 N. Y. 317, 320, 39 Am. Rep. 660.

"By his own hand," as used in a policy of insurance, providing that it should be void if the assured should die by his own hand within two years from the date of the policy, does not mean death by accident. There must be an intent to commit suicide, even though it be but the intent of a drunken man. Equitable Life Assur. Soc. v. Paterson, 41 Ga. 338, 367, 5 Am. Rep. 535.

The clause "die by his own act," as used in a policy exempting the insurer from liability if the insured should die by his own

act, is limited to the deliberate act of the insured in ending his own existence, or committing any unlawful malicious act, the consequences of which is his own death. The insured must be of years of discretion and in his senses when committing such act, as "it would be unreasonable to interpret it as including death by accident or by mistake, though the direct or immediate act of the insured may have contributed to it." Supreme Commander of the Knights of the Golden Rule v. Ainsworth, 71 Ala. 436, 448, 46 Am. Rep. 332.

#### Self-destruction while insane.

A life insurance policy providing that there should be no liability in case assured should "die by his own hand" means an intentional suicide while assured is in full possession of his mental faculties, and a person who ends his life under the influence of an insane impulse which he has not the power to resist, or commits the act without a knowledge at the time of its moral character and its consequences and effects, does not "die by his own hand" within the meaning of the policy. Waters v. Connecticut Mut. Life Ins. Co. (U. S.) 2 Fed. 892; Mutual Life Ins. Co. v. Terry, 82 U. S. (15 Wall.) 580, 590, 21 L. Ed. 236; Terry v. Life Ins. Co. (U. S.) 23 Fed. Cas. 856, 857; Manhattan Life Ins. Co. v. Broughton, 3 Sup. Ct. 99 104, 109 U. S. 121, 27 L. Ed. 878; Mutual Life Ins. Co. v. Leubrie (U. S.) 71 Fed. 843, 844, 18 C. C. A. 332 (citing Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Charter Oak Life Ins. Co. v. Rodel, 95 U. S. 232, 24 L. Ed. 433; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740); Connecticut Mut. Life Ins. Co. v. Akens, 14 Sup. Ct. 155, 156, 150 U. S. 468, 37 L. Ed. 1148; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. (4 Seld.) 299, 304, 59 Am. Dec. 482; De Gogorza v. Knickerbocker Life Ins. Co., 65 N. Y. 232, 235; Mutual Ben. Life Ins. Co. v. Daviess' Ex'r, 9 S. W. 812, 815, 87 Ky. 541; St. Louis Mut. Life Ins. Co. v. Graves, 69 Ky. (6 Bush) 268, 269; Mutual Life Ins. Co. v. Walden (Tex.) 26 S. W. 1012, 1013; Schultz v. Insurance Co., 40 Ohio St. 217, 223, 48 Am. Rep. 676; Knickerbocker Life Ins. Co. v. Peters, 42 Md. 414, 417, 421; New Home Life Ass'n v. Hagler, 29 Ill. App. 437, 439; Eastabrook v. Union Mut. Life Ins. Co., 54 Me. 224, 225, 89 Am. Dec. 743; Cooper v. Massachusetts Mut. Life Ins. Co., 102 Mass. 227, 230, 3 Am. Rep. 451; Blackstone v. Standard Life & Accident Ins. Co., 42 N. W. 156, 160, 161, 74 Mich. 592, 3 L. R. A. 486; Scheffer v. National Life Ins. Co., 25 Minn. 534, 536.

The words "die by his own hand," in a policy exempting the insurer from liability in case the insured die by his own hand, if literally construed, import death caused by the act of the assured, whether intentional or accidental. Some relaxation of their strict



sense, however, is required, by the nature of the contract, to effectuate the intention and object of the parties, but no qualification not necessary to this end is warrantable. They are intended to protect the insurer against the consequences of the physical act of the deceased. They refer distinctly to the physical agency by which death may be caused, and only by implication quite speculative to the moral sensibility of the agent. Their sense, then, is entirely satisfied by explaining them as describing an act of the assured resulting in his death as an intended consequence of it, irrespective of his understanding its moral nature. Adopting the language of Erskine, J., in *Borradaile v. Hunter*, 5 Man. & G. 639, it seems to me that the only qualification that the literal interpretation of the words with reference to the nature of the contract will permit is that the act of self-destruction should be the voluntary and willful act of the assured, having at the time sufficient power of mind and reason to understand the physical nature and consequence of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry, further than to illustrate the extent of his capacity to understand the physical character of the act itself. The proviso exempts the insurers from liability when life is destroyed by the act of the party insured, although it may be distinctly traced as the result of a diseased mind, if the insured committed self-destruction, intending to destroy his life, and comprehending the physical nature and consequences of his act. *Nimick v. Mutual Ben. Life Ins. Co.*, 3 Pittsb. R. 293-295, 18 Fed. Cas. 247, 248.

In a policy of life insurance providing that the policy should be void in case the assured should die by his own hand, the words "die by his own hand," should be construed in their largest ordinary sense, which comprehends all cases of self-destruction. Where the assured voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong, he "died by his own hand" within the meaning of the policy. *Borradaile v. Hunter*, 44 Eng. Com. Law, 335, 352.

"By his own hand," as used in an insurance policy providing that the insurer should not be liable in case the insured should die by his own hand, meant an act of self-destruction, sane or insane. *Dean v. American Mut. Life Ins. Co.*, 86 Mass. (4 Allen) 96, 98.

#### **Suicide synonymous.**

"The authorities uniformly treat the terms 'suicide' and 'dying by one's own hand'

in policies of life insurance as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindall in *Borradaile v. Hunter*, 5 Man. & G. 668, says the expression 'dying by his own hand' is in fact no more than the translation into English of the word of Latin origin 'suicide.' Life insurance companies indiscriminately use either phrase as conveying the same idea. If the words 'shall commit suicide,' standing alone in the policy, import self-murder, so do the words 'shall die by his own hand.' " *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, 286, 23 L. Ed. 918; *Moore v. Connecticut Mut. Life Ins. Co. (U. S.)* 17 Fed. Cas. 672, 673; *Keels v. Mutual Reserve Fund Life Ass'n (U. S.)* 29 Fed. 198, 201. See, also, *Spruill v. Northwestern Mut. Life Ins. Co.*, 27 S. E. 39, 42, 120 N. C. 141; *Billings v. Accident Ins. Co.*, 24 Atl. 656, 657, 64 Vt. 78, 17 L. R. A. 89, 33 Am. St. Rep. 913; *Grand Legion of Select Knights A. O. U. W. v. Korneman*, 63 Pac. 292, 293, 10 Kan. App. 577; *Mutual Life Ins. Co. v. Wiswell*, 44 Pac. 996, 998, 56 Kan. 765, 35 L. R. A. 258 (citing *Mutual Life Ins. Co. v. Terry*, 82 U. S. [15 Wall.] 580, 591, 21 L. Ed. 236; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317, 321, 322, 39 Am. Rep. 660; *Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 367, 5 Am. Rep. 535); *Blackstone v. Standard Life & Accident Ins. Co.*, 42 N. W. 156, 160, 161, 74 Mich. 592, 3 L. R. A. 486; *Cooper v. Massachusetts Mut. Life Ins. Co.*, 102 Mass. 227, 229, 3 Am. Rep. 451; *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224, 226, 89 Am. Dec. 743; *Phadenhauer v. Germania Life Ins. Co.*, 54 Tenn. (7 Heisk.) 567, 570, 19 Am. Rep. 623.

The clause "die by his own hand," as used in a life insurance policy, includes any form of suicide. *Ritter v. Mutual Life Ins. Co.*, 18 Sup. Ct. 300, 306, 169 U. S. 139, 42 L. Ed. 693.

"Death by his own hand," as used in an insurance policy providing that it should be void if the insured should die by his own hand, includes committing suicide by taking poison. *Bachmeyer v. Mutual Reserve Fund Life Ass'n*, 52 N. W. 101, 103, 82 Wis. 255.

"By his own hand," as used in a condition of a policy of life insurance that it shall be void if a party shall die by his own hand, means suicide by any means, and includes the case of suicide by swallowing arsenic. *Hartman v. Keystone Ins. Co.*, 21 Pa. (9 Harris) 466, 479.

#### **DIE BY HIS OWN HAND OR ACT, SANE OR INSANE.**

Where a life policy provides that it shall be void if the insured "die by his own hand, sane or insane," it covers all cases of self-destruction, whether felonious or not, and relieves the company from liability, though

the suicide is the result of insanity, or in itself an insane act. *Streeter v. Western Union Mut. Life & Accident Soc. of the United States*, 31 N. W. 779, 780, 65 Mich. 199, 8 Am. St. Rep. 882.

The term "death by his own hand or act, sane or insane," in a condition in a life policy that the policy shall be void in case of the death of insured by his own hand or act, sane or insane, includes his death by suicide, though insane at the time of the commission of the act. *Northwestern Mut. Life Ins. Co. v. Maguire*, 19 Ohio Cir. Ct. R. 562, 563.

In a policy of life insurance providing that in case of the death of the insured "by his own act or intention, whether sane or insane," the company shall only be liable for the net value of the policy at that time, the clause "by his own act or intention," etc., is equivalent to the words "by his own hand." *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27, 28, 35 Am. Rep. 410.

Under a policy providing that it should be void if insured "die by his own act, sane or insane," there can be no recovery if insured took his life when he had mind enough to know that the act by which he did so would probably result in his death, and he committed it with the intention that it should do so, though he may not, from mental derangement, have known that the act was wrong, and may not have had power to resist the impulse. *Manhattan Life Ins. Co. v. Beard*, 66 S. W. 35, 36, 23 Ky. Law Rep. 1747, 1750, 112 Ky. 455.

In an action on a life policy providing that if insured should die by his own hand or act, sane or insane, the policy should be void, the court said: "We are to say from these words what the parties must have intended, and we cannot properly say that additional words having no meaning were inserted in the contract, and if they mean anything it is just what the words commonly import, and that is, if death ensues from any physical movement of the hand or body of the assured, proceeding from a partial or total eclipse of the mind, the insurer may go free. We are not altogether unmindful of the force of the proposition that a man does not die by his own hand who has not sufficient mind to will his own death, and it is not, perhaps, entirely easy to see in what precise words in our language the idea may be accurately and artistically expressed that a totally insane man may take his own life. But the question seems to involve more the refinement of language than the application of practical sense, and we are of opinion that, in the common judgment of mankind, it will be considered that, when a totally insane man blows his brains out with a pistol, he will be said to have 'died by his own hand,' within the meaning of a policy such as we have now under consideration." *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232, 241, 242.

## **DIE BY SUICIDE.**

See "Suicide."

## **DIE BY SUICIDE, SANE OR INSANE.**

See "Suicide Sane or Insane."

## **DIE BY SUICIDE, VOLUNTARY OR INVOLUNTARY.**

See "Suicide Voluntary or Involuntary."

## **DIE IN CONSEQUENCE OF VIOLATION OF LAW.**

An exception in a policy that the company shall not be liable if insured shall "die in or in consequence of the violation of any criminal law" would not include death of the insured by suicide committed in order to escape arrest for violation of a criminal law. *Kerr v. Minnesota Mut. Ben. Ass'n*, 39 N. W. 312, 313, 39 Minn. 174, 12 Am. St. Rep. 631.

As used in a life policy containing a clause to the effect that the policy should be void if the assured should die in consequence of the violation of any law, the phrase "in consequence of the violation of any law" meant in consequence of the commission of any crime, the character of which directly increased the risk, although the crime might be below the grade of a felony. *Wolff v. Connecticut Mut. Life Ins. Co.*, 5 Mo. App. 236, 244.

An exception in a policy of life insurance that it should be void if the insured should "die in consequence of the violation of the laws" of any nation, state, or province, should be construed to include the dying from a shot from a pistol in the hands of a person upon whom the insured and his brother had committed a violent assault, even though the pistol might have been accidentally discharged. *Murray v. New York Life Ins. Co.*, 96 N. Y. 614, 616, 48 Am. Rep. 658.

## **DIE IN KNOWN VIOLATION OF LAW.**

The term "known violation of any law," in a life policy containing a clause that the policy shall be void in case insured shall die in a known violation of any law of the state, or of the United States, or any foreign country, means while engaged in a criminal act, known by him at the time to be a crime against the laws of such state or country. *Cluff v. Mutual Ben. Life Ins. Co.*, 95 Mass. (13 Allen) 308, 317.

Where a life policy provides that the same shall be void if the insured "die in the known violation of any law," such phrase means that the policy is to be void if death occur by reason of the violation of law. It cannot be construed to mean that the policy is to be avoided by the mere fact that at the time of the death the insured was vio-

lating the law, if the death occurred from some cause other than such violation. *Bradley v. Mutual Ben. Life Ins. Co.*, 45 N. Y. 422, 428, 6 Am. Rep. 115.

A life policy which provided it should be void if the assured should die in a duel, or by the hand of justice, in the commission of a felony, or in the "known violation of the law" of a state, meant a death in the commission of the felony. *Harper's Adm'r v. Phoenix Ins. Co.*, 19 Mo. 506, 511.

"Die in known violation of law," as used in a life insurance policy conditioned that it was avoided if the assured died in the known violation of a law of the state, did not include the death of insured which resulted from a quarrel, unless his slayer was excusable. *Harper's Adm'r v. Phoenix Ins. Co.*, 18 Mo. 109, 110.

Where insured came to his death by a wound received by him in an encounter between himself and another in which pistols loaded with powder and balls were fired by each party at the other, if insured's firing off his pistol was done in lawful defense of his person, when there was reasonable cause for him to apprehend design on the part of the other to do him a great personal injury, and also to apprehend immediate danger of such design being accomplished, then insured did not come to his death in "known violation of the law of the land," within the meaning of a clause in the policy "that in case he should die in the known violation of any law of this state, or of the United States, or of any government where he may be, this policy shall be void and of no effect." A killing under such circumstances, under the statutes of Missouri, would be justifiable homicide, and not a "violation of the law" within the meaning of the policy. *Overton v. St. Louis Mut. Life Ins. Co.*, 39 Mo. 122, 124, 90 Am. Dec. 455.

Under a policy providing that it shall be forfeited in case the assured shall die while engaged in a known "violation of law," a known violation of a positive law, whether a civil or a criminal one, avoids the policy if the natural and reasonable consequences of the violation increase the risk. A violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequences of the act do not increase the risk. An assault and battery upon the person of the wife of another, violently beating, bruising, or choking her, is a known violation of law. *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 484, 49 Am. Rep. 469.

#### DIE INTESTATE.

"Dying intestate" means dying without making a valid and operative disposition of

one's property by will. *Newton v. Griffith* (Md.) 1 Har. & G. 111, 131.

#### DIE LEAVING ISSUE.

The words "leaving issue" in a will, when used in reference to realty, mean leaving issue at the time of death. *Downing v. Wherrin*, 19 N. H. 2, 86, 49 Am. Dec. 139.

The phrase "if he shall leave issue" is uniformly construed to mean an indefinite failure of issue, unless there be something in the context to qualify the expression. *George v. Morgan*, 16 Pa. (4 Harris) 95, 107.

The words "die leaving issue," as used in a will making a gift to certain daughters for life, and providing that if such daughters, or either of them, should die leaving issue, the share of such daughter so dying should go to and be equally divided among such issue, and the lawful issue of such as may be dead, naturally and necessarily means issue surviving at the time of the daughter's death. *Appeal of Woelpper*, 17 Atl. 870, 872, 126 Pa. 562.

A provision in a will that, if any of testator's children should die leaving issue or lawful heirs, such issue or heirs should receive their parents' portion, refers to a death in the testator's lifetime, and not afterwards. *Livingston v. Greene*, 52 N. Y. 118, 124; *Phelps v. Robbins*, 40 Conn. 250, 251.

#### DIE LEAVING NO DESCENDANTS.

A will provided finally that, should either of testator's sons die leaving no legal descendants, then and in that event all the property which should have been his, if living, should go to and become the property of the survivor and his legal descendants, and the property of the survivors of the trustees mentioned. Held, that the words "die leaving no legal descendants" are not used in their technical sense, in which they are held to import an indefinite failure of issue; but, when construed with the whole clause, mean a dying of one son without legal descendants during the life of the other, so that the estate devised will take effect on the death of one and during the lifetime of the other. *Armstrong v. Douglass*, 14 S. W. 604, 605, 89 Tenn. (5 Pickle) 219, 10 L. R. A. 85.

#### DIE SEISED.

A will giving to one person certain property, "and all other property of which I shall die seised," passes a life insurance under a certificate payable "to the devisees, or, if no will, to the heirs," though nearly if not all of the property of the insured, except the insurance, is specifically named in the bequest. *Aveling v. Northwestern Masonic Aid Ass'n*, 40 N. W. 23, 29, 72 Mich. 9, 1 L. R. A. 528.

**DIE UNMARRIED OR WITHOUT ISSUE.**

It has long been regarded as an established law in Pennsylvania that such words as "in case of his death, unmarried or without issue," as used in a will, are equivalent to simply dying without issue, unless there is something else in the case to warrant a different construction of the will. *Barber v. Pittsburgh, Ft. W. & O. R. Co.*, 166 U. S. 83, 106, 17 Sup. Ct. 488, 41 L. Ed. 925.

**DIE WITHOUT CHILDREN.**

A devise to one, but, in case he should "die without children," then over, means "die without children living at the time of his death." *Morgan v. Morgan* (Conn.) 5 Day, 517, 523; *Barney v. Arnold*, 23 Atl. 45, 15 R. L. 78; *Fairchild v. Crane*, 13 N. J. Eq. (2 Beas.) 105, 107; *Parish's Heirs v. Ferris*, 6 Ohio St. 563, 574, 575.

Where a will bequeathed certain property to the testator's son, to be put on interest for his benefit until he should arrive at the age of 21 years, and that, in case he should "die having no children," then the property should go to certain beneficiaries, the devise over was on the condition of the son's dying under 21 years of age and without issue. *Van Houten's Ex'rs v. Pennington*, 8 N. J. Eq. (4 Halst. Ch.) 745, 746.

The term "die without children," in a will devising property to testator's son, but directing that if he die without children or their legal representatives the property shall be divided, etc., is to be construed to mean living children. *Bullock v. Seymour*, 33 Conn. 289, 293.

The words "die without children," as used in a will, mean die in the lifetime of the testator without children. *McCormick v. McElligot*, 17 Atl. 896, 898, 127 Pa. 230, 14 Am. St. Rep. 837.

Unless a different purpose be plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying "without heirs," or "without children" or "issue," or other words of like import, shall be construed as a limitation to take effect when such person shall die, unless the object on which the contingency is made to depend is then living, or, if a child of his body, such child be born within 10 months next thereafter. Ky. St. 1903, § 2344.

An absolute devise, followed by a proviso that, if the devisee "die without children, grandchildren, or wife living," the estate shall go over, carries the fee to the devisee if he survive the testator, inasmuch as the limiting words will be taken to refer to the devisee's death in the lifetime of the testator, unless a contrary intention appears. *King v. Frick*, 135 Pa. 575, 19 Atl. 951, 952, 20 Am. St. Rep. 889.

**DIE WITHOUT HAVING CHILDREN.**

"Having" as used in a will reciting, after giving and bequeathing a certain house and money to a daughter, that in the event of her dying without "having" any lawful issue such house and money should go to certain others, is capable of two meanings: When applied to realty, it means a general, indefinite failure of issue; when applied to personalty, it means leaving at the time of the death. *Cole v. Goble*, 13 C. B. 444, 455, 20 Eng. Law & Eq. 234, 237; *Downing v. Wherrin*, 19 N. H. 2, 86, 49 Am. Dec. 139; *Harris v. Smith*, 16 Ga. 545, 548.

As used in a will leaving a leasehold estate to a certain daughter, but, if she died without having children, that it should then go to another, etc., "having" does not mean leaving, so that such other person is not entitled to such leasehold in the event of such daughter's ever having had any child, though it dies before her decease. *Weakley v. Rugg*, 7 Term R. 322, 326.

**DIE WITHOUT HAVING ISSUE.**

The text-books lay down the general rule that where a devise is to one and his heirs, with a devise over "if he die without issue" or "without having issue," and with no explanatory words defining the time to which this contingency is to apply, it will be construed to be a general failure of issue at any time, however indefinite or remote, and which may not, therefore, happen for many generations. But the decisions upon this subject are exceedingly arbitrary, and without much foundation in reason or common sense. Hence courts will seize hold of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time. The construction of the words as importing an indefinite failure of issue will give way to any explanatory words in the context which can be interpreted as fixing the time of the failure at the death of the first taker. *Strain v. Sweeny*, 45 N. E. 201, 202, 163 Ill. 603.

It has been long settled that the words occurring in a will referring to the death of a person without issue, whether the terms be "if he die without issue," or "if he have no issue," or "if he die before he has issue," or "for want of or in default of issue," unexplained by the context, and whether applied to real or personal estate, are construed to import a general indefinite failure of issue. The rule, in the language of Lord Redesdale, is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise, or unless, in the language of Lord Alvaney, in *Coole v. Coole*, 3 Bos. & P. 620, the intent appears so plainly to the contrary that no one can misunderstand it. As to personalty, it seems the word "Issue"

yields more readily to expressions and circumstances in a will tending to confine it to the restricted sense, than when applied to real estate. *Tinsley v. Jones* (Va.) 18 Grat. 289, 292.

### DIE WITHOUT HEIRS.

The terms "die without issue," "die without leaving issue," and "die without heirs lawfully begotten," are synonymous. *Moody v. Walker*, 3 Ark. 147, 198.

A will providing that, in case the daughter of the testatrix should "die without heirs," the estate devised to her should vest in others named, should be construed to mean without issue. *Kent v. Armstrong*, 6 N. J. Eq. (2 Halst. Ch.) 637, 640 (citing *Cro. Jac.* 415; 8 *Lev.* 17; 1 *P. Wms.* 23; 2 *Saund.* 288, a, b); *Niles v. Gray*, 12 Ohio St. 320, 328.

#### As indefinite failure of issue.

The words "die without heirs" import an indefinite failure of heirs, in contradistinction to a failure or extinction within some specified period, which is called a "definite failure of heirs." *Gambrill v. Forest Grove Lodge*, 5 Atl. 548, 549, 66 Md. 17; *Watkins v. Quarles*, 23 Ark. 179, 192; *Seaman v. Harvey* (N. Y.) 16 Hun, 71, 75.

Unless a different purpose be plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying "without heirs," or "without children" or "issue," or other words of like import, shall be construed as a limitation to take effect when such person shall die, unless the object on which the contingency is made to depend is then living, or, if a child of his body, such child be born within 10 months next thereafter. *Ky. St.* 1903, § 2344.

In a limitation of real or personal property by deed, will, or other instrument in writing, the words "die without issue," or "die without leaving issue," or "have no issue," or "die without heirs of the body," or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall, unless a contrary intention clearly appears by the instrument creating such limitation, mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue. *Rev. Laws Mass.* 1902, p. 1268, c. 134, § 5.

A devise to a daughter, but in case she should "die without any legitimate heirs," then over, means a definite, and not an indefinite, failure of issue, and is to be construed as if the words "living at the time of her death" had been added after the words "legitimate heirs." *Niles v. Gray*. 12 Ohio St. 320, 328.

A will providing that, if a beneficiary should "die without an heir before he shall arrive to the age of 21 years," what was bequeathed to him should be divided among his brothers and sisters, should be construed to mean a definite failure of issue, and vests the first taker with a fee simple. *Lippett v. Hopkins* (U. S.) 15 Fed. Cas. 567, 568.

"A devise, 'If either of my sons John and Jacob should happen to die without any lawful heirs of their own, then the share of him who may first decease shall accrue to the other survivor and his heirs,' should be construed to provide for a definite failure of issue, and that each son took an estate in fee simple conditional, and not an estate tail. It seems to me that the natural construction is, and the real meaning of this testator was, that, if one of these sons should die without issue in the lifetime of the other, the other was to have the whole. If this contingency should not happen, the testator desired to make no further provision on the subject. The best opinion I have been able to form is that, by way of executory devise, the share of the son first dying without issue in the lifetime of the other was to go over to that survivor, and that, subject to this contingency, each took a fee simple." *Abbott v. Essex Co.* (U. S.) 1 Fed. Cas. 16, 20.

A testator devised certain land to his children in fee, and then added the following clause: "That if any of my said sons [naming them] or my daughter M. shall happen to die without heirs male of their own bodies, that then the land shall return to the survivors, to be equally divided between them." Held, that the devise over to the survivors showed that an indefinite failure of issue was not meant, and that the will should be construed to mean that, if any of the devisees named should die without leaving male issue at the time of his death, his portion should be divided among the survivors. *Fosdick v. Cornell* (N. Y.) 1 Johns. 440, 448, 452, 8 Am. Dec. 340.

#### As within lifetime of testator.

Where a future interest is limited by a grant to take effect on the death of any person "without heirs" or "heirs of his body," or "without issue," or in equivalent words, such words must be taken to mean successors, or issue living at the death of the person named as ancestor. *Civ. Code Idaho* 1901, § 2397.

A will providing for the division of property among testator's children, and, in case any of such children should "die without an heir of their body begotten," their part should be equally divided among the survivors or their heirs, should be construed as meaning the death of the legatee after that of the testator, and before the time for distribution, or when the legacy may be re-

duced to possession. *Pool v. Benning*, 48 Ky. (9 B. Mon.) 628.

Testator devised certain land to his wife for life, then to his son W. and his heirs forever. Another clause provided that, if any of his sons to whom he bequeathed property should die without "heirs of his body," the real estate so bequeathed should go to the surviving brother or brothers, and personalty to all the other heirs equally. Other provisions tended slightly to show that testator contemplated that his son should survive him. It was held that, construing all the clauses together, the word "die without heirs of his body" referred to death at any time before or after testator's death, and passed a conditional fee to W., determinable upon his death without lineal heirs. *Summers v. Smith*, 21 N. E. 191, 192, 127 Ill. 645.

#### DIE WITHOUT HEIRS AND INTESTATE.

Where a will devised property to a person to be possessed, enjoyed, and occupied by her and her heirs forever, but, if she should die without heirs and intestate, then that all the estate should vest in her brother, the words "without heirs and intestate" implied a power of control and disposition, so as to be inconsistent with and avoid the limitation over, and the devisee took an estate in fee. *Armstrong v. Kent*, 6 N. J. Eq. (2 Halst. Ch.) 559, 574.

#### DIE WITHOUT HEIRS LIVING.

"Dying without heirs living or surviving" is always held to import a definite failure of issue. *Granger v. Granger*, 46 N. E. 80, 84, 147 Ind. 95, 36 L. R. A. 190.

#### DIE WITHOUT ISSUE.

The terms "die without issue," "die without leaving issue," and "die without heirs lawfully begotten," are synonymous. *Moody v. Walker*, 3 Ark. (3 Pike) 147, 198.

A will which devised all the testator's estate to G. and his heirs forever, and afterwards provided that, if G. should die without issue who could inherit, the estate given to him in the will should be otherwise disposed of, is of the same effect as though the testator had said without "heirs of his body lawfully begotten," and the word "heirs," in the first devise, will be construed as intended for heirs of the body, G. taking an estate tail. *Turrill v. Northrop*, 51 Conn. 33, 36.

The words "without issue, that is, without heirs, being his own children lawfully begotten," have the same meaning as if only the words "without issue or without heirs of his body" had been used. The only effect of the use of the words "children lawfully begotten" was to qualify and restrict the meaning of the word "heirs" to the heirs of

the body. *Moore v. Gary*, 48 N. E. 630, 632, 149 Ind. 51.

#### As indefinite failure of issue.

The term "die without issue," standing uninfluenced by other parts of the will, imports an indefinite failure of issue; that is, a failure not on the death of the first taker, but a failure when all his issue or descendants shall cease. *Kent v. Armstrong*, 6 N. J. Eq. (2 Halst.) 637, 638; *Wardell v. Allaire*, 20 N. J. Law (Spencer) 6, 9, 21; *Condict's Ex'rs v. King*, 13 N. J. Eq. (2 Beas.) 375, 376; *Trumbull v. Gibbons*, 22 N. J. Law (2 Zab.) 117, 154; *Davies' Adm'r v. Steele's Adm'r*, 38 N. J. Eq. (11 Stew.) 168, 171; *Hugg v. Hugg*, 5 N. J. Law (2 Southard) 427, 431; *Morehouse v. Cotheal*, 21 N. J. Law (1 Zab.) 480, 490 (citing 4 Kent, Comm. 274 [5th Ed.]; 2 Jarm. Wills, 417, 427); *Morehouse v. Cotheal*, 22 N. J. Law (2 Zab.) 430, 435; *Wilson v. Small*, 20 N. J. Law (Spencer) 151, 152; *Chetwood v. Winston*, 40 N. J. Law (11 Vroom) 337, 338; *Harris v. Taylor*, 5 N. J. Law (2 Southard) 413, 416; *Wilson v. Wilson*, 19 Atl. 132, 133, 46 N. J. Eq. (1 Dick.) 321; *Harris v. Smith*, 16 Ga. 545, 548; *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 282; *Jackson v. Bull* (N. Y.) 10 Johns. 19; *Wilson v. Wilson* (N. Y.) 20 How. Prac. 41, 44; *Whitford v. Armstrong*, 9 R. I. 394, 395; *Arnold v. Brown*, 7 R. I. 188, 196; *Vaughn v. Guy*, 17 Mo. 429, 431; *Moody v. Walker*, 3 Ark. (3 Pike) 147, 198; *Hollett's Lessee v. Pope* (Del.) 3 Har. 542; *Fisk v. Keene*, 35 Me. 349, 355; *Mendenhall v. Mower*, 16 S. C. 308, 312; *Mangum v. Piester*, 16 S. C. 316, 327; *Eichelberger v. Barnitz* (Pa.) 9 Watts, 447, 450; *Lawrence v. Lawrence*, 105 Pa. 335, 339; *Stouch v. Zeigler*, 46 Atl. 486, 488, 196 Pa. 489; *Wynn v. Story*, 38 Pa. (2 Wright) 166, 169; *Kay v. Scates*, 37 Pa. (1 Wright) 31, 33, 78 Am. Dec. 399; *In re Miller's Estate*, 22 Atl. 1044, 145 Pa. 561; *In re Hoff's Estate*, 23 Atl. 890, 892, 147 Pa. 636; *Reinoehl v. Shirk*, 12 Atl. 806, 808, 119 Pa. 108; *Hackney v. Tracy*, 20 Atl. 560, 561, 137 Pa. 53; *In re Robinson's Estate*, 24 Atl. 297, 299, 149 Pa. 418; *Tongue's Lessee v. Nutwell*, 18 Md. 415, 425; *Dallam v. Dallam's Lessee* (Md.) 7 Har. & J. 220, 236; *Newton v. Griffith* (Md.) 1 Har. & G. 111, 116; *Comegys v. Jones*, 4 Atl. 567, 568, 65 Md. 317; *Barlow v. Salter*, 17 Ves. 479, 482; *Cole v. Goble*, 13 C. B. 444, 455, 20 Eng. Law & Eq. 234, 237; *Allen v. Trustees of Ashley School Fund*, 102 Mass. 262, 264; *Hall v. Priest*, 72 Mass. (6 Gray) 18, 19; *Ide v. Ide*, 5 Mass. 500, 502; *Hawley v. Inhabitants of Northampton*, 8 Mass. 3, 12, 5 Am. Dec. 66; *Hayward v. Howe*, 78 Mass (12 Gray) 49, 50, 71 Am. Dec. 734; *Downing v. Wherrin*, 19 N. H. 9, 86, 49 Am. Dec. 139; *McGraw v. Davenport* (Ala.) 6 Port. 319, 327, 329. But where, from its context, and the will as a whole, it appears that testator intended the term to mean a definite failure of issue, it will be so construed. *Oain v. Robertson*, 61 N. E. 26, 27, 27 Ind. App. 198; *Hall v. Chaf-*

fee, 14 N. H. 215, 224; *Seddel v. Wills*, 20 N. J. Law (Spencer) 223, 225; *Van Middleworth v. Schenck*, 8 N. J. Law (3 Halst.) 29, 41; *Wurts' Ex'rs v. Page*, 19 N. J. Eq. (4 C. E. Green) 365, 367; *Buchanan v. Schulderman*, 11 Pac. 899, 900, 11 Or. 150; *Dumond v. Stringham* (N. Y.) 26 Barb. 104, 111; *Moffat's Ex'rs v. Strong* (N. Y.) 10 Johns. 12, 17; *Anderson v. Jackson* (N. Y.) 16 Johns. 382, 402, 8 Am. Dec. 330; *Appeal of Fitzwater*, 94 Pa. 141, 146; *Strain v. Sweeny*, 45 N. E. 201, 202, 163 Ill. 603; *Stone v. Bradlee* (Mass.) 66 N. E. 708, 709, 183 Mass. 165.

The words "die without issue" have been held to import an indefinite failure of issue, when applied to personality as well as to realty. *Chism's Adm'r v. Williams*, 29 Mo. 288, 292; *Davies' Adm'r v. Steel's Adm'r*, 38 N. J. Eq. (11 Stew.) 168, 170; *Moody v. Walker*, 3 Ark. (3 Pike) 147, 198. But ordinarily they are construed to mean definite failure of issue, when so used. *Forth v. Chapman*, 1 P. Wms. 663; *Caulk's Lessee v. Caulk* (Del.) 52 Atl. 340, 345, 3 Pennewill, 528; *Kimball v. Penhallow*, 60 N. H. 448, 451; *Downing v. Wherrin*, 19 N. H. 9, 86, 49 Am. Dec. 139; *Hall v. Chaffee*, 14 N. H. 215, 224; *Pinkham v. Blair*, 57 N. H. 226, 227; *Patterson v. Madden*, 33 Atl. 51; *Appeal of Eachus*, 91 Pa. 105, 108; *Appeal of Myers*, 49 Pa. 111, 114; *In re Francis' Estate*, 4 Pa. Dist. R. 694; *In re McCoy's Estate* (Pa.) 16 Wkly. Notes Cas. 243; *In re Duffy's Estate*, 36 Wkly. Notes Cas. 199; *In re Moorhead's Estate*, 36 Atl. 647, 648, 180 Pa. 119.

The statutory definition of the phrase "dying without issue" is dying without heirs or descendants of the first taker surviving him. 1 Rev. St. 724, § 22; *Bowman v. Tallman*, 25 N. Y. Super. Ct. (2 Rob.) 385, 401.

A will executed in New York contained the following clause: "I direct that, in case my daughter M. should die without issue, that my real and personal property should be possessed and enjoyed by my husband, R. P. W., and my sister, D. F., during their natural lives, and after their death the said real and personal property to be divided equally between my brothers H., J., F., and T., or their representatives, share and share alike; the devise over to my husband, sister, and brothers to depend upon my daughter M. dying without issue." Held, that M. took under her mother's will a base or conditional fee, defeasible by her dying without issue living at the time of her death, under the provisions of 1 Rev. St. 724, § 22, and that her issue, should she leave any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual as against them, and that an indefeasible title in fee could be conveyed, and the contingent expectant estate, limited to the husband, sister, and brothers of the testatrix in the event of M.'s dying without issue, cut off by their joining with her in a conveyance. *In re*

*New York, L. & W. Ry. Co.*, 11 N. E. 492, 495, 105 N. Y. 89, 59 Am. Rep. 478.

The text-books lay down the general rule that where a devise is to one and his heirs, with a devise over "if he die without issue," or "without having issue," and with no explanatory words defining the time to which this contingency is to apply, it will be construed to be a general failure of issue at any time, however indefinite or remote, and which may not, therefore, happen for many generations. But the decisions upon this subject are exceedingly arbitrary, and without much foundation in reason or common sense. Hence courts will seize hold of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time. The construction of the words as importing an indefinite failure of issue will give way to any explanatory words in the context which can be interpreted as fixing the time of the failure at the death of the first taker. *Strain v. Sweeny*, 45 N. E. 201, 202, 163 Ill. 603.

It has been long settled that the words occurring in a will referring to the death of a person without issue, whether the terms be "if he die without issue," or "if he have no issue," or "if he die before he has issue," or "for want of or in default of issue," unexplained by the context, and whether applied to real or personal estate, are construed to import a general indefinite failure of issue. The rule, in the language of Lord Redesdale, is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise, or unless, in the language of Lord Alvaney in *Poole v. Poole*, 8 Bos. & Pul. 620, the intent appears so plainly to the contrary that no one can misunderstand it. As to personality, it seems the word "issue" yields more readily to expressions and circumstances in a will tending to confine it to the restricted sense, than when applied to real estate. *Tinsley v. Jones* (Va.) 13 Grat. 289, 292.

In Kentucky and Ohio the term "die without issue" is construed to import a definite failure, unless a contrary intention is plainly expressed in the will, or is necessary to carry out its undoubted purpose. *Daniel v. Thomson*, 53 Ky. (14 B. Mon.) 662, 708; *Lewis v. Shropshire*, 68 S. W. 426, 427, 24 Ky. Law Rep. 331; *Birney v. Richardson*, 35 Ky. (5 Dana) 424, 427; *Armstrong v. Armstrong*, 53 Ky. (14 B. Mon.) 333, 344; *Moore v. Moore*, 51 Ky. (12 B. Mon.) 651, 657; *Brown's Heirs v. Brown's Devisees*, 31 Ky. (1 Dana) 39, 41; *McKay v. Merrifield*, 53 Ky. (14 B. Mon.) 322; *Brashear v. Macey*, 26 Ky. (3 J. J. Marsh.) 89, 90; *Lee v. Mumford*, 44 S. W. 91, 19 Ky. Law Rep. 15, 85; *Carter v. Reddish*, 82 Ohio St. 1, 14; *Parish's Heirs v. Ferris*, 6 Ohio St. 563, 574, 575. The

Kentucky statutory provision is as follows: "Unless a different purpose be plainly expressed in the instrument, every limitation in a deed or will contingent upon a person dying 'without heirs,' or without 'children' or 'issue,' or other words of like import, shall be construed a limitation to take effect when such person shall die, unless the object on which the contingency is made to depend is then living, or, if a child of his body, such child be born within ten months next thereafter." Ky. St. 1903, § 2344. In Massachusetts there is a similar statute, which is as follows: "In a limitation of real or personal property by deed, will or other instrument in writing, \* \* \* the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or 'die without heirs of the body,' or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall, unless a contrary intention clearly appears by the instrument creating such limitation, mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue." Rev. Laws Mass. 1902, p. 1268, c. 134, § 5. And in Maryland there is also a statutory provision: "In any deed of any real or personal estate, the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or a failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the deed." Pub. Gen. Laws Md. 1883, p. 275, art. 21, § 33.

The words "die without issue," in a will directing that a bequest shall be divided between other beneficiaries if the first beneficiary "die without issue," are to be construed, in view of Acts 1862, c. 161, to mean a want or failure of issue in the lifetime or at the time of the death of the person so taking, unless a contrary intention appears from the will. *Hutchins v. Pearce*, 31 Atl. 501, 502, 80 Md. 434.

"Die without issue," as used in a will devising property to testator's children, and providing that, if they should "die without issue," his or her share should be equally divided among the survivors, means death without issue in the lifetime of testator's surviving children. *Schively's Estate* (Pa.) 42 Leg. Int. 100.

A devise over in case the devisee "dies before the age of 21 years and without issue" imports a definite failure of issue. *Dallam v. Dallam* (Md.) 7 Har. & J. 220, 236.

When the term "survivor" is used, following the general phrase "dying without issue," and unaccompanied by other words indicating a transferable interest to the heirs of the survivor, the term will always have the effect of controlling the generality of this phrase, and of changing it from an indefinite failure, which it would mean when standing alone, to a failure at a definite time, to wit, the death of the first taker. *Mendenhall v. Mower*, 16 S. C. 303, 312; *Gray v. Bridgeforth*, 33 Miss. 312, 313; *Kennedy v. Kennedy*, 29 N. J. Law (5 Dutch.) 185, 188; *Howell v. Howell*, 20 N. J. Law (Spencer) 411, 415; *Groves v. Cox*, 40 N. J. Law (11 Vroom) 40, 44; *Cutter v. Doughty* (N. Y.) 23 Wend. 513, 518; *Lewis v. Claiborne*, 13 Tenn. (5 Yerg.) 369, 372, 26 Am. Dec. 270.

#### As within lifetime of testator.

The words "die without issue" are held to refer to death within the lifetime of the testator. *Yocum v. Siler*, 160 Mo. 281, 295, 61 S. W. 208; *Phelps v. Phelps*, 11 Atl. 596, 598, 55 Conn. 359; *Coe v. James*, 9 Atl. 392, 54 Conn. 511; *Lawlor v. Holohan*, 38 Atl. 903, 70 Conn. 87; *Washbon v. Cope*, 39 N. E. 388, 392, 144 N. Y. 287; *Coles v. Ayres*, 27 Atl. 375, 378, 156 Pa. 197; *Appeal of Mickle*, 92 Pa. 514, 518; *Stevenson v. Fox*, 17 Atl. 490, 125 Pa. 568, 11 Am. St. Rep. 922; *King v. Frick*, 19 Atl. 951, 952, 135 Pa. 575, 20 Am. St. Rep. 889; *Fowler v. Duhme*, 42 N. E. 623, 631, 143 Ind. 248; *Teal v. Richardson*, 66 N. E. 435, 160 Ind. 119. But when a contrary intent is indicated, they are not so limited. *Huston's Lessee v. Hamilton* (Pa.) 2 Bin. 387, 392; *Vanderzee v. Slingerland*, 8 N. E. 247, 103 N. Y. 47, 57 Am. Rep. 701; *Cooksey v. Hill*, 50 S. W. 235, 237, 106 Ky. 297, 20 Ky. Law Rep. 1873, 1875.

When a future interest is limited by a grant to take effect on the death of any person without heirs, or heirs of his body, or without issue, or in equivalent words, such words must be taken to mean successors or issue living at the death of the person named as ancestor. *Civ. Code Mont.* 1895, § 1475; *Rev. Codes N. D.* 1899, § 3526; *Liston v. Jenkins*, 2 W. Va. 62, 65.

#### As without having had issue.

In a will creating a remainder in case one of the devisees dies without issue, the words "dies without issue" mean if the devisee dies without having had issue, not without surviving issue. *Fleld v. Peeples*, 54 N. E. 304, 305, 180 Ill. 876; *Chaplin v. Doty*, 15 Atl. 362, 365, 60 Vt. 712.

#### DIE WITHOUT ISSUE LIVING.

"Dying without issue living or surviving" is always held to import a definite failure of issue. *Granger v. Granger*, 46 N. E. 80, 84, 147 Ind. 95, 36 L. R. A. 190 (citing *Pells v.*



Brown, Cro. Jac. 590); Glover v. Condell, 45 N. E. 173, 179, 163 Ill. 566, 35 L. R. A. 360; Vaughan v. Dickes, 20 Pa. (8 Harris) 509, 514.

Testator devised to his son a farm—to him, his heirs and assigns—provided he had living issue, but, if he should die leaving no issue living, then the said property to be equally divided between his sisters. Held, that the phrase “leaving no issue living” meant a failure of issue at the time of the death of the devisee, and not an indefinite failure of issue. Wallington v. Taylor, 1 N. J. Eq. (Saxt.) 314, 318.

“It is well settled that in gifts of personality the phrase ‘die without living issue’ means die without living issue living at the death of the person, the failure of whose issue is spoken of.” Still v. Spear, 45 Pa. (9 Wright) 168, 171.

#### DIE WITHOUT LAWFUL ISSUE.

In a will, a limitation to T. and his heirs, and, “in case of his death without lawful issue,” the estate to revert to R. and his heirs, the words “in case of his death without lawful issue” qualify the general expression “to T. and his heirs,” and point out the heirs intended to inherit, and confine them to heirs of his body. Handy v. McKim, 4 Atl. 125, 129, 64 Md. 560.

A will devised real estate to children in fee, and then added the following devise over: “But if any one or more of my said children should die before they arrive at full age or without lawful issue then his or her share shall devolve upon and be equally divided among the rest of my surviving children.” Held, that the words “without lawful issue,” in such connection, meant issue living at the time of his death, and that the devise over was good by way of executory devise, and not too remote. Jackson v. Blanshan (N. Y.) 3 Johns. 292, 299, 3 Am. Dec. 485.

Testator, after a devise of a life estate to his children, and the remainder to his grandchildren, provided that, in case any of his children should die without lawful issue, then the portion of his estate which would have gone to such issue should be equally divided among the survivors of his children or grandchildren. Held, that the devise to the survivor or survivors after the death without issue showed that the words “without lawful issue” should be interpreted as though followed by the words “living at the time of his death,” and that therefore the devise to the survivors was not void as a limitation on an indefinite failure of issue. Cutter v. Doughty (N. Y.) 23 Wend. 513, 518.

The phrase “without legal issue” in a will providing for a legacy, should either of testator’s three sons die without legal issue, refers to an indefinite failure of issue, and renders the gift over to the survivors a re-

mainder, and not an executory devise. Perry v. Kline, 66 Mass. (12 Cush.) 118, 123.

The words “dying without leaving lawful issue or descendants,” applied to a devise of leasehold property, mean a dying without issue living at the death of the first taker. Allender v. Sussan, 33 Md. 11, 15, 3 Am. Rep. 171.

#### DIE WITHOUT LEAVING CHILDREN.

The words “leaving no child or children,” in a devise of property directing that if the beneficiary die, “leaving no child or children,” the property shall pass to another, cannot be construed to denote an indefinite failure of issue. Hull v. Eddy, 14 N. J. Law (2 J. S. Green) 169, 175.

A devise over upon the death of a devisee without leaving child or children does not mean a failure of issue at some indefinite future period, but dying without children at the death of such devisee—a definite event. Brooks v. Kip, 35 Atl. 658, 660, 54 N. J. Eq. 462.

As used in a will giving money to a certain person, and, if she should die leaving no children, the legacy should go in another manner, “leaving” should be construed in the sense of the words “having had,” so that the contingency contemplated was the death of the legatee without having had a child or children. “If personal estate,” said Mr. Hawkins (Hawkins’ Wills, 216), “be given to the children of A., the shares to vest in them on attaining a given age or marriage, without reference to their surviving the parent, but there is a gift over on the death of A. without leaving a child or children, the word ‘leaving’ will be construed ‘having’ or ‘having had,’ in order not to defeat the prior vested interest.” In Theob. on Wills, 532, it is said that the word “leaving,” under such circumstances, will be taken as equivalent in meaning to the words “without having had children who take a vested interest.” Male v. Williams, 21 Atl. 854, 855, 48 N. J. Eq. (3 Dick.) 83.

#### DIE WITHOUT LEAVING ISSUE.

The terms “die without issue,” “die without leaving issue,” and “die without heirs lawfully begotten” are synonymous. Moody v. Walker, 3 Ark. 147, 198; Paterson v. Ellis’ Ex’rs (N. Y.) 11 Wend. 259, 282.

The expression “without leaving living issue,” as used by a testator in a will making a gift over on the first taker dying without leaving living issue, means lawful issue living beyond the death of the first taker. A testator, after having used expressions which, though containing no words of inheritance, would, standing by themselves, have given a fee simple absolute to his two grandsons,

added a provision "that the property willed by me to the said grandchildren should be held in common, and if either of them should depart this life without leaving living issue, then in that case the survivor or the heirs of his body shall inherit all the property and estate devised to both of them." Held that the latter words referred to a death either before or after testator's death, and that each grandson took a base or determinable fee, defeasible by his death without living issue, leaving the other grandson surviving. *First Nat. Bank v. De Pauw* (U. S.) 75 Fed. 775, 777.

The words "without leaving issue," as used in a will providing for the disposition of property "in case of the death of my son S. without leaving issue," mean without leaving issue at the time of the death of the devisee, and not at the time of the death of the deviser. *Metzen v. Schopp*, 67 N. E. 36, 39, 202 Ill. 275.

As used in a will in which the testator, after giving the remainder of his property to his two children, provided that, if either of them should die without leaving issue, the portion of such child should go to his or her issue in equal shares, is construed to mean "dying without issue" in the testator's lifetime. Hence the children who survive the testator would take an absolute estate. *Phelps v. Robbins*, 40 Conn. 250, 264.

#### As indefinite failure of issue.

In the following cases the words "die without leaving issue" have been held to import an indefinite failure of issue: *Kay v. Scates*, 37 Pa. (1 Wright) 31, 39, 78 Am. Dec. 399; *Middleswart's Adm'r v. Blackmore*, 74 Pa. (24 P. F. Smith) 414, 419; *Parkhurst v. Harrower*, 21 Atl. 826, 142 Pa. 432, 24 Am. St. Rep. 507 (citing *Taylor v. Taylor*, 63 Pa. [13 P. F. Smith] 481, 3 Am. Rep. 565; *Middleworth's Adm'r v. Blackmore*, 74 Pa. [24 P. F. Smith] 414); *In re Miller's Estate*, 22 Atl. 1044, 145 Pa. 561; *Moody v. Walker*, 3 Ark. (3 Pike) 147, 148; *Morehouse v. Cotheal*, 21 N. J. Law (1 Zab.) 480, 490; *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 282. On the other hand, the following cases have held that they do not import an indefinite failure of issue: *Atwell's Ex'rs v. Barney* (Ga.) *Dud.* 207, 208; *Harris v. Smith*, 16 Ga. 545, 548; *Nicholson v. Bettie*, 57 Pa. (7 P. F. Smith) 384, 387 (citing *Porter v. Bradley*, 3 Term R. 143); *Patterson v. Madden*, 54 N. J. Eq. 714, 720, 36 Atl. 273, 274.

In any deed of any real or personal estate, the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or a failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in

the lifetime or at the time of the death of such person, and not an indefinite failure of his issue unless a contrary intention shall appear by the deed. Pub. Gen. Laws Md. 1888, p. 275, art. 21, § 83.

In a limitation of real or personal property by deed, will, or other instrument in writing, the words "die without issue," or "die without leaving issue," or "have no issue," or "die without heirs of the body," or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall, unless a contrary intention clearly appears by the instrument creating such limitation, mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue. Rev. Laws Mass. 1902, p. 1268, c. 134, § 5.

It was settled at common law that the phrase "leaving no issue," or "without leaving issue," when applied to a devise of land, meant an indefinite failure of issue, but, when applied to a bequest of personalty, it imported failure of issue at the time of the death of the first legatee. *Patterson v. Madden* (N. J.) 33 Atl. 51.

#### DIE WITHOUT LEAVING LAWFUL ISSUE SURVIVING.

Die leaving no issue behind him, see "Behind."

There is a marked difference between a gift over in a will, the first taker's dying with lawful issue, and a gift over on his dying without leaving lawful issue surviving. The latter, if it means anything, must mean lawful issue living beyond the death of the first taker. It is much more expressive than the phrase "leaving no lawful issue behind him," which, in *Porter v. Bradley*, 3 Term R. 143, was held to denote a definite failure of issue. *Nicholson v. Bettie*, 57 Pa. (7 P. F. Smith) 384, 387.

#### DIE WITHOUT LEGAL ISSUE.

See "Die Without Lawful Issue."

#### DIE WITHOUT LIVING HEIRS.

The words "death without living heirs," as used in a will providing that, in case of devisee's death without living heirs of his own, the whole shall revert to testator's heirs, when given their natural meaning, can only be construed as referring to death at any time, and not simply to death within the lifetime of testator. *Thomas v. Miller*, 43 N. E. 848, 850, 161 Ill. 60.

#### DIE WITHOUT LIVING ISSUE.

See "Die Without Issue Living."

## DIES JURIDICUS.

The civilians employed this term to denote days for legal purposes or judicial proceedings. *Didsbury v. Van Tassel*, 10 N. Y. Supp. 32, 33, 56 Hun, 423.

## DIES NON.

"Dies non" is an abbreviation of the phrase "dies non juridicus," universally used to denote nonjudicial days—days during which the courts do not transact any business—as Sunday or the legal holidays. *Havens v. Stiles* (Idaho) 67 Pac. 919, 921, 56 L. R. A. 736.

## DIES NON JURIDICUS.

It is frequently said that Sunday is "dies non juridicus," but this means only that process cannot ordinarily issue or be executed or returned, and that courts do not usually sit, on that day. It does not mean that no judicial action can be had on that day. On the contrary, it is laid down in books of authority that warrants for treason, felony, and breach of the peace may be issued and executed on that day. *State v. Ricketts*, 74 N. C. 187, 193.

The term "dies non juridicus" was used by the civilians to designate the days in which judicial proceedings were prohibited, but, with the exception of Sunday, we have no such days; and hence Laws 1881, c. 30, providing that certain days, including Christmas, shall be considered Sunday, for the purpose of presenting and producing commercial paper, and for the purpose of transacting business in a public office, does not diminish the number of judicial days, and service of a summons on Christmas is valid. *Didsbury v. Van Tassel*, 10 N. Y. Supp. 32, 33, 56 Hun, 423.

## DIETING.

"Dieting," as used in Rev. St. c. 53, § 19, providing that the sheriff shall receive for dieting each prisoner such compensation, to cover the actual costs, as may be fixed by the county board, means providing and furnishing to the prisoners their daily food. *Cook County v. Gilbert*, 33 N. E. 761, 762, 146 Ill. 268.

## DIFFERENCE.

In a contract providing that it is hereby understood that should any difference arise in regard to the proper performance of the contract, etc., then said difference shall be left to the arbitrators, "difference" means disagreement or dispute, and would not in-

clude mere failure of one to pay a debt owing to another. *Fravert v. Fessler*, 53 Pac. 288, 290, 11 Colo. App. 387.

Rejection by an assured of an offer by an insurance company of a certain amount in settlement of the damages to the insured property constitutes a difference between the parties, within the meaning of a condition in the policy that any difference as to the amount of loss shall be submitted to arbitration before action brought. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 10 S. E. 1057, 1059, 106 N. C. 28.

Palpable abuse of judicial discretion is not beyond remedy, but "difference in judicial opinion" is not synonymous with "abuse of judicial discretion." *Day v. Donohue*, 41 Atl. 934, 935, 62 N. J. Law, 380.

## DIFFICULT.

The term "difficult and extraordinary case," in statutes providing for an extra allowance in a difficult and extraordinary case, includes all cases of a difficult or extraordinary character, and includes a suit to foreclose a mechanic's lien, if difficult or extraordinary. *Horgan v. McKenzie*, 17 N. Y. Supp. 174, 175. The term, as so used, should be construed as synonymous with "litigated," and hence all litigated cases are difficult. It should not mean simply a case where a party's debt was doubtful or unfounded, and that, by the skill or ingenuity or the smartness of his counsel, he had performed the difficult task of obtaining a verdict contrary to evidence, for, while this would establish a difficult as well as an extraordinary case, in the literal acceptance of the term, it would not be such in a legal acceptance thereof, which is that defendant has forced plaintiff, the owner of a claim plainly and clearly just, to resort to trouble and expense in order to enforce payment thereof, and it is for the reimbursement of such expenses that he is entitled to an extra allowance. *Dyckman v. McDonald* (N. Y.) 5 How. Prac. 121, 122. It means the opposite of "common and ordinary." Each case must be determined according to its own peculiar circumstances, and each judge must necessarily be guided by his own individual experience as to what actions and trials are difficult or extraordinary. All litigated trials cannot be considered difficult, within the statute, because such a construction would completely nullify the words "difficult and extraordinary," as used, and contravene the plain intent of the Legislature. "Difficult" should probably be applied to questions of law involved in the action, while "extraordinary" may apply to any other feature or circumstances distinguishing the case from ordinary litigations. *Fox v. Gould* (N. Y.) 5 How. Prac. 278, 279.

**DIFFICULTY.**

The words "any difficulty," in a will directing that, in case any difficulty arises, the matter shall be submitted, do not mean only such as may arise outside the will, but will cover the determination of questions of interpretation. In *re Phillips' Estate* (Pa.) 48 Leg. Int. 232.

The term "difficulty," as applicable to what transpires between parties when it results in some breach of the peace or more flagrant violation of law, is, in general use, well understood by all classes. It is of constant application in legal proceedings and in the reports of adjudicated cases. It is expressive of a group or a collection of ideas that cannot, perhaps, be imparted so well by any other term. This use, therefore, in instructions, avoids a great deal of circumlocution, which generally leads to confusion and misapprehension, and it is uniformly used in preparing instructions in all cases where it is applicable. *Gainey v. People*, 97 Ill. 270, 279, 37 Am. Rep. 109.

**DIFFICULTY WITH HEAD.**

An applicant for life insurance was asked, "Have you ever had any difficulty with your head or brain?" to which he answered, "No." In construing this answer, in an action on the policy, the court said: "The question evidently pointed to mental unsoundness or some derangement of the head or brain, and was so understood by the examiner and the applicant; that it did not include a temporary or occasional disturbance, the result of accidental causes. *Higbie v. Guardian Mut. Life Ins. Co.*, 53 N. Y. 603, 605.

**DIG.**

A deed giving the liberty and privilege to dig a canal across the grantor's land does not give to the grantee a right to the soil or trees dug up in the course of the work. *Lyman v. Arnold* (U. S.) 15 Fed. Cas. 1143, 1145.

A contract requiring a party to go to California and to dig gold for a certain time and to pay the other parties one-fourth of the amount he should collect while there, was construed to only require him to account for the sums obtained by taking gold, and not for any other sums gained by him. The phrase "digging gold" was not sufficient to indicate any employment in which the obligor might engage. It is true that it is susceptible of a figurative meaning, and is sometimes used in this manner to signify generally any mode by which wealth or property is obtained, of which a fine illustration is given by the great lyrical poet of England in his version of the thirty-ninth psalm:

"Some walk in honor's gaudy show,  
Some dig for gold and ore."

—*Hoyt v. Smith*, 27 Conn. 63, 68.

A contract under seal conveyed both the right and privilege of "digging all the ore" on the grantor's land. Held, that the quoted words constituted an equitable conveyance of the ore in the land in fee, and that the contract could not be construed as a mere license to take minerals. *Fairchild v. Dunbar Furnace Co.*, 18 Atl. 443, 128 Pa. 485.

**DIGGING.**

In a contract for the excavation of a certain trench, and providing that, for executing the digging, the contractor should receive a certain sum per cubic foot, "digging" is synonymous with the term "excavation," as used in the contract, and cannot be limited to the mere excavation of dirt, in contradistinction to hardpan or rock. *Sherman v. City of New York*, 1 N. Y. (1 Comst.) 816, 820.

**DIGNITY OF OFFICE.**

"Dignity of office," in the sense that the term is used in the English cases holding that the compensation of officers is not subject to assignment, does not exist in this country, and yet there is a dignity, or at least should be, attending every office, in the sense that a proper and independent discharge of its duties inspires respect for the officer and for the office; and this is sufficient grounds for holding that his unearned compensation cannot be assigned. *National Bank of El Paso v. Fink*, 24 S. W. 256, 257, 86 Tex. 303, 40 Am. St. Rep. 833; *Sanger v. City of Waco*, 40 S. W. 549, 550, 15 Tex. Civ. App. 424.

**DILATORY PLEA.**

Dilatory pleas are distinguished from pleas to the action, and are defined to be such as tend merely to delay or put off the suit by questioning the propriety of the remedy, rather than by denying the injury; whereas pleas to the action are such as dispute the cause of action. *Parks v. McClellan*, 44 N. J. Law (15 Vroom) 552, 558.

A dilatory plea is one which seeks to excuse the defendant from pleading to and answering the declaration, and gives reason why he should not be required so to plead or answer. It is not a plea or answer, within the meaning of statutes relating to the removal of cases. *Mahoney v. New South Building & Loan Ass'n* (U. S.) 70 Fed. 513, 515.

**DILIGENCE.**

See "Common Diligence"; "Due Diligence"; "Extraordinary Diligence"; "Great Care or Diligence"; "High Diligence"; "Low Diligence"; "Necessary Diligence"; "Ordinary Diligence"; "Reasonable Diligence"; "Slight Diligence"; "Special Care and Diligence."

**Care synonymous.**

Diligence is defined to be a steady application to business of any kind; constant effort to accomplish any undertaking. The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary, and reasonable. *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 546, 97 Am. Dec. 550; *Ennis v. Eden Mills Paper Co.*, 48 Atl. 610, 613, 65 N. J. Law, 577.

Diligence is such care and prudence as is usually exercised by persons of common or average care and prudence. *Lee v. Chicago, R. I. & P. R. Co.*, 45 N. W. 739, 741, 80 Iowa, 172.

By reasonable and ordinary care and diligence is meant that degree of care which an ordinarily careful and prudent man would be expected to use under similar circumstances. *Union Pac. R. Co. v. Estes*, 16 Pac. 131, 134, 37 Kan. 715.

"Diligence, when the law imposes it as a duty, implies that we shall do those things we ought to do, and leave undone those things we ought not to do. It requires action, as well as forbearance to act." *Grant v. Moseley*, 29 Ala. 302, 305.

The diligence to be exacted from a specialist is the diligence which good specialists in his department are accustomed to bestow. *Diamond v. Northern Pac. R. Co.*, 13 Pac. 367, 372, 6 Mont. 580 (citing *Whart. Neg.* § 872).

The term "diligence," when applied to the management of railroad engines and cars in motion, must be understood to import all the care and circumspection which the peculiar circumstances of the place or occasion reasonably require, and these will be increased or diminished according as the ordinary liability to danger and accident and to do injury to others is increased or diminished in the movement and operation of them. *Knopf v. Philadelphia, W. & B. R. Co. (Del.)* 46 Atl. 747, 748, 2 Pennewill, 392.

"The word 'diligence,' as used in the definitions of the degrees of negligence, in the definition defining gross negligence to be the want of slight diligence, slight negligence to be the want of great diligence, and ordinary negligence to be the want of ordinary diligence, is synonymous with 'care.' This is shown by the text in *Story*, immediately following the definition referred to. It is there said: 'For he who is only less diligent than very careful men cannot be said to be more than slightly inattentive, he who omits ordinary care is a little more negligent than men ordinarily are, and he who omits even slight diligence fails in the lowest degree of prudence and is deemed grossly negligent.'" *Chicago, B. & Q. R. Co. v. Johnson*, 103 Ill. 512, 523 (quoting *Story*, *Bailm.* § 17 et seq.).

**Good faith.**

Good faith and diligence are not always the same. Lack of diligence does not necessarily involve absence of good faith, so that failure to discover fraud in the sale of bank stock within a short time is not proof of lack of good faith. *Stufflebeam v. De Lashmutt* (U. S.) 101 Fed. 367, 370.

**As a relative term.**

Diligence is in all cases a relative term, and what is due diligence must be determined by the circumstances of each case. *Rue v. Quinn*, 66 Pac. 216, 217, 137 Cal. 651; *Heintz v. Cooper*, 38 Pac. 511, 512, 104 Cal. 608; *Carter v. Kansas City Cable Ry. Co.* (U. S.) 42 Fed. 37, 38; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, 110 Fed. 420, 427, 49 C. C. A. 1; *Isabel v. Hannibal & St. J. R. Co.*, 60 Mo. 475, 482 (citing *Davis v. Chicago & N. W. R. Co.*, 17 N. W. 406, 412, 58 Wis. 646, 46 Am. Rep. 667); *Ennis v. Eden Mills Paper Co.*, 48 Atl. 610, 613, 65 N. J. Law, 577; *Prince v. Alabama State Fair*, 17 South. 449, 451, 106 Ala. 340, 28 L. R. A. 716; *Lee v. Chicago, R. I. & P. R. Co.*, 45 N. W. 739, 741, 80 Iowa, 172.

Diligence is a relative term, and depends on the nature of the trust, duty, or subject in hand; hence, if the trust confided or duty imposed required delicate handling or skillful manipulation to preserve the one or to so control the other as to do no mischief, the requisite degree of diligence arises in proportion to the delicacy of danger which attends the service. Greater watchfulness and care are required in the proper custody and preservation of a diamond than need be bestowed on chattels of ordinary value. Greater skill and diligence are exacted in driving a locomotive than in driving a road wagon. *Carter v. Chambers*, 79 Ala. 223, 230.

Diligence is a relative term, to be judged of according to the nature of the subject to which it is to be directed. Whether a man has exercised the diligence required of him by law in discharging an agency, or not, must be determined by all the considerations surrounding the agency. The circumstances, the general customs of the trade, the course of business of that particular line or character of trade, the common habits of business in the particular matter or article, the situation of the parties, and the way the principal and agent deal with each other, are all to be considered. *Elchel v. Sawyer* (U. S.) 44 Fed. 845, 847.

Ordinary diligence has been defined by Judge *Story* to be "that degree of care which men of common prudence generally exercise in their affairs, in the country and the age in which they live." These last words are quite material, quite important, in this case. "In the country and in the age in which they lived." Thus what might be ordinary diligence in one country and in one age may, at

another time and in another country, be negligence, even gross negligence. *Erie Bank v. Smith* (Pa.) 3 Brewst. 9, 14.

Diligence is a relative term, and must be proportionate to the danger against which it is required to guard. More active diligence is required to conduct a locomotive through the streets of a populous town than is necessary to guide a sled drawn by oxen in an unfrequented place. The degree of ordinary care implies a higher state of mental activity in one case than in the other. It demands more skill and science to guide a ship on the ocean than a mud scow in a harbor. With regard to the degree of care or diligence which are recognized in the law Sir Wm. Jones says: "There are infinite shades, from the slightest momentary thought or transient glance of attention to the most vigilant anxiety and solicitude." *Brand v. Schenectady & T. R. Co.*, 8 Barb. 368, 378.

No general standard by which the diligence required of an inventor in applying for and procuring a patent on his invention has been established, by law, nor in the nature of things is such a standard possible. It must be reasonable under the circumstances of the particular case in question. The character of the invention, the help, the means, the liberty of the inventor, his occupation upon kindred or subordinate inventions, are proper subjects for consideration. Such reasonable diligence does not involve uninterrupted effort, nor concentration of his entire energies upon the single enterprise. *Von Schmidt v. Bowers* (U. S.) 80 Fed. 121, 143, 25 C. C. A. 323.

#### DILIGENT INQUIRY.

Where a notary, who had protested a bill of exchange, testified that he made diligent inquiry as to the drawer's place of residence, he testified that as a matter of fact he made a careful, thorough, and business-like inquiry. *Carrol v. Upton*, 3 N. Y. (3 Comst.) 272, 274.

It is diligent inquiry regarding the residence of an indorser of a negotiable note, for the purpose of giving notice of protest, to inquire of such persons, at the place where the bill or note is payable, as may reasonably be supposed capable of giving the required information. *Marsh v. Barr*, 19 Tenn. (Meigs) 68, 70.

The diligent inquiry required of the holder of a bill in seeking the indorser must be such ordinary or reasonable diligence as men of business usually exercise when their interest depends upon obtaining correct information. *Garver v. Downie*, 33 Cal. 176, 182.

Rev. St. 1891, c. 120, § 216, excusing personal service of tax notice where the party to be assessed cannot upon diligent inquiry be found in the county, means such inquiry as a

diligent man, intent upon ascertaining a fact, would usually and ordinarily make—inquiry with diligence and in good faith to ascertain the truth. *Glos v. Sankey*, 36 N. E. 628, 635, 148 Ill. 536, 23 L. R. A. 665, 39 Am. St. Rep. 196.

#### DILIGENT SEARCH.

The term "diligent search," as used in the return of an officer on an execution, reciting diligent search for the debtor, means reasonable effort to find him. *In re Bayley*, 132 Mass. 457, 461.

#### DIMENSION STONE.

Where a lease of a stone quarry provides for one rate of compensation for dimension stone shipped, and another lower rate for all other stone, it must be conclusively presumed that the parties to the lease, who were both experienced quarrymen, used the term "dimension stone," which is a term of art, in its technical sense, and as would be ordinarily understood by quarrymen, in the absence of anything in the lease itself indicating that they use it in any other sense. *Crawford v. Oman & Stewart Stone Co.*, 12 S. E. 929, 930, 34 S. C. 90, 12 L. R. A. 375.

#### DIMINISH.

The power of increasing or diminishing the number of judicial districts and judges, given to the Legislature by Const. art. 6, § 5, is not a power to entirely deprive a district of any judge. To "diminish" means to make less, not to utterly wipe out. Therefore the authority to diminish the number of judges does not apply where a district has but one judge. *State v. Kinkad*, 14 Nev. 117, 123.

#### DIMINISHED USE.

In an action for damages for diversion of water from plaintiff's well, the court charged that, if the water could not have been obtained from said well by the use of plaintiff's appliances at a reasonable and moderate cost, the plaintiff would be entitled to recover as damages the value of the diminished use of said property during the time that she was entitled to the use. It was contended that the instruction should have read "diminution of the use," instead of "diminished use." The court held that "technically it may be true that 'diminished use' should be held to refer to the value of the use remaining after the diminution had taken place," but that the words "diminished use," taken in connection with the rest of the instructions, should be construed as practically synonymous with the words "diminution of the use," and to mean the same thing. *Willis v. City of Perry*, 60 N. W. 727, 732, 92 Iowa. 297, 26 L. R. A. 124.

**DIP.**

See "Compass Dip"; "Inclination Dip"; "Practical Dip."

Dip is the direction of a vein as it goes downward into the earth; the dip in different veins and in the same vein varying from a perpendicular to the earth's surface to an angle perhaps only a few degrees below the horizon. The dip is spoken of from three different points of view: (1) As to its inclination from a perpendicular to the horizontal, as so many degrees from the perpendicular or from the horizontal. A vein is thus described as having a dip of 20 degrees, 30 degrees, etc. (2) As to the direction it takes from the strike or apex by the points of the compass. If the strike were due east and west, and the vein in its course downward departed from the perpendicular at an angle so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip in this point of view would be said to be due north; or, the conditions reversed, due south. In this respect the dip—that is, the direction of the dip—is said to be, and is, at right angles to the strike. (3) The dip is again spoken of as portions of the vein successively encountered in going down and away from the apex. The miner follows the dip when he works downward leaving the apex further from and above him at each advance. *King v. Amy & Silversmith Consol. Min. Co.*, 24 P. 200, 202, 9 Mont. 543.

The term "dip," as used in mining, means the downward course of a vein. "Dip" and "depth" are of the same origin. Dip is the direction or inclination toward the depth; that is, toward the depth that veins may be followed, and that is surely their downward course. Mr. Riotte gives us a different definition. He says: "Starting upon any line upon the apex of the vein, and running down the vein parallel to the end lines of the location, the inclination that the line has is the downward course of the vein." *Duggan v. Davey*, 26 N. W. 887, 901, 4 Dak. 110.

**DIPLOMA.**

A diploma is said to be a document bearing record of a degree conferred by a literary society or educational institution; in short, a statement in writing under the seal of the institution, setting forth that the student therein named has attained a certain rank, grade, or degree in the studies he has pursued. *State v. Gregory*, 83 Mo. 123, 130, 53 Am. Rep. 565.

A diploma is an instrument, usually under seal, "conferring some privilege, honor, or authority; almost wholly restricted to certificates of degrees conferred by universities and colleges." *Hallday v. Butt*, 40 Ala. 178, 183 (quoting Worcester's Dict.).

The words "license, diploma, or certificate of qualification," in a statute making it criminal to practice medicine without having first obtained a license or diploma or certificate of qualification, were considered in the case of *Brooks v. State*, 6 South. 902, 88 Ala. 122, and it was held that the words did not refer to and mean the same thing. *Nelson v. State*, 12 South. 421, 422, 97 Ala. 79.

**DIPLOMATIC OFFICER.**

The term "diplomatic officer," when used in the title relating to diplomatic and consular officers, shall be deemed to include ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, charges d'affaires, agents, and secretaries of legation, and none others. U. S. Comp. St. 1901, p. 1150.

**DIPSOMANIA.**

Dipsomania is an insatiable thirst, intensified by long indulgence. *State v. Potts*, 6 S. E. 657, 659, 100 N. C. 457.

Dipsomania is an irresistible impulse to indulge in intoxication, either alcohol or other drugs—opiums. This mania, or dipsomania, is classed as one of the minor forms of insanity. Repeated intoxication for a number of years, which is entirely voluntary, is not dipsomania. One having the power to refrain from the use of intoxicants, and who becomes intoxicated voluntarily, is not affected with dipsomania. *Ballard v. State*, 28 N. W. 271, 273, 19 Neb. 609.

Dipsomania, or alcoholism, is a disease caused from excessive indulgence in drink. It oftentimes develops into what is called by medical men "mania a potu," wherein the patient becomes a madman, wholly deprived of all sane reason, while the fit is upon him. In that condition he is not legally responsible for his actions, being treated as insane. As the disease has created for him, in his imagination, a totally new existence, the reason which before controlled his conduct no longer exists, but a new and perverted one has taken its place. The will power which attended it has gone with the reason itself. So it is in the case of the mere hard drinker, who, a victim of the disease of dipsomania, loses control of his will with respect to restraint of his thirst for liquor; and though he may be perfectly sane, and have complete control over himself generally, yet from his disease, or passion for drink, and the momentary relief indulgence of it gives his morbid feelings of despondency, he has entirely lost control of himself with respect to such indulgence, and drink he must and will in spite of his reason, his past experience, and the warnings his physician and friends give him. He drinks, not because of desire to taste stimulants, but because his disease de-

mands of him that he get relief at any hazard. *State v. Reidell* (Del.) 14 Atl. 550, 551, 9 Houst. 470.

## DIRECT.

The term "direct," as defined by Webster, means "immediate; express; unambiguous; confessed; absolute." *People v. Boylan* (U. S.) 25 Fed. 594, 595.

An agreement by one hiring a team to go to a certain place to go direct to such place does not necessarily imply an engagement to go the shortest way, but merely to go by some usual and expeditious route, without diverging therefrom. The doctrine that a person who hires a horse for a specified journey is liable for conversion if he drives the horse further than the stipulated journey, or on another and different trip, cannot be pressed so far as to make the hirer chargeable as for a tort merely by reason of slight and immaterial departures from the general course of the direction outlined in the contract. *Young v. Muhling*, 63 N. Y. Supp. 181, 183, 48 App. Div. 617.

Either of the words "wish," "desire," "command," or "direct" are apt words to be used in a will to show testator's intent to make a will. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

St. 55 Geo. III, c. 184, sched. pt. 3, tit. "Legacies," subjecting legacies payable on the proceeds of "real estate directed to be sold" by a will to a tax, would include real estate devised to trustees in trust to convey the same among certain persons, mentioned in the will, in equal proportions, in severalty, and empowering the trustees, for the purpose of such division and partition, to sell any part of the lands and to stand possessed of the money arising from such sales. *Attorney General v. Simcox*, 1 Exch. 749, 768.

The word "direct," as used in an insuring clause, "against all direct loss or damage by fire, except as hereinafter provided for," qualifies, not alone "loss," but also "damage by fire," and the phrase has precisely the same meaning as if the insurance was "against loss or damage by fire direct." *Hustace v. Phenix Ins. Co.*, 67 N. E. 592, 593, 175 N. Y. 292, 62 L. R. A. 651.

Where a charter provided that the vessel was to proceed direct to load on the charter, the word "direct" meant that the vessel was to proceed without unreasonable delay and by the usual route, and the contract would have been the same if the word "direct" had been left out. *The Onrust* (U. S.) 18 Fed. Cas. 728, 783.

As used in a contract by which one of the parties had sold his interest in a stage line to the other parties and pledged himself not to be concerned, "direct or indirect," in any line of stages in opposition to them, the

quoted words are used for the special purpose of guarding against any kind of interference in the business of the parties operating the stage line by aiding or in any manner permitting the establishment of or carrying on any opposition. The word "direct" is to be so construed that the party could not set up or carry on, or knowingly aid or intermeddle in any way whatsoever, or be concerned in setting up or carrying on, any line of stages in opposition to his vendees. *Davis v. Barney* (Md.) 2 Gill & J. 382, 402.

### As command or order.

Laws 1892, c. 481, § 12, providing that the proper officers of the city of Brooklyn are authorized and directed to issue water bonds sufficient to pay the award in condemnation proceedings, means that the officers are ordered, and has the same force as an order given to a soldier, whose only answer is obedience. *People v. Guggenheimer*, 59 N. Y. Supp. 913, 922, 28 Misc. Rep. 735.

Where commissioners are directed to pave any street on the application of the lot holders, no discretion is included. *Spring Garden Com'rs v. Wistar*, 18 Pa. (6 Harris) 195, 198.

Under a will providing that the executors shall sell the land, a majority of the heirs so "directing," the word imports an order before the power to sell can be exercised. *Potter's Ex'rs v. Adriance*, 44 N. J. Eq. (17 Stew.) 14, 17, 14 Atl. 16.

As used in a will directing the doing of certain things, "direct" is a mandatory word, unless controlled by something in the context indicating otherwise; and the fact that discretion is given in the execution of the direction is not sufficient to change the mandatory sense. *Collister v. Fassitt*, 39 N. Y. Supp. 800, 801, 7 App. Div. 20 (reversing 38 N. Y. Supp. 601, 16 Misc. Rep. 395).

The definition of the word "direct," as given by Webster, is "to order; to instruct; to point out a course of proceedings with authority; to command." But direction may be given or a course of proceedings may be pointed out with authority in a will by implication as certainly as by explicit instructions. A clear implication of the testator's intention is as binding upon the court as his express direction, and under Pub. St. c. 189, § 2, providing that the personal estate shall stand charged for debts and expenses in the first instance, unless the deceased has otherwise directed, the word requires no more than that the plain intention or the necessary implication of the will shall exonerate the personal estate. *Calder v. Curry*, 17 R. I. 610, 615, 24 Atl. 103.

### As immediate.

The provision of a charter party that "it is understood that the vessel is now loading for K. or T., and is to proceed thence direct



to load on this charter," meant that the vessel is to take a direct course to the port or ports at which she must load under the charter party, without deviation or unreasonable delay, but did not mean that the vessel should depart from T. instantly or immediately, but that she should at that place enter on the voyage provided for in the charter and proceed in a direct course to the place of loading. *The Onrust* (U. S.) 18 Fed. Cas. 734, 735.

#### Natural and proximate synonymous.

In the statement of the rule that one is not liable for the results of an act, unless the act was the natural and proximate cause of the injury, the word "direct" is often used as synonymous with "natural" and with "proximate." *Lovett v. City of Chicago*, 35 Ill. App. 570, 571.

#### As point out.

"Direct," as used in Act 1863, providing that the court to which the record is remitted is to pass such sentence as the appellate court shall direct, means to point out a law providing for the punishment, and direct the court below to sentence thereunder. *People v. Bork*, 96 N. Y. 183, 202.

Code Civ. Proc. § 1022, provides that the report of a referee must direct the judgment to be entered thereon. Held, that the word "direct," as used in this connection, is synonymous with the words "to point out; to guide; to show; to regulate." *Webst. Internat. Dict.* And hence it cannot be held that the Legislature thereby intended that the referee should formulate the judgment, and that the only requirement was that the report should be sufficiently full to show the particular form and terms of the judgment to which the successful party was entitled thereunder. *Hinds v. Kellogg*, 13 N. Y. Supp. 922, 923.

The verb "direct" ordinarily implies a pointing out with authority, or directing as a superior, and as used in a contract by an attorney with a client for a percentage of the recovery as compensation for his services, providing that no settlement shall be made unless he is present and directs it, is used in such sense, thus limiting the client's control over the action, and does not mean to guide or advise. *Davis v. Chase*, 64 N. E. 88, 89, 159 Ind. 242, 95 Am. St. Rep. 294.

#### As require.

The word "directing," in Code, § 346, providing that "a notice of appeal from a judgment directing the payment of money shall not stay the execution of the judgment unless a stay of execution is granted," amounts to neither more nor less than the word "require." When a tribunal invested with the power to enforce its mandates directs by its judgment a payment of money, it is equivalent to saying that it required

the payment of such money, and in this connection the two words may be used interchangeably. *Pelzer Mfg. Co. v. Cely*, 18 S. E. 790, 791, 40 S. C. 430.

#### As wish.

The term "direct," as used in a will creating a trust, is used in the same sense as "wish" or "will." *Bliven v. Seymour*, 88 N. Y. 469, 476.

#### DIRECT ATTACK.

"A direct attack upon a judgment," says Mr. Justice Cooke in *Pope v. Harrison*, 34 Tenn. (16 Lea) 82, "is by appropriate proceedings between the parties to it, seeking, for sufficient cause alleged, to have it annulled, reversed, vacated, or declared void." *Meinert v. Harder*, 65 Pac. 1056, 1058, 39 Or. 609.

A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of same in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc. An attack in trespass to try title by devisees against a purchaser at a sale by the executor, or the judgment of a probate court having jurisdiction over plaintiff which confirmed the sale, is not a direct, but a collateral, attack. *Crawford v. McDonald*, 33 S. W. 325, 327, 88 Tex. 626.

The phrase "direct attack," in a statement that upon a direct attack on a judgment there is no presumption in favor of the existence of a fact essential to the jurisdiction of the court, refers to appeals from the judgment. *Eichhoff v. Eichhoff*, 40 Pac. 24, 25, 107 Cal. 42, 48 Am. St. Rep. 110.

Where a statutory method is pursued for avoiding a judgment, the attack on the judgment is direct. *Spencer v. Spencer*, 67 N. E. 1018, 1020, 31 Ind. App. 321.

#### Collateral distinguished.

When the validity of a record attacked is directly put in issue by the pleadings of the party attacking it by proper averment, the attack is direct, and not collateral; but when there are no proper averments attacking the record, although its validity is drawn in the issue of the case, the attack is collateral. *Walker v. Goldsmith*, 12 Pac. 537, 553, 14 Or. 125.

A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. In *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155, 23 Am. St. Rep. 95, a collateral attack is aptly defined to be "an attempt to impeach a decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree, or enjoining its execu-

tion." It follows, therefore, that if the proceeding was instituted for any one of these express purposes it would be a direct attack. *Smith v. Morrill*, 55 Pac. 824, 826, 12 Colo. App. 233.

A direct attack upon a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same, in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc., while a collateral attack is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effects, etc. Thus, where a plaintiff in an action to recover land sought to set aside on the ground of fraud judgments in partition affecting their title, all parties to the judgments were made parties to the action, the tribunal in which the pending action was brought had rendered the judgments, and had jurisdiction to set them aside. The attack on the judgments was not collateral, but direct, though third parties, defendants to the action, claiming under the judgments, had become possessed of the land. *Schneider v. Sellers*, 61 S. W. 541, 543, 25 Tex. Civ. App. 226.

#### DIRECT CAUSE.

By the words "direct and proximate cause" are meant the cause which naturally led to and might have been expected to be directly instrumental in producing the result complained of. *McKeon v. Chicago, M. & St. P. Ry. Co.*, 69 N. W. 175, 177, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910.

By "direct and proximate cause" is not meant the cause or agency which is nearest in time or place to the result, necessarily. "The active efficient cause, that sets in motion a train of events which brings to a result, without the intervention of any force started and working actively from a new and independent source, is the direct and proximate cause." *Lynn Gas & Electric Co. v. Meriden Fire Ins. Co.*, 33 N. E. 690, 691, 153 Mass. 570, 20 L. R. A. 297, 35 Am. St. Rep. 540.

The direct cause may not be the proximate cause, and the proximate cause may not be the direct cause. Neither time nor distance is essentially a controlling element in determining whether a certain cause of an injury is the proximate cause of such injury; so that an instruction that the words "direct" and "proximate" mean about the same thing, mean the cause which naturally produced the accident, is erroneous. *Wills v.*

*Ashland Light, Power & Street Ry. Co.*, 84 N. W. 998, 1000, 108 Wis. 255.

The direct cause of an injury is one without which the injury would not have happened. Such was the sense in which the word "directly" was used in an instruction in an action for damages for an injury occasioned by collision between two vessels, stating that the plaintiff would not be entitled to recover if by his negligence he had directly contributed to the accident. *Tuff v. Warman*, 5 C. B. (N. S.) 573, 586.

#### DIRECT CONSANGUINITY.

The series of degrees between persons who descend from one another is called direct, or lineal, consanguinity. Civ. Code Mont. 1895, § 1856; Civ. Code Cal. 1903, § 1390; Rev. Codes N. D. 1899, § 8747.

#### DIRECT CONTEMPT.

Direct contempts are contempts offered to a court while sitting as such and in its presence. *Stuart v. People*, 4 Ill. (3 Scam.) 395, 404; *Cooper v. People*, 22 Pac. 790, 796, 13 Colo. 337, 6 L. R. A. 430; *Territory v. Murray*, 15 Pac. 145, 148, 7 Mont. 251; *Stewart v. State*, 39 N. E. 508, 140 Ind. 7; *State v. Anders*, 68 Pac. 668, 669, 84 Kan. 742.

"A direct contempt is an open insult in the face of the court, in the presence of the judges while presiding, or a resistance to its powers in their presence." *Ex parte Wright*, 65 Ind. 504, 508. See, also, *Holman v. State*, 5 N. E. 556, 557, 105 Ind. 513; *Whittem v. State*, 36 Ind. 196, 198.

Direct contempts are such as are committed in the presence, or such as obstruct or interrupt the proceedings, of the court. *State v. McClaugherty*, 33 W. Va. 250, 253, 10 S. E. 407, 408.

Direct contempts are those which are committed in the presence of the court while in session, or so near as to interrupt its proceedings. *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 177 Mo. 205.

A direct contempt is an act committed in the presence of the court, while sitting judicially, or so near to the court as to interfere with or stop its ordinary way of procedure. *Indianapolis Water Co. v. American Strawboard Co. (U. S.)* 75 Fed. 972, 975; *Snyder v. State*, 52 N. E. 152, 151 Ind. 553.

Where attorneys during a court day, but while it was not in session, held a meeting at which one of their number presided in a room in the courthouse adjoining the courtroom, and occasionally used as a courtroom, which meeting was attended by the judge at their request, their acts in his presence are not committed in the presence of the court, and hence cannot constitute direct

contempt. *Snyder v. State*, 52 N. E. 152, 151 Ind. 553.

To constitute a direct contempt of court there must be some disobedience to its powers, judgment, or process, or some open and intended disrespect to the court or its officers in the presence of the court, or such conduct in or near the court as to interrupt or interfere with its proceedings or with the administration of justice. *In re Dill*, 5 Pac. 39, 47, 32 Kan. 668, 49 Am. Rep. 505.

Contempts are either direct, which openly insult and resist the powers of the court or the persons of the judges who preside there, or else are consequential, which without such gross insolence or direct opposition plainly tend to create a universal disregard of other authority. A direct contempt is one offered in the presence of a court while sitting judicially. A constructive contempt is one which tends to obstruct or embarrass a court, though the act be not done in its presence. *State v. Hansford*, 28 S. E. 791, 792, 43 W. Va. 773; *State v. Henthorn*, 26 Pac. 937, 938, 46 Kan. 613; *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 49 Me. 392, 400.

#### DIRECT DAMAGES.

Direct damages are such as flow immediately upon the act done. *Civ. Code Ga.* 1895, § 3911.

#### DIRECT EVIDENCE.

Direct evidence is given where a witness testifies directly of his own knowledge of the main fact or facts to be proven. *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. Tate*, 56 S. W. 1099, 1100, 156 Mo. 119; *State v. Dickson*, 78 Mo. 438, 441.

"Direct or positive evidence is given when a witness can be called to testify to the precise fact which is the subject of an issue on trial." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 310, 52 Am. Dec. 711; *People v. Morrow*, 60 Cal. 142, 144.

Evidence is direct and positive where the particular facts in dispute are communicated by those who have actual knowledge of them by means of their senses. *Pease v. Smith*, 61 N. Y. 477, 484.

Direct evidence is that which in the first instance applies directly to the *factum probandum*. *Beason v. State*, 67 S. W. 96, 98, 43 Tex. Cr. R. 442.

Direct evidence is that which immediately points to the question at issue. *Civ. Code Ga.* 1895, § 1543; *Pen. Code Ga.* 1895, § 983.

Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact; for example, if the fact in dispute be an agree-

ment, the evidence of a witness who was present and witnessed the making of it is direct. *Code Civ. Proc. Cal.* 1903, § 1831; *Ann. Codes & St. Or.* 1901, § 684. Thus where, on a trial for murder, the identity of the person alleged to have been guilty was proved by the direct evidence of an accomplice, corroborated by circumstantial evidence. The death of a human being was proved by the identification of certain teeth and charred bones found in a river near the point where the body was burned, and there was circumstantial evidence to prove the identity of the deceased. The evidence was sufficient to satisfy the requirements of *Pen. Code*, § 358, that the death of a person alleged to have been killed must be established by direct proof as an independent fact. *State v. Calder*, 59 Pac. 903, 904, 23 Mont. 504.

1 *Greenl. Ev.* § 13, defines direct evidence as being given when the thing to be proved is directly attested by those who speak from their own actual and personal knowledge of its existence; circumstantial, when the thing to be proved is to be inferred from other facts satisfactorily proved. See, also, *Wills*, on *Cir. Ev.* c. 2, § 1. And in a case of homicide direct proof of death would have been testimony of a witness who knew the person killed in his lifetime, and who would testify that the body found was the body of such person. *People v. Palmer*, 11 N. Y. St. Rep. 817, 820.

Under the rule that a contract for testamentary compensation for work done by a father for a son, after his majority, can be proved only by direct and positive evidence, a charge that the evidence must be clear and satisfactory is erroneous; the words not being synonymous. *Bash v. Bash*, 9 Pa. (9 Barr) 260, 262.

#### DIRECT EXAMINATION.

The examination of a witness by the party producing him is denominated the "direct examination"; the examination of the same witness upon the same matter by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct. *Ann. Codes & St. Or.* 1901, § 846.

#### DIRECT INJURY.

The phrases "direct injury" and "consequential injury" are not of the same meaning as "direct damages" and "consequential damages." The latter phrases are of the terminology of damages and the measure of damages, while the former are not, but are of the terminology of injuries. To illustrate, a direct injury may, in addition to direct damages, do indirect, or, as it is often more loosely phrased, consequential, damages; and the latter are recoverable as well as the for-

mer, unless they be not "proximate," but "remote," to use two other words which belong to the terminology of damages. In the case of a direct injury the measure of damages includes both direct and indirect or consequential damages, but in the case of consequential injuries, there are no recoverable damages at all. Consequential damages can only result from a direct injury, while no actionable damages of any kind result from a consequential injury. *Sadler v. City of New York*, 81 N. Y. Supp. 308, 312, 40 Misc. Rep. 78.

#### DIRECT INTEREST.

A direct interest, as relating to the competency of a witness in a suit against an executor, is the opposite of an indirect interest, and excludes the idea of contingency. A direct interest is defined in *Winfield, Words & Phrases*, p. 195, as "one which is certain, and not contingent or doubtful." In *Black's Law Dictionary* it is defined: "A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain, and not contingent or doubtful." In *re Van Alstine's Estate*, 72 Pac. 942, 943, 26 Utah, 193.

#### DIRECT LINE.

See "By Direct Line."

The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestor with those who descend from him. The second is that which connects a person with those from whom he descends. *Rev. Codes N. D. 1899*, § 3748.

#### DIRECT LOSS.

In an insurance policy, providing that the insurer would be liable if the falling of the insured building was caused by a direct loss or damage by fire, the word "direct" means merely immediate or approximate, as distinguished from remote; and where a building fell because a portion of the building was burned and fell, thereby causing the partition wall to fall, the loss was direct. *Ermentrout v. Girard Fire & Marine Ins. Co.*, 65 N. W. 635, 636, 63 Minn. 305, 30 L. R. A. 346, 56 Am. St. Rep. 481.

"Direct loss or damage by fire," as used in a fire policy against direct loss or damage by fire, applies to all losses of which fire is the immediate cause. *California Ins. Co. v. Union Compress Co.*, 10 Sup. Ct. 365, 133 U. S. 387, 33 L. Ed. 730.

In a policy of insurance, direct loss or damage by fire meant the loss or damage occurring directly from the fire as the destroying agency, in contradistinction to the remoteness of fire as such agency. Remoteness of agency is the explosion of gunpowder, gases,

or chemicals caused by fire; explosion of steam boilers; the destruction of buildings to prevent the spread of fire; or their destruction through the falling of burning walls, etc. *California Ins. Co. v. Union Compress Co.*, 10 Sup. Ct. 365, 372, 133 U. S. 387, 33 L. Ed. 730.

#### DIRECT PAYMENT.

The term "direct," as defined by Webster, means "immediate, express, unambiguous, confessed, absolute." The word "direct," in the English language, is one of wide acceptance, and has been adopted into the law in many relations. Thus, we have "direct descent," "direct taxes," "direct interest," "direct route," and "direct payment"; and as used in the latter term it means one which is absolute and unconditional as to time, amount, and the persons by whom and to whom it is to be made. *People v. Boylan* (U. S.) 25 Fed. 594, 595.

The phrase "direct payment of money," as used in Code, § 92, which provides that in all actions brought on overdue promissory notes, bills of exchange, or other written instruments for the direct payment of money, and upon book accounts, the creditor may have a right of attachment entered, means such instruments as provide for the immediate payment of money, such as overdue bills of exchange and promissory notes. *Hurd v. McClellan*, 23 Pac. 792, 793, 14 Colo. 213.

#### DIRECT RESULT.

By direct result, as relating to the cause of an injury, is meant the first result or effect. *Story v. Chicago, M. & St. P. Ry. Co.*, 44 N. W. 690, 692, 79 Iowa, 402.

In an instruction, in an action for personal injuries, that the jury should assess such damages as were the direct result of defendant's negligence, "direct" is synonymous with "natural" and "proximate." *Lovett v. City of Chicago*, 35 Ill. App. 570, 571.

"Direct result," as used in the statement that the diseased mental condition of accused in a prosecution for murder was the direct and immediate result of voluntary drunkenness, means that such mental condition arose during a condition of drunkenness, and pending a single, continuous, voluntary, drunken debauch, which at its origin started with the accused in a condition of sanity. *State v. Haab*, 29 South. 725, 723, 105 La. 230.

#### DIRECT ROUTE.

Code, § 3788, provides that a sheriff shall be entitled to mileage for conveying convicts to the penitentiary at the rate of 16 cents for each mile traveled from the county seat to the penitentiary by the most direct route of travel. Held, that the term "most direct route of travel," as so used, meant the route

which was most generally used in journeying between the two places. Thus, where the route most generally used was a railway, which was much longer than an old wagon road, which was but seldom used, and then only by private conveyances, the sheriff was entitled to convey his prisoners by the railroad, and was entitled to compensation computed by that route, instead of by the shorter wagon road. *Maynard v. Cedar County*, 1 N. W. 701, 702, 51 Iowa, 430.

### DIRECT TAX.

A direct tax, within Const. art. 1, § 8, providing that no capitation or other direct tax shall be levied, unless in proportion to the census of the inhabitants of the United States, means a capitation or poll tax simply, without regard to property, profession, or any other circumstance, and a tax on land. *Hylton v. United States*, 3 U. S. (3 Dall.) 171, 174, 1 L. Ed. 556; *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 433, 445, 19 L. Ed. 95; *Scholey v. Rew*, 90 U. S. (23 Wall.) 331, 347, 23 L. Ed. 99; *Springer v. United States*, 102 U. S. 586, 602, 26 L. Ed. 253. The tax imposed by Act Cong. July 13, 1866, on notes of state banks, is therefore not a direct tax. *Veazie Bank v. Fenko*, 75 U. S. (8 Wall.) 533, 542, 19 L. Ed. 482.

Historical evidence shows that personal property, contracts, occupations, and the like have never been regarded as the subjects of direct taxation. The phrase is understood to be limited to taxes on land and its appurtenances, and on polls. *Veazie Bank v. Fenko*, 75 U. S. (8 Wall.) 533, 541, 19 L. Ed. 482.

A direct tax is a tax demanded from the very person who it is intended or desired should pay it. A tax assessed as a direct tax in this sense may nevertheless fall ultimately upon one other than the one desired to pay it. It is generally agreed that the greater part of a tax assessed against the landlord falls finally upon his tenant. So a tax upon mortgages upon land in the end proves to be a tax upon the borrower. In neither of these cases was it intended or desired that the burden of the tax should fall upon either the renter or borrower. Yet, though it may happen that the renter and borrower have in other forms fully paid their due proportion of tax, the unintended duplication of their burden will not make the tax which they have been indirectly compelled to pay double taxation. *South Nashville St. R. Co. v. Morrow*, 11 S. W. 348, 850, 87 Tenn. (3 Pickle) 406, 2 L. R. A. 853.

A tax upon rents and income of real estate is equivalent to a tax on the real estate itself, and is therefore a direct tax, within the constitutional prohibition. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 673, 889, 157 U. S. 429, 39 L. Ed. 759. Likewise

a tax on personal property or the income thereof. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 916, 158 U. S. 601, 39 L. Ed. 1108.

A tax on real estate is a direct tax on real property. *People v. Knight*, 67 N. E. 65, 66, 174 N. Y. 475, 63 L. R. A. 87.

### DIRECT TESTIMONY.

The term "direct testimony," or "positive testimony," is used to designate the testimony of those who speak of their own actual and personal knowledge of the fact in controversy. The proof in such case rests upon faith in the veracity, impartiality, opportunity for observation, accuracy of memory, etc., of the witnesses. The proof applies immediately to the factum probandum, without any intervening process. *State v. Miller* (Del.) 32 Atl. 137, 141, 9 Houst. 564.

### DIRECT TRUST.

A direct or express trust is one springing from the agreement of the parties, created by words, either expressly or impliedly evincing the intention to create a trust. It is distinguished from a constructive or implied trust, which is a trust created by equity law; a trust not created by any words either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice. *Currence v. Ward*, 27 S. E. 329, 330, 43 W. Va. 367.

### DIRECTION.

See "Express Direction"; "Under the Direction of."

In a plea alleging that plaintiff had the "direction, care, and management" of a ship, which defendant was charged with having neglected to load according to contract, was construed to mean the actual direction, care, and management, and not merely the legal direction, care, and management. It is equivalent to a charge of actual bad direction, care, and management, which included such conduct on the part of the master and crew. *Taylor v. Clay*, 9 Q. B. 713, 723.

The word "direction," as used in a contract by which a contractor agreed to build a sewer under the immediate direction and superintendence of the commissioner of public works, related to the results, and not to the methods to be employed, and did not, therefore, make the contractor a servant of the city, as being one who, though he is to have a stipulated price for a thing, executes it under the direction and superintendence of the employer. *Foster v. City of Chicago*, 64 N. E. 322, 323, 197 Ill. 264.

**As approval.**

In the acts of Congress granting lands to the Northern Pacific Railroad Company, and providing for the selection of indemnity lands "under the direction of the Secretary of the Interior," the term does not mean subject to the approval of that officer. "Direction," says Mr. Webster, is an "order prescribed, either verbally or written; instructions in what manner to proceed. The employer gives directions to his workmen; the physician, to his patient." Lord Coleridge, defining the phrase "under the direction of," says: "Work is done by the direction of the board, who were represented by the surveyor. It is done in the manner in which they should prescribe, and is therefore done under their direction." *Newton v. Ellis*, 5 El. & Bl. 124. To make the selections "under the direction of the Secretary of the Interior" is to make them in accordance with the rules and regulations prescribed by him. *Northern Pac. R. Co. v. Barnes*, 51 N. W. 386, 403, 404, 2 N. D. 367.

**As authority to control.**

The word "direction," in the clause in Rev. Laws, § 819, providing that writs shall be issued by the clerks under the direction of the judges, is to be construed in the sense of authority to direct as circumstances may require only, and not as requiring "direction" in order to confer authority on the clerk to act. *In re Durant*, 12 Atl. 650, 652, 60 Vt. 176.

"Direction," as used in Rev. St. §§ 441, 453, 2478 [U. S. Comp. St. 1901, pp. 252, 257, 1586], providing that the Commissioner of the General Land Office is to perform, under the direction of the Secretary of the Interior, all executive duties, etc., is intended as an expression in general terms of the power of the Secretary to supervise and control the operations of the Land Department, of which he is the head. It means that in important matters, relating to the sale and disposition of the public domain, the surveying of private claims, and the issuing of patents thereon, and the administration of the trust devolving upon the government by reason of the laws of Congress or under treaty stipulations, the Secretary of the Interior is the supervising agent of the government, to do justice to all claimants and preserve the rights of the people of the United States. *Warner Valley Stock Co. v. Smith*, 17 Sup. Ct. 225, 227, 165 U. S. 28, 41 L. Ed. 621 (citing *Knight v. United Land Ass'n*, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737).

Where defendant contracted with a local board of health to dig wells for them according to a specification prepared by the surveyor, the works to be done to the satisfaction of such surveyor, the digging to be under

his direction, and he to have power of making the contractor remove materials and power to dismiss workmen, defendant was "a person acting under the direction of the board of health" within St. 11 & 12 Vict. c. 63, § 139, providing that no process should be sued out against any person acting under the direction of the board of health until one month after notice had been delivered to him. *Newton v. Ellis*, 5 El. & Bl. 115, 123.

**As general instructions.**

Several actions for a nuisance occasioned by the defendant's dam were referred under a rule of court, accompanied with an agreement that the referees might decide how much the dam should be cut down, and that the same should be done "under their direction." Held, that the phrase "under their direction" meant that they should give general instructions as to the manner of cutting down the dam. *Berkshire Woolen Co. v. Day*, 66 Mass. (12 Cush.) 128, 130.

**As guardianship.**

A devise providing that the executors shall have control and direction over a son meant that they should have the power of guardianship over the son. *Rock River Paper Co. v. Fisk*, 10 N. W. 344, 346, 47 Mich. 212.

**DIRECTLY.**

Under Comp. St. c. 18, § 146, providing that every unorganized county shall be attached to the nearest organized county directly east for election, judicial, and revenue purposes, where about one-half of the eastern boundary of an unorganized county was an organized county of the state and the remainder of such eastern boundary was another state, the whole of such unorganized county was attached to such organized county, and not merely the portion thereof which was directly west of the organized county. *State v. Van Camp*, 54 N. W. 113, 116, 36 Neb. 13.

A contract for the sale of a lumber business, which provides that the seller shall not "engage in the lumber business, directly or indirectly," at the town where the business sold is situated, means not only engaging in the business on his own behalf, but engaging in the service of a rival dealer, for the purpose of soliciting and making sales. *Nelson v. Johnson*, 36 N. W. 868, 38 Minn. 255.

"Directly," as used in a statute relating to the obtaining of a settlement by a pauper coming directly from some foreign port or place into the state, means coming from some port or place out of the United States, without passing through either of the sister states into the state. *Stillwater Tp. v. Green Tp.*, 9 N. J. Law (4 Halst.) 59, 63 (citing *Overseers of Chatham v. Overseers of Middlefield* [N. Y.] 19 Johns. 56).

**As a direct course.**

Within instructions to British cruisers to seize all ships laden with goods from Spanish ports, and going directly from them to any port in Europe, does not mean going in a direct course, which would be an absurd construction. Then nothing would be necessary to evade the order but going out of the direct course. The meaning is "going in a direct voyage." A voyage may be direct, and the course indirect. Whether the voyage is direct is a matter of fact, to be determined from the exigencies of the case. The British courts have held that the directness of the voyage from the Spanish colony to the mother country is broken by a bona fide importation into the United States, and there is no instance of any importation being bona fide without landing the goods. *Kohne v. Insurance Co. of North America (Pa.)* 6 Bin. 219, 225.

**As immediately.**

Act April 8, 1801 (1 K. & R. Laws, p. 566; Laws 24th Sess. c. 184) § 2, declares that all mariners coming into the state, and having no settlement in the state or in any of the United States, and every other person coming directly from some foreign port or place into the state, shall be deemed to be legally settled in the city or town in which they shall have first resided for the space of one year. Held, that the word "directly" means coming from some port or place out of the United States, without passing through either of the sister states. *Overseers of Chatham v. Overseers of Middlefield (N. Y.)* 19 Johns. 56, 57.

Act 1774, providing that a healthy person coming directly from Europe into the state should be legally settled in the township in which he should first settle and reside for one year, cannot be construed to apply to a pauper who came to New Jersey from the state of New York nearly two months after he landed from Europe. It would be a perversion of language and a denial of any signification or force to the word to say that he came directly from Europe. *Stillwater Tp. v. Green Tp.*, 9 N. J. Law (4 Halst.) 59, 63.

**As proximately.**

An instruction, in an action for death, that unless the death was caused directly by the acts of the defendant he could not be held liable, meant that unless the death was proximately caused, etc. *McLean v. Burbank*, 11 Minn. 277, 290 (Gil. 189, 199).

"Directly," as used in the Washington water tunnel act (22 Stat. 168), providing for compensation to persons directly injured in any property rights, must be understood in its colloquial sense, and means proximate and actual. *Lyons v. United States (U. S.)* 26 Ct. Cl. 31, 42.

Within an instruction that plaintiff's contributory negligence only could relieve the liability of defendant, and must have directly contributed to his injury, "directly" means approximately, which is the technical and more accurate word used by text writers, and in the opinion of courts generally, where the effect of plaintiff's contributory negligence is scientifically discussed; but in this connection the two words are synonymous. *Davis v. Spicer*, 27 Mo. App. 279; *Missouri, K. & T. Ry. Co. v. Lyons (Tex.)* 53 S. W. 96, 97; *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa, 45, 46.

**As in a straight line.**

The word "directly" is derived from the Latin "directus," straight, past participle of "dirigere," to set in a straight line. The primary idea is of space—in a straight line, rectilinearly, undeviating, etc. All the secondary meanings are analogous to the idea of straightness in space. The following are the primary definitions of the leading authorities. Cent. Dict.: "In a straight line or course, literally or figuratively; in a direct manner; rectilinearly." Bouv. Law Dict.: "Straightforward." Anderson, Law Dict.: "Straight; not circuitous; immediate; the first or original." An entrance to a barroom, requiring a circuitous or crooked route of travel from the highway to the barroom, is an entrance other than directly from the public traveled way. *State v. Conley*, 48 Atl. 200, 201, 22 R. I. 397.

**Reasonable time, or as soon as possible.**

In *Duncan v. Topham*, 8 C. B. 225, the proof showed that a contract provided that goods were to be shipped directly, and the court held that within a reasonable time was a much more protracted period than was meant by the word "directly." *Metropolitan Land Co. v. Manning*, 71 S. W. 696, 699, 98 Mo. App. 248; *Lewis v. Hojer*, 16 N. Y. Supp. 534, 536; *Sentenne v. Kelly*, 13 N. Y. Supp. 529, 530, 59 Hun, 512. There is also a distinction between "directly" and "as soon as possible." *Sentenne v. Kelly*, 13 N. Y. Supp. 529, 530, 59 Hun, 512.

**DIRECTLY INTERESTED.**

A juror, on being examined as to his qualifications, stated that he had formed an opinion as to the merits of the case from facts which he had heard from the parties directly interested in the case. Held, that this answer could not be considered to justify the court in holding that the juror's opinion was based on public rumor or common notoriety; that it might be conceded that the words "directly interested" are somewhat vague and indefinite, and did not necessarily refer to parties who were competent witnesses to the facts; but the words must be construed to import persons having better opportunities to know and state the facts of

the case than mere repeaters of public rumor. *People v. Wells*, 34 Pac. 718, 719, 100 Cal. 227.

### DIRECTLY TEND.

Where, on the trial of a prosecution for murder, the court, in instructing a jury, assumed to distinguish between the occurrences happening after the killing which did, and those which did not, directly tend to prove premeditation, the phrase "directly tend" had no different meaning than "tending." *State v. Anderson*, 10 Or. 448, 461.

### DIRECTOR.

See "Bank Director"; "De Facto Director"; "De Jure Director."  
All directors, see "All."

Directors are persons appointed or elected according to law, authorized to manage and direct the affairs of a corporation or company. *Brandt v. Godwin*, 3 N. Y. Supp. 807, 809.

A director is defined by Webster to be one who or that which directs, especially one of a body of persons who manages the affairs of a corporation. Thus, where the Grand Foreman of a fraternal order was by the constitution of the order to assist the Grand Master Workman, and in his absence preside over the lodge, he was a director of it, within the code provisions providing for service of summons on a director or other official of the corporation. *Balmford v. Grand Lodge A. O. U. W.*, 37 N. Y. Supp. 645, 646, 16 Misc. Rep. 4.

The term "director," as used in the chapter relating to crimes against property, embraces any of the persons who have by law the direction or management of the affairs of a corporation, by whatever name such persons are described in its charter or known by law. Pen. Code Idaho 1901, § 5023; Rev. Codes N. D. 1899, § 7536; Pen. Code S. D. 1903, § 691; Pen. Code Cal. 1903, § 572.

The term "director," as used in the chapter of the Penal Code relating to fraudulent insolvencies by corporations and other frauds in their management, includes any of the persons having by law the direction or management of the affairs of a corporation, by whatever name described. Pen. Code N. Y. 1903, § 614.

The term "directors," as used in the chapter relating to home, life and accident insurance companies, includes the persons duly appointed or designated to manage the affairs of the company. Rev. St. Tex. 1895, art. 3096a.

The word "directors," used in the article relating to general provisions concerning corporations, includes managers and trustees. Ky. St. 1903, § 575.

"Directors," as used in 1 Rev. St. p. 590, § 1, subd. 9, prohibiting the directors of a moneyed corporation from making loan or discounts to the "directors" of a corporation, or on paper on which they or any of them are responsible to an amount exceeding in the aggregate one-third of the capital stock of the company, means the corporation itself, or the board or body exercising the corporate franchises, by whom or under whose direction or authority alone these violations of the statute could occur. *Bank Com'rs v. Bank of Buffalo* (N. Y.) 6 Paige, 497, 502.

Directors are usually but consulting creditors. They are but occasionally at the place of business of a company, and it would produce endless confusion if we were to hold that a verbal notice, communicated to a director, not at the place of business of the company, but at his house or upon the street, or wherever he might happen to be at the time, is binding upon the company. *Bard v. Pennsylvania Mut. Fire Ins. Co.*, 153 Pa. 257, 262, 25 Atl. 1124, 34 Am. St. Rep. 704.

The directors of a corporation are its chosen representatives, and constitute the corporation to all purposes in dealing with others. What they do to further the purposes of the corporation, the corporation does. If they do an injury to another, though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong and answerable as an individual in such case. *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48, 91 Am. Dec. 872.

### As an agent or trustee.

Directors of a corporation are to be considered as agents or mandataries of the stockholders, and as such undertake the management of its affairs according to the rules prescribed by their charter and the by-laws made in pursuance thereof. *Campbell v. Watson*, 50 Atl. 120, 132, 62 N. J. Eq. 396.

A director of a corporation is a trustee for the entire body of stockholders, and both good morals and common law imperatively demand that he shall manage all the business affairs of the company, with a view to promote, not his own interests, but the common interests, and by assuming the office he undertakes to give his best judgment in the interests of the corporation in all matters in which he acts for it, untrammelled by any hostile interest in himself or others. *Bird Coal & Iron Co. v. Humes*, 27 Atl. 750, 752, 157 Pa. 278, 37 Am. St. Rep. 727.

The directors of a corporation are the mere agents of the stockholders. They are trustees and representatives charged with the exercise of all the powers of a corporation which do not involve fundamental changes in the purpose of its incorporators or in the relation of the stockholders. Louis-



ville Trust Co. v. Louisville, N. A. & C. R. Co. (U. S.) 75 Fed. 433, 449, 22 C. C. A. 378.

Under Burns' Rev. St. 1894, §§ 2922-2925, 2927, 2929, 2934, defining the powers and duties of the directors of a bank, directors are agents of the corporation, having general custody, control, and management of its property and affairs, and as such are liable for losses and waste of money and property through their gross inattention to the business of the bank, or their willful violation of their duties. This general supervision over the business and property of the bank should enable them to know the financial condition of the bank at all times, the character of the men employed, and the correctness of the accounts. They are the agents of the corporation, and as such are liable to account for all property which has been intrusted to their control or management. They are liable for losses or waste occurring through gross negligence or inattention to business, though not for mere errors of judgment. The borrowing of money and executing of worthless paper for the same, the transfer of bills receivable to preferred creditors, etc., by the president of a bank, and the fact that he was permitted to do so, constitutes such negligence and carelessness on the part of the directors of the bank as will render them liable for all such losses to the bank. *Coddington v. Canaday*, 61 N. E. 567, 572, 157 Ind. 243.

The directors of an incorporated company are not technically trustees. They are the agents of the company, and, so far as the doctrines in reference to trusts are applicable to the relations of principal and agent, the same will be enforced against the directors in favor of the corporation. *Charleston Ins. & Trust Co. v. Sebring* (S. C.) 5 Rich. Eq. 342, 345.

Directors of a corporation, such as a bank, are not express trustees. In this connection the court says: "The language of Special Judge Ingersoll, in *Shea v. Mabry*, 69 Tenn. (1 Lea) 319, that 'directors are trustees,' etc., is rhetorically sound, but technically inexact. It is a statement often found in opinions, but is true only to a limited extent. They are mandataries. They are agents. They are trustees, in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith. They do not hold the legal title, and more often than otherwise are not the officers of the corporation having possession of the corporate property. They are equally interested with those they represent. They more nearly represent the managing partners in a business firm than a technical trustee. At most they are implied trustees, in whose favor the statutes of limitation do run." *Wallace v. Lincoln Sav. Bank*, 15 S. W. 448, 453, 89 Tenn. (5 Pickle) 630, 24 Am. St. Rep. 625.

The directors of a bank of discount and deposit, incorporated under the statute, are not, at least in a technical sense, trustees, and it is said that they cannot be held to a very high degree of diligence in their management of the financial affairs of the bank. They usually serve without pay, and the general conduct of the business of the bank is necessarily intrusted to a large extent to the executive officers of the bank; but at the same time the directors are in a very emphatic sense officers of the corporation, and have large powers, which they can neither evade nor delegate. *Coddington v. Canaday*, 61 N. E. 567, 572, 157 Ind. 243.

Directors of a corporation are fiduciaries, and subject to the rule that persons standing in such relation will not be suffered to retain a personal profit out of transactions respecting the subject-matter of the trust, but will be compelled to account to their cestuis que trust therefor. *Forker v. Brown*, 30 N. Y. Supp. 827, 829, 10 Misc. Rep. 161.

A director of a stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency and with the beneficiary or party whose interest is confided to his care are regarded with jealousy by the courts. He must deal with the interest confided to his care with conscientious fairness, and will not be permitted to secure advantages by virtue of his position prejudicial to the interests he represents. The relative duties and obligations of managers and officers of a corporation to it and to its stockholders have been likened to those of trustee and cestuis que trust. *Glenwood Mfg. Co. v. Syme*, 85 N. W. 432, 434, 109 Wis. 355.

#### As executive officers.

See "Executive Officer."

#### As officers of corporation.

See "Officer (Of Corporations)."

### DIRECTORY STATUTE.

The distinction between directory statute and imperative statute is that a clause is directory when the provisions contain mere matters of deduction and nothing more, but not so when they are followed by such words as are used here, "that anything done contrary to such provision shall be null and void to all intents"; these words giving direct, positive, and absolute prohibition. A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute. *Nelms v. Vaughan*, 5 S. E. 704, 706, 84 Va. 696 (citing *Pearse v. Morrice*, 2 Adol. & E. 94). A statute authorizing the majority of judges in any county to request the Governor to direct a judge of a

superior court in any other county to hold a session of the superior court in the county mentioned is directory merely, and not imperative. *State v. Holmes*, 40 Pac. 735, 737, 12 Wash. 169.

A clause of a statute is directory when the provision contains mere matter of direction and no more, but not so when it is followed by words of positive prohibition. Prohibitory words can rarely, if ever, be directory. There is but one way to obey the command, "Thou shalt not," which is to abstain altogether from doing the act forbidden. Rev. St. arts. 1694, 1697, directing judges of election to write the voter's poll list number on the ballot, and forbidding the counting of an unnumbered ballot, is mandatory. *State v. Conner*, 23 S. W. 1103, 1107, 86 Tex. 133.

Statutes may be directory or imperative. The former prescribe privileges, and the latter impose duties. The former leave room for the exercise of a choice or discretion, while the latter are absolute and peremptory. *Payne v. Fresco (Pa.)* 4 Kulp, 25, 26.

"It would not be, perhaps, easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory; and negative words, which go to the power or jurisdiction itself, have never been brought within that category. "A clause is directory," says Taunton, J., "when the provisions contain mere matter of direction and no more, but not so when they are followed by words of positive prohibition; and hence where a statute provides that no debt should be binding on a certain city, unless authorized by law or ordinance and an appropriation therein previously made by the council, it was not directory, but mandatory." *Bladen v. City of Philadelphia*, 60 Pa. (10 P. F. Smith) 464, 466.

## DIRECTORY TRUST.

A directory trust arises when by the terms of the trust the fund is directed to be invested in a particular manner until the period arrives at which it is to be appropriated. In such cases, if the fund be not invested, or invested in a different manner from that pointed out, it is an abuse of trust, for which the trustees are responsible, though but one receives the money, because both are bound to attend to the directions of the trust, and must be careful to execute it faithfully according to its terms and the intention of the person by whom it was created. *Deaderick v. Cantrell*, 18 Tenn. (10 Yerg.) 263, 272, 31 Am. Dec. 576.

## DISABILITY.

See "Civil Disabilities"; "Legal Disability"; "Physical Disability."  
Other disability, see "Other."

The words "under disability" include married women, except as otherwise provided by law, persons under the age of 21 years, insane persons, and convicts while confined in the penitentiary. Code W. Va. 1899, p. 133, c. 13, § 17.

Disability, within the statute of limitations, necessarily presupposes an existing right, which has been disabled. In order for a right to be disabled, it must have accrued. *Valle v. Obenhouse*, 62 Mo. 81, 89.

"Disability," as used in the statute of limitations, is the want of legal capacity to do a thing. The disability may relate to the power to contract or to bring suit, and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy, or want of freedom of will, as in the case of married women and persons under duress, or out of the policy of the law, as alienage, when the alien is an outlaw, and the like. The disability is something pertaining to the person of the party, a personal incapacity, and not to the cause of action or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. *Berkin v. Marsh*, 44 Pac. 528, 530, 18 Mont. 152, 56 Am. St. Rep. 565.

## Death.

An accident insurance policy provided for a weekly indemnity not exceeding 52 weeks for total "disability." Insured died within 24 hours after an accident. Held, that his personal representative was not entitled to recover indemnity for the balance of the period, as death cannot be said to be disability. *Rosenberry v. Fidelity & Casualty Co.*, 43 N. E. 317, 318, 14 Ind. App. 625.

A weekly indemnity insurance policy agreed to indemnify the insured against physical injury, resulting in disability, caused by external or accidental means, and against loss of time at a certain sum per week, for not more than a certain number of weeks, and provided that the death of the insured should immediately terminate all liability under the policy. There was no provision in express terms as to the death of the insured and providing a payment therefor. An identification card given insured provided that notice in accordance with the policy must be given of accidental death or injury. Held, that the death of the insured, caused by accidental means, was not a disability within the policy. *Burnett v. Railway Officials' & Employes' Acc. Ass'n*, 64 S. W. 18, 19, 107 Tenn. 185 (citing *Hall v. American Employers' Liability Ins. Co.*, 23 S. E. 310,

96 Ga. 413, where it is said death evidently is not the kind of disability to which the policy refers). See, also, *Rosenberry v. Fidelity & Casualty Co.*, 43 N. E. 317, 318, 14 Ind. App. 625; *Brown v. United States Casualty Co.* (U. S.) 95 Fed. 935, 937.

#### **As physically disabled.**

A "disability," as the term is used in an accident or life insurance policy, is a deprivation of ability; the state of being disabled or incapacitated. Any bodily infirmity by which a person is incapacitated from pursuing his usual vocation is a disability, within the policy. *Miller v. American Mut. Acc. Ins. Co.*, 21 S. W. 39, 40, 92 Tenn. (8 Pickle) 167, 20 L. R. A. 765.

"Disability of any kind," as used in an accident certificate, reciting that such certificate would not entitle the holder or any person in interest to indemnity for disability of any kind, unless the disability accrued within 30 days from the date of the accident causing such disability, etc., meant personal hurts, to wit, the loss of a hand or foot, or both hands or both feet, or a hand and foot, or both eyes. Such words do not refer to the incapacity for business specified as one of the losses insured against. *Odd Fellows Fraternal Acc. Ass'n v. Earl* (U. S.) 70 Fed. 16, 20, 16 C. C. A. 596.

The constitution of a mutual benefit society provided that "disability" benefits should accrue to a member in case he should suffer a disability rendering him unable to perform his usual kind of business or labor. Held, that a switchman on a railroad, by the loss of the fingers of one hand, was disabled within the meaning of the constitution. *Hutchinson v. Supreme Tent of Knights of Maccabees of the World*, 22 N. Y. Supp. 801, 68 Hun, 355.

"Disability," as used in an accident insurance policy, is defined to be a deprivation of ability; state of being disabled; incapacity. Thus a person who loses a leg or arm or eye, or is otherwise disabled, whether temporarily or permanently, by external and violent means, is one suffering from an imperfection, and is to that extent disabled by a bodily infirmity. *Miller v. American Mut. Acc. Ins. Co.*, 21 S. W. 39, 40, 92 Tenn. (8 Pickle) 167, 20 L. R. A. 765.

#### **Impossibility distinguished.**

There is a marked distinction between a disability or inability of a party to perform a contract and the absolute and inherent impossibility of performance in the true sense. To excuse performance of a contract on the ground of impossibility of performance, the impossibility must be more than merely a great inconvenience or hardship, or mere impracticability. *Reid v. Alaska Packing Co.*, 73 Pac. 337, 339, 43 Or. 429.

#### **Failure to elect.**

In Const. art. 5, § 16, providing that in case of a death, impeachment and notice thereof to the accused, failure to qualify, resignation, absence from the state or "other disability" of the Governor, the powers, duties, and emoluments of the office for the residue of the term or until the disability shall be removed shall devolve upon the Lieutenant Governor, "disability" does not mean the ineligibility of the person to be elected to the office, but means any disability of the Governor, not specifically enumerated, occurring after the commencement of his term of office. Failure to elect a Governor, on account of the ineligibility of the person receiving the highest number of votes for the office, is not a disability of the Governor, so that the Lieutenant Governor could take the office. *State v. Boyd*, 48 N. W. 739, 753, 31 Neb. 682.

In the Constitution, providing that, on disability of the Governor, the President of the Senate shall act as Governor, "disability" means something attaching to the person of the Governor and disabling him; and the nonconsideration of the result of the election, so that no one has been appointed as a successor to the Governor, is not a disability of the Governor such as is meant by the Constitution. It is simply nonaction or incomplete action by the agencies assigned to vest the title in the candidate. It is not like insanity, conviction of the officer for crime, continued absence, or other disability connected with the person of the Governor. *Carr v. Wilson*, 9 S. E. 31, 33, 32 W. Va. 429, 3 L. R. A. 64.

#### **Insolvency.**

Within a contract authorizing certain parties to take immediate possession of cattle, if others were prevented by disability from carrying on the business, insolvency of such parties is a disability. *Montgomery v. McGuire*, 25 Ill. App. 31, 38.

#### **Refusal to act.**

Disability implies want of power, and not want of inclination. It refers to incapacity, and not to disinclination. It is founded on want of authority, arising out of some circumstances or other, notwithstanding the amount or degree of willingness or disposition to act. It is so used in 3 Rev. St. p. 475 (5th Ed.) § 29, authorizing a special proceeding to be continued before another officer in case of death, sickness, etc., or other disability of the one before whom it was commenced; and hence the mere refusal of such latter officer to act does not authorize another officer to act in his place. *People v. Ulster County Sup'rs* (N. Y.) 32 Barb. 473, 480.

#### **Resignation.**

Acts 1849, p. 206, provides that, in case of death or disability of one or more of the

transportation commissioners provided for by that act, it should be lawful to supply the place so vacated. Held, that the word "disability," as there used, was sufficiently extensive to cover, and was designed to cover, any cause which prevented the commissioners from acting, and thus the resignation of one of the commissioners was necessarily a disability authorizing an appointment of his successor, since no power could compel him to continue to act if he thought proper to decline; the right of resigning an office or employment being universally recognized. *State v. City of Newark*, 27 N. J. Law (3 Dutch.) 185, 197.

## DISABLE:

See "Wholly Disabled."  
Otherwise disabled, see "Otherwise."

Under a statute (Act Va. Dec. 17, 1792) making it a felony to disable any limb or member of any person, with intent to disfigure, etc., it was held that an ear could not be disabled, within the meaning of the statute, and hence that the biting off of an ear was not within the statute. *United States v. Askins* (U. S.) 24 Fed. Cas. 875.

### Mental distress.

Const. art. 5, § 13, Rev. Civ. St. art. 3101, providing that where, pending a trial, any number of jurors not exceeding three shall die or be "disabled from sitting" the remainder of the jury shall have power to render a verdict, cannot be construed to include mere distress of mind, caused by information of sickness in the juror's family calling for his presence at home. If a juror became sick, so as to be unable to sit longer, he is plainly disabled from sitting, and if, by reason of some casualty or otherwise, physically prostrated, so as to be wholly incapable of sitting as a juror, or losing his mental powers, so as to become insane or idiotic, he is disabled. *Houston & T. C. Ry. Co. v. Waller*, 56 Tex. 331, 336.

### Permanent injury.

Aik. Dig. 102, declares that if any person or persons, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut off or disable the tongue, put out an eye, etc., while fighting or otherwise, etc., such person shall be deemed guilty of mayhem. Held, that the word "disable," as used in such statute, meant a permanent injury, and did not include merely a temporary "disabling" of a finger, arm, or eye. *State v. Briley* (Ala.) 8 Port. 472, 474.

In an indorsement on the back of a certificate of membership in an accident insurance association, reciting that, if the member should sustain bodily injuries by means as provided in such certificate, the payment

of weekly relief, whether "totally or partially disabling," for the number of days fixed in the schedule on the back of the certificate, should be in full satisfaction of all claims for such injuries, "disabling" relates to the same kind of total disablement provided for in the certificate; that is, permanent injuries, which are either totally or partially of that character. *Hollobaugh v. People's Ins. Ass'n*, 22 Atl. 29, 30, 138 Pa. 595.

## DISABLED FROM HOLDING OFFICE.

Within the provision that, by the making of a contract letting out the duties of an office, the parties shall be thereby disabled from holding said office, the language, "shall thereby be disabled from holding said office," was construed, in the case of *Dryden v. Swinburne*, 20 W. Va. 89, to mean that they should be disabled only from holding the particular term of the office in respect to which the illegal contract was made. *White v. Cook*, 41 S. E. 410, 415, 51 W. Va. 201, 57 L. R. A. 417, 90 Am. St. Rep. 775.

## DISADVANTAGES.

Under Sess. Acts 1849, p. 219, authorizing an assessment of damages to land for the disadvantages or injuries resulting from the construction of a road, only such injuries which result to the landowner in respect to the residue of the tract unappropriated from the particular mode in which the part thereof is taken, or the use to which it is applied, are included. *Pacific R. Co. v. Chrystal*, 25 Mo. 544, 546.

## DISAGREE—DISAGREEMENT.

"Disagree," as used in a statute providing that the Supreme Court might review the decision of the Court of Civil Appeals in cases where the judges disagree, means nothing more than a want of unanimity among the judges, which is usually evidenced by dissent; for the law contemplates that there shall have been a judgment rendered, by which the judgment of the trial court is reversed and the case remanded, and which could not occur if the disagreement contemplated was such that no two of the judges could agree upon a judgment. *Darnell v. Lyon*, 22 S. W. 304, 309, 85 Tex. 466.

In an agreement between a fire insurance company and an insurer that two persons should act as appraisers, together with a third, who should act as umpire in case of disagreement between such two appraisers, on matters of difference, "disagreement" means the forming or expressing to each other of different opinions concerning the matters submitted to the appraisers. If, after the appraisers had examined and conferred about the damage done, they had reached

and expressed to each other different estimates of the amount, and thereafter one of the appraisers in bad faith endeavored to prevent further conference or to postpone such conference for some ulterior purpose, then the other appraiser, acting in good faith, would have a right to regard their difference as a final disagreement, and thereupon call in the umpire. *Broadway Ins. Co. v. Doying*, 27 Atl. 927, 928, 55 N. J. Law (28 Vroom) 569.

## DISALLOW—DISALLOWANCE.

As rejected, see "Reject."

"Disallowed," in Rev. Code, p. 754, c. 99, § 24, providing that an appeal from judgments given by justices of the peace to the superior court may be allowed in case any part of the plaintiff's demand or of the defendant's counterclaim or set-off is disallowed by the justice, should be construed to include a case where the plaintiff has failed to prove any sum whatever. It is broad enough to include a case where the justice of the peace has arrived at the conclusion that the plaintiff has not proven anything at all, nor established and maintained his suit. *Pepper v. Warren* (Del.) 43 Atl. 91, 92, 2 Marv. 225.

Rev. St. c. 13, § 40, relating to proceedings after the disallowance of a claim against a county by its board, should be construed to include the adoption by the board of supervisors of the report of a committee advising the rejection of an account or claim for moneys paid at tax sales for tax certificates. *Warner v. Outagamie County Sup'rs*, 19 Wis. 611, 613.

## DISBAND.

The words "disband" and "dissolve" are of similar import, and a vote taken to "disband" a school district is supported by notice of a meeting to be held for the purpose of voting on a proposition to dissolve the district. *Briggs v. Borden*, 38 N. W. 712, 714, 71 Mich. 87.

## DISBARMENT PROCEEDING.

As civil action, see "Civil Action—Case—Suit—Etc."

As criminal case, see "Criminal Case or Cause."

As prosecution, see "Prosecution."

A disbarment proceeding is not simply for the purpose of punishing the offending attorney, but is to aid in securing a proper administration of the law. As was said by Mr. Justice Hooker in *Re Shepard*, 109 Mich.

631, 67 N. W. 971: "This is not a proceeding by way of punishment, though the deprivation of the privileges of an attorney may be a matter of serious importance to a practitioner. It is in a measure necessary to the protection of the public, who have a right to expect that courts will be vigilant in withholding, and, if already given, withdrawing, their certificates of qualification and character, upon which the public rely." In *re Mains*, 80 N. W. 714, 716, 121 Mich. 603.

A disbarment proceeding is not primarily in the interest of members of the legal profession, but in the interest of those who, desiring to have the services of an attorney, may be misled to their injury or defrauded in employing a disqualified or dishonest attorney by reason of the action of the state in admitting him to practice. *Hyatt v. Hamilton County*, 96 N. W. 855, 856, 121 Iowa, 292, 63 L. R. A. 614.

## DISBURSEMENTS.

See "Legal Disbursements"; "Necessary Disbursements."

Receipts and disbursements, within the rule that executors are to receive compensation based upon receipts and disbursements, means receipts and disbursements having an actual, and not merely constructive, existence. *Hill v. Nelson* (N. Y.) 1 Dem. Sur. 357, 361.

Where a law requires surveyors to give bond for the faithful disbursement of public money, it is evident that it contemplates such surveyors as disbursing officers. Nevertheless, where the statute requires that bond be given both for the disbursement of money and also for the faithful discharge of the duties of the office, and in fact the bond is conditioned only on the latter, a serious question arises as to whether it was open to proof that the disbursement of money was known as one of the duties of the office and included in the general words. *Farrar v. United States*, 30 U. S. (5 Pet.) 373, 388, 8 L. Ed. 159.

### As costs in actions.

Cost distinguished, see "Cost."

"Disbursements" is a term properly used to designate the costs which a party to an action has advanced. *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536, 540.

Money paid by an attorney for costs which his client was adjudged to pay was a "disbursement" within 2 Geo. II, c. 23, providing that no attorney can commence an action until the expiration of one month after delivering to the parties to be charged a bill of his fees, charges and "disburse-

ments," signed with his proper hand. *Crowder v. Shee*, 1 Camp. 437, 438.

As used in an agreement by which an attorney stipulated to give his legal services to the administrators until the estate was settled, and by which the administrators agreed that he should be repaid for any and all disbursements necessary on the settlement, the word "disbursements" was employed in its technical meaning, and was confined to such disbursements as were set forth in the Code. *Hanover v. Reynolds* (N. Y.) 4 Dem. Sur. 385, 386.

Disbursements by an attorney are expenditures or outlays of money which he is authorized by law to make, and which he does make, in the conduct of a cause. *Durham Fertilizer Co. v. Glenn*, 26 S. E. 796, 797, 48 S. C. 494.

Disbursements are the fees of officers and all other expenses necessarily incurred in the preparation for a trial and costs. *Mitchell & Lewis Co. v. Downing*, 32 Pac. 394, 395, 23 Or. 448.

"Disbursements," as used in an agreement with an attorney whereby he was to be paid a certain sum out of the proceeds recovered in the suit after the payment of all proper disbursements, is not confined within the narrow and technical meaning it has acquired in the offices of court clerks, as something distinct from costs, counsel fees, and allowances. *De Chambrun v. Cox* (U. S.) 60 Fed. 471, 479, 9 O. C. A. 86.

"Disbursements," as defined by Gen. St. 1894, c. 67, § 5500, are the expenses necessarily paid or incurred by the prevailing party, and are included in the term "costs," used in section 7814, providing that, on change of venue, the costs accruing from the change shall be paid by the county in which the offense was committed. *Hennepin County Com'rs v. Wright County Com'rs*, 87 N. W. 846, 847, 84 Minn. 267.

As used in Code, c. 13, § 2182, which provides that an undertaking for stay of proceedings on appeal to the circuit court from a justice's court must be in such an amount as may be deemed sufficient to compensate plaintiff for the use or profits of the claim during the pendency of the appeal, and for costs and disbursements of the action, must be construed to mean that the undertaking includes all costs and disbursements that may be awarded against the appellant on the appeal, and is not limited to include only the costs and disbursements of the trial in the justice's court. "Costs and disbursements of the action" must certainly mean the costs and disbursements which will accrue in the trial of the action, as well as those which have already accrued. *Bilyeu v. Smith*, 22 Pac. 1073, 1074, 18 Or. 335.

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#### As expenditure.

"Disbursements," as used in an order allowing an administrator a certain per cent. on receipts and disbursements of the estate, did not include the delivery of bonds which were in the hands of the intestate as a trustee, and were delivered by the administrator to the true owner. Such delivery was not an expenditure for the estate. *Walton v. Avery*, 22 N. C. 405, 411.

A decree allowed a trustee commissions at the rate of 5 per cent. on all collections which he might make, and also a further commission of 5 per cent. on the amount of all disbursements and investments which he had made or might thereafter make. Held that the word "disbursements," as so used, meant merely expenditures during the existence of the trust, as contradistinguished from payments to the cestui que trust. *Whyte v. Dimmock*, 55 Md. 452.

Battle's Revisal, c. 68, § 35, provides that all orders on the county treasurer for school money shall be signed by the school committee of the township, which orders, duly indorsed by the persons to whom the same are payable, shall be the only vouchers in the hands of the county treasurer for disbursements of school moneys. Held, that the "disbursements" mentioned in the section, and of which the orders taken up are declared to be the only valid voucher for moneys paid out, have reference to the administration of the fund, and contemplate a settlement of the treasurer's account. *Wake County Com'rs v. Magnin*, 86 N. C. 285, 288.

#### DISCHARGE.

See "Plea in Discharge."

Webster defines "discharged" to be "paid; released; acquitted; freed from debt; performed; executed." *Union Bank of Florida v. Powell's Heirs*, 3 Fla. 175, 193, 52 Am. Dec. 367.

"Discharged," as used in a declaration on a contract, alleging that plaintiff was prevented and discharged from delivering goods thereunder, did not mean a release under seal, but only that the act of the defendants was the cause of the nondelivery; and the expression was satisfied by proof of a notice from the defendant that he would not accept goods under the contract. *Cort v. Amburge*, N. & B. & E. J. Ry. Co., 17 Q. B. 127, 145.

Gen. St. c. 162, § 1, providing the punishment for the forgery of any order, acquittance, or discharge for money, means any paper that sufficiently demonstrates that it is a discharge, whether it contain the word "discharge" or not. *Commonwealth v. Talbot*, 84 Mass. (2 Allen) 161, 162.

**Composition.**

The mere fact that a bankrupt has been refused a discharge on a specification of objection is not an absolute bar to a composition; a composition not being a "discharge." In re Odell (U. S.) 18 Fed. Cas. 575.

**As release.**

A discharge by statute must of necessity be a legal defense, and, of course, proper matter to be pleaded at law. It is equivalent, when it proceeds from the act of the creditor, to a release, and may therefore be pleaded. *Steptoe's Adm'rs v. Harvey's Ex'rs* (Va.) 7 Leigh, 501, 535.

**Of attachment.**

The word "discharge," as used in an opinion, stating that the effect and design of an instrument given under Code, § 112, providing for the release of property from an attachment upon the giving of a bond, is to release the property attached, but not to discharge the attachment, was used as synonymous with "dissolve," and not in the sense of "release." *Nichols v. Chittenden*, 59 Pac. 954, 957, 14 Colo. App. 49.

**Of debt.**

Compromise as, see "Compromise."

"Discharge" means "to send away, as a creditor, by payment; to set free, release, absolve, or acquit, as of an obligation, claim, accusation, or service due; to exonerate; to relieve." The manner in which a release is accomplished or the obligation satisfied seems to be material, so that evidence that a claim was compromised was sufficient foundation for a finding that the obligations of the parties were discharged. *Rivers v. Blom*, 63 S. W. 812, 813, 163 Mo. 442.

A debt is discharged, and the debtor is released, when the creditor has received something from the debtor which satisfies him. It may be in money or its equivalents, and it may consist in setting off mutual demands or wiping out mutual disputed claims by mutual concessions, in which event no money is required to pass from one to another. When a referee held the termination of cross-actions between two parties a discharge of one of them, it meant that the other was satisfied, and had no further cause of complaint against the one discharged. *Rivers v. Blom*, 163 Mo. 442, 446, 63 S. W. 812.

In a plea in an action on assumpsit on a bill of exchange, alleging an agreement to accept payment of the bill on certain conditions and to discharge defendant from performing his promise, the word "discharge" does not import payment or satisfaction of the debt, but only that the bill was given for and on account of it. *Kemp v. Watt*, 15 Mees. & W. 672, 680.

**Of debtor.**

A discharge under the prison bounds act is only a discharge from confinement at the suit of the suing creditor for a year and a day. It cannot, therefore, be a discharge to the sheriff himself from the debt, much less to his sureties. *Treasurers of State v. Bates* (S. C.) 2 Bailey Law, 362, 384.

**Of employé.**

In a suit by a workman, who has agreed to do the work to the satisfaction of his employer, there is a distinction between being dissatisfied with his work and discharging him because of dissatisfaction. An employer may be dissatisfied with the work of one of his men, and yet retain the workman in his employment, or he may be dissatisfied, and may discharge the workman, not because of dissatisfaction, but because of some other reason; and in the action by the workmen they are complaining, not of dissatisfaction, but of discharge, and hence the question whether the employer ought to have been satisfied does not arise under the contract, so that it would not be legitimate for either workman to prove that in his opinion or the opinion of the other he had done good work. But proof may be directed to the question whether the employer was dissatisfied, and whether he discharged because of dissatisfaction. *Gwynn v. Hitchner*, 52 Atl. 997, 998, 67 N. J. Law, 654.

**Of guardian.**

As used in a statute providing that no action shall be maintained against the sureties on any bond, given by a guardian, unless it be commenced within four years from the time when the guardian shall be discharged, the term "discharged" means any mode by which the guardianship is effectually determined and brought to a close. *Loring v. Al-line*, 63 Mass. (9 Cush.) 68, 70. This may be either by the resignation or death of the guardian, by the marriage of the female ward, by the arrival of the minor ward at the age of 21 years, or otherwise. *Perkins v. Cheney*, 72 N. W. 595, 596, 114 Mich. 567, 68 Am. St. Rep. 495; *Berkin v. Marsh*, 44 Pac. 528, 529, 18 Mont. 152, 56 Am. St. Rep. 565; *Goble v. Simeral* (Neb.) 93 N. W. 235, 236. It means any termination, such as termination by the death of the guardian, and not necessarily a discharge by the court. *Paine v. Jones*, 67 N. W. 31, 93 Wis. 70. It means the end of the guardianship office, and not his discharge from liability. *Probate Judge v. Stevenson*, 21 N. W. 348, 55 Mich. 320.

The guardian of a minor ward is "discharged," within the meaning of Gen. St. c. 72, § 20, if not when the ward attains the age of majority, which may be questioned, at latest when he has settled his guardianship

account with the probate court and the court has ordered him to pay over to the ward the money in his hands. Probate Court for Orleans Dist. v. Child, 51 Vt. 82, 85.

A guardian is discharged, within the meaning of the statute relating to the liability of his sureties, when he has settled his guardianship account with the court and has been ordered to pay over to the ward money in his hands. Probate Court v. Child, 51 Vt. 82, 85.

To say that the term "discharged" is synonymous with settlement of guardian's account would seem to do violence to the language used. With due deference to courts that have otherwise held, this appears to be quite clear. We are unable to see where a mere settlement of a guardian's account, without the actual compliance with the order of the court, operates as a discharge in any sense. The term "discharged" is synonymous with the termination of the guardianship, not of the relation of the trustee and beneficiary, but of the office or the right to be guardian; and such termination occurs in the event of the death of the guardian, the arrival of the ward at the age of 21, or any other event by which the office of guardian, strictly so called, is brought to a close, though the trust relation in respect to the property may still continue up to the time of the settlement and discharge in respect to such relation. Paine v. Jones, 67 N. W. 31, 93 Wis. 70.

Within a statute limiting the liability of sureties of a guardian, the discharge is practically, in the majority of cases, when he makes a final settlement of his accounts. For instance, when the ward becomes of age, it is the duty of the guardian to settle his accounts and turn over all property in his hands belonging to the ward. The fact that the ward comes of age does not *ipso facto* change the relation in which the guardian holds the property from that of a statutory trustee to that of a debtor. The death of the guardian ends, of course, all personal control over the property, and death is a discharge of the guardian. Hudson v. Bishop (U. S.) 32 Fed. 519, 521; Id., 35 Fed. 820, 822; Marlow v. Lacy, 2 S. W. 52, 53, 68 Tex. 154.

#### Of mortgage.

The word "discharge," in an indorsement by a mortgagee, on the record of the mortgage, that "in consideration of the full payment of all moneys secured to be paid I hereby discharge the same of record," imports an absolute discharge, and not an assignment of the mortgage, and therefore a bona fide purchaser, relying on the record as showing the discharge of the mortgage, will be protected, though the mortgage was only assigned. Lowry v. Bennett, 77 N. W. 935, 936, 119 Mich. 301.

Within an agreement to return certain money on the discharge of two certain mortgages, "discharge" is not synonymous with "payment." By the discharge of a mortgage, as the term is commonly understood, a discharge of record, something that relieves the land from the apparent liens, is intended, not a mere payment, that may rest for proof upon parol, and perhaps disputed, testimony. Blackwood v. Brown, 29 Mich. 483, 484.

The word "discharge," as used in a quitclaim deed, reciting that this release is made at the request of the mortgagors, and is intended to discharge all title acquired by the mortgagee, when taken in connection with the word "release," can mean nothing more than that the mortgagee had no remaining claim upon the property, and whatever title it had acquired was released. Rangely v. Spring, 28 Me. (15 Shep.) 127, 151.

#### Of prisoner.

See "Lawfully Discharged."

A declaration in an action for malicious prosecution, alleging that the plaintiff was discharged from his imprisonment, is not sufficient to show that he was acquitted, which has a definite meaning. Where the word "acquitted" is used, it must be understood in a legal sense, namely, by a jury on the trial; but there are various ways in which a man may be discharged from his imprisonment without putting an end to the prosecution. Morgan v. Hughes, 2 Term. R. 225, 231; Law v. Franks (S. C.) Cheves, Law, 9, 10; Hester v. Hagood (S. C.) 3 Hill, 195; Bacon v. Townsend (N. Y.) 2 Edm. Sel. Cas. 120, 122.

"Discharge," as used in a statute (Rev. St. § 292) providing that every indictment shall be tried at the term or session in which the issue is joined, or the term after, unless the court, having just cause, shall allow further time for the trial thereof, and that if such indictment be not tried as aforesaid the defendant shall be discharged, means merely a release from imprisonment and bail, and not also a release from further prosecution or indictment, or from the penalty of the crime itself. State v. Garthwaite, 23 N. J. Law (3 Zab.) 143, 145.

"Discharge," as used in a statute providing for the payment of fees to United States marshals in case of the discharge of a person, means an order of discharge which releases the person entirely from custody. It does not apply to the removal of a person from one place to another, or merely bringing the person up to testify or be tried. It means discharge from the custody of the law. Ex parte Paris (U. S.) 18 Fed. Cas. 1104, 1105.

A statute authorized the sheriff to charge for every person committed to jail 35 cents



and for every person discharged from jail 35 cents. Held, that the words "committed" and "discharged" should be construed to mean a technical committal and discharge, and could not be so liberally construed as to authorize the sheriff to charge 35 cents for taking out and 35 cents for returning a prisoner to jail in the course of the proceedings against them. *Lee v. Ionia County Sup'rs*, 36 N. W. 83, 84, 68 Mich. 330.

#### Of seamen.

A discharge imports, in the natural and ordinary meaning of the word, and as used in Act Cong. Feb., 1803, c. 62, 2 Stat. 203, allowing two months' extra wages to a crew of a vessel upon its sale and their discharge in a foreign country, a voluntary act on the part of the master, not a mere separation from the vessel by the unavoidable breaking up of the voyage by misfortune. Indeed, a seaman cannot in propriety of language be said to be discharged by the master, when the master himself is dispossessed of the vessel, and the whole enterprise is brought to a violent end by an accident of major force. *The Dawn* (U. S.) 7 Fed. Cas. 200, 202.

#### Of soldier.

The term "discharge" was used during the period of the Revolution to designate the dismissal from the continental service of troops, either individually or as organizations. *Williams v. United States*, 11 Sup. Ct. 43, 48, 137 U. S. 113, 34 L. Ed. 590.

In the military service the word "discharge" is the word applied to an order ending the service of the officer at his own request; but in other connections it conveys the notion of a movement beginning with a superior, and more or less adverse to the object, as, for instance, we speak of the discharge of a servant. Usually it is a slightly discrediting verb. *United States v. Sweet*, 23 Sup. Ct. 638, 639, 189 U. S. 471, 47 L. Ed. 907.

#### Of tax.

The term "discharge," as used in St. 1867, p. 111, authorizing the board of supervisors of a county to equalize, modify, or discharge a tax, is not synonymous with the other words, "equalize" or "modify," as used in the act, so that, when the board had acted on a petition to equalize, it had not exhausted its powers to subsequently act on a petition to discharge. *State v. Ormsby County Com'rs*, 7 Nev. 392, 397.

#### Of vessel.

See "Customary Discharge."

"In a general sense, as well as in a nautical sense, the proper meaning of the

word 'discharge,' with reference to a cargo, is to unload it from the ship." As used in a charter party, providing that the freight shall be paid in five days after the vessel's return to and discharge in B., it will be construed to have been used in its ordinary meaning, when the circumstances fail to show that it was used in a different sense; and hence it refers merely to the unloading, and not to the delivery, of the cargo. *Certain Logs of Mahogany* (U. S.) 5 Fed. Cas. 374, 378; *Kimball v. Kimball* (U. S.) 14 Fed. Cas. 481, 486; *The Bird of Paradise v. Heyneman*, 72 U. S. (5 Wall.) 545, 557, 18 L. Ed. 662; *Sears v. 4,885 Bags of Linseed* (U. S.) 21 Fed. Cas. 934.

#### DISCHARGE FOR MONEY.

Instruments in the form of ordinary receipted statements of account, by various persons, against the town or county, presented by defendant, who was the clerk of the town and county, to the treasurer, and paid and acted upon as vouchers for money expended by defendant in behalf of the town and county, are properly described in the indictment as "discharges for money," under Pub. St. c. 204, § 1, declaring the punishment for forgery of a discharge for money, and chapter 214, § 26, providing that variances are immaterial if the identity of the instrument is evident and its purport is sufficiently described to prevent prejudice to defendant. *Commonwealth v. Brown*, 18 N. E. 587, 592, 147 Mass. 585, 1 L. R. A. 620, 9 Am. St. Rep. 736.

#### DISCHARGE IN BANKRUPTCY.

"Discharge," as used in the bankruptcy act, shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted. U. S. Comp. St. 1901, p. 3419.

A discharge in bankruptcy is in the nature of a personal privilege granted to a debtor in consideration of his yielding up all of his property for distribution among his creditors, so that a discharge of a bankrupt in bankruptcy proceedings, by which the bankrupt preferred certain creditors to the exclusion of others, is not such a discharge as will relieve the bankrupt. *Southern Loan & Trust Co. v. Benbow* (U. S.) 96 Fed. 514, 528.

A discharge in bankruptcy, unlike the bar of statutes of limitations, is a positive extinguishing of the debt, liability, or demand to which it applies. Nothing less than his express promise to pay can remove or revise the bankrupt's liability; and by statute the promise must be put in writing and signed by the party to be charged therewith. *Colton v. Depew*, 44 Atl. 662, 663, 59 N. J. Eq. 126.

Rev. St. § 5116, declaring that no person who has been discharged, and afterwards becomes bankrupt on his own petition, shall be again entitled to a discharge if his estate is insufficient to pay 70 per cent. of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors, who have proved their claims as filed, etc., is not to be construed in a technical legal sense as meaning a discharge by order of court, but it includes as well a discharge effected by composition proceedings, by which the bankrupt was released from his debts. In re Bjornstad (U. S.) 5 Fed. 791.

A debt discharged is a debt extinguished, and therefore the discharge of a debt by discharge in bankruptcy destroys all legal obligation to pay; but as it has been discharged, not by payment or the act of the creditor, but by operation of law, there remains a moral obligation to pay, which is a sufficient consideration to support a new promise, agreement, or contract to pay. *Steward v. Reckless*, 24 N. J. Law (4 Zab.) 427, 430.

The word "discharge" has no technical, common, or appropriate meaning in the law of common or voluntary composition; nor would it have in an ordinary statute, authorizing creditors to get together and adopt a composition on such terms as the statute might prescribe, voluntary or compulsory. The word "release" would exactly describe the transaction; or, with equal common significance, the word "satisfy" or "acquit" would define that which was done, so that, in such sense, the word "discharge" would somewhat synonymously express the transaction. Yet, when the word is used in the statute authorizing a debtor to compound his debts with his creditors, which statute at the same time establishes a system of bankruptcy, it borrows not unnaturally a reflected light by association with a technical term of similar import and identical form familiar to all bankruptcy statutes. But this reflected light might be discarded for a proper understanding of the use of the word in the composition sections of the statute. So that, under the bankrupt act, allowing appeals from a judgment granting or denying a discharge, no appeal lies from a refusal of the court of bankruptcy to confirm a composition by a bankrupt. In re Adler (U. S.) 103 Fed. 444, 445.

#### DISCHARGED PASSENGER.

A discharged passenger is a passenger over whom the care of a common carrier has entirely ceased. One who has left the car, but is using means provided by the carrier for the alighting, and is being assisted by the agent of the company, does not come within the meaning of the term. *Hartzig v.*

*Lehigh Valley R. Co.*, 26 A. 310, 311, 154 Pa. 364.

#### DISCIPLES OF CHRIST.

"Disciples of Christ" is the name given to a certain religious sect. The movement resulting in the foundation of the brotherhood was a decided revolt from the ecclesiasticism into which it was conceived. Protestant religion had fallen, and in all organic and fundamental polity authority was alone sought in the doctrines of the New Testament and the authentic practice of the Apostles themselves. In a corporate sense, the Church of the Disciples is essentially congregational. The congregation is the unit of organization, and generally the source of corporate authority. In its government the church has discarded all councils, synods, and presbyteries. It recognizes no court of appeal or of last resort, representing and standing for the entire brotherhood of believers. In re Reinhart, 9 Ohio Dec. 441, 447.

#### DISCLAIMER.

A disclaimer consists in a denial of the insistence upon any claim or right in the thing demanded, and a renunciation of all claim thereto. *Moores v. Clackamas County*, 67 Pac. 662, 663, 40 Or. 536.

A disclaimer is an admission upon the record of the plaintiff's right, and a denial of assertion of title on the part of the defendant. *Snyder v. Compton* (Tex.) 29 S. W. 73.

A disclaimer is a renunciation of the title and right to possession. If not falsified, it defeats an action of ejectment. *Webster v. Pierce*, 83 N. W. 938, 940, 108 Wis. 407. It imports only the disavowal of title or right in the supposed tenant. *Inhabitants of Oakham v. Hall*, 112 Mass. 535, 539.

Disclaimer is a formal mode of expressing a grantee's dissent to the conveyance of property before the title has become vested in him. The object of a disclaimer is to prevent an estate passing from the grantor to the grantee, and an estate, having once vested, cannot be divested by a disclaimer, though made under seal, duly witnessed, acknowledged, and recorded. *Watson v. Watson*, 13 Conn. 83, 85 (citing *Jackson v. Richards* [N. Y.] 6 Cow. 617; *Jackson v. French*, [N. Y.] 3 Wend. 337, 20 Am. Dec. 699; *Jackson v. Wheeler* [N. Y.] 6 Johns. 272; *Bush v. Bradley* [Conn.] 4 Day, 298; *Kinne v. Beebe*, 6 Conn. 494; *Wheeler v. Hotchkiss*, 10 Conn. 225).

The word "disclaimer," in St. c. 7, p. 89, providing that the writ in ejectment shall not be abated because all the tenants are not

sued, but those on whom service is made shall answer for such part of the premises only as he or they shall distinguish and set forth in his or their plea, and disclaim the remainder, and if any shall disclaim the whole, unless plaintiff shall prove such disclaimer's possession of all or part of the premises demanded, such "disclaimer" shall recover costs against plaintiff, is used for the word "defendant." *Marshall v. Wood*, 5 Vt. 250, 254, 255.

#### As a plea.

In real actions in trespass, by force of the statute and in a quare impledit, disclaimer is a plea, and, like pleas in error or in abatement, concludes with a verification, and calls for a replication and issue. But in ejectment, notwithstanding the defendant disclaims title to the land, it is still necessary to try the fact whether defendant was in possession when the writ was served. And consequently, where ejectment was brought against two, and one entered a disclaimer, the court should have compelled him to give judgment which would secure the costs and damages, or to plead instant the general issue. *Bratton v. Mitchell* (Pa.) 5 Watts, 69, 71.

A disclaimer, instead of being a plea to an action, resembles so far a release or conveyance of the land that in general no person could disclaim who was incapable of conveying the land. *Kentucky Union Co. v. Cornett*, 66 S. W. 728, 729, 112 Ky. 677.

## DISCONTINUANCE.

See "Involuntary Discontinuance"; "Voluntary Discontinuance."

#### Of action.

"The term 'discontinuance' is the name applied to the voluntary withdrawal of a suit by a plaintiff, or where he is regarded as out of court by some technical omission or mispleading, and the like." *Hadwin v. Southern Ry. Co.*, 45 S. E. 1019, 1020, 67 S. C. 463.

A discontinuance is a chasm or gap left by neglecting to enter a continuance. *Taft v. Northern Transp. Co.*, 56 N. H. 414, 416.

A discontinuance is, in substance and effect, an abandonment of the moving party of his pending cause. Hence the failure of a clerk to note a continuance on his docket does not amount to a discontinuance. *Ex parte Humes* (Ala.) 30 South. 732, 733.

A discontinuance is the interruption of a proceeding, occasioned by the failure of the plaintiff to continue the suit regularly from time to time as he ought. *Gillespie v. Bailey*, 12 W. Va. 70, 85, 86, 29 Am. Rep. 445.

A discontinuance is a gap or chasm in the proceedings, occurring while the suit is pending. *Hayes v. Dunn*, 84 South. 944, 945, 136 Ala. 528. "A criminal as well as a civil suit may be discontinued." *Ex parte Hall*, 47 Ala. 675, 680.

A "discontinuance" means no more than a declaration of the plaintiff's willingness to stop the pending action. It is neither an adjudication of his cause by the proper tribunal, nor an acknowledgment by himself that his claim is not well founded. *T. & H. Prac.* § 564. This, of course, does not apply where actions are groundless, and brought with a vexatious or corrupt purpose. *Engle v. Susquehanna Mut. Fire Ins. Co.*, 8 Pa. Dist. R. 172.

A discontinuance is the result of some act done or omitted by the plaintiff, which legally withdraws his case from the power and jurisdiction of the court. Where the plaintiff did, or omitted to do, nothing to produce such a result, but what was done was done by the court, and which plaintiff could not prevent, his cause was not discontinued. *McGuire v. Hay*, 25 Tenn. (6 Humph.) 419, 421.

A discontinuance is a break or chasm in a suit, arising from the failure of the plaintiff to carry the proceedings forward in due course of law, and cannot, therefore, *ex vi termini*, occur after the suit has been brought to an end. This is not only true technically, but in point of essential justice. A discontinuance does not, like a retraxit, operate as an extinguishment of the cause of action, but leaves the plaintiff free to bring another suit. It will not, therefore, be allowed when the effect is to deprive the defendant of an advantage which he is entitled to retain. *Kennedy v. McNickle* (Pa.) 7 Phila. 217 (citing *Mechanics' Bank v. Fisher* [Pa.] 1 Rawle, 341, 347).

#### Same—Dismissal or nonsuit synonymous.

A discontinuance, in practice, is the same as a dismissal, and means that the cause is sent out of court. *Thurman v. James*, 48 Mo. 235, 236.

Where an order had been rendered which had the effect of discontinuing an action, it was contended that the courts had no authority to order a discontinuance of the cause, such a thing as a discontinuance being unknown to our practice, but it was held that "discontinuance" and "dismissal" are synonymous terms. *English v. Dickey*, 27 N. E. 495, 497, 128 Ind. 174, 13 L. R. A. 40.

"Discontinuance," at common law, was a failure to continue the cause regularly from day to day, or term to term, between the commencement of the suit and final judgment, and if there was any lapse or want of

continuance the parties were out of court, and the plaintiff had to begin anew. The plaintiff having left a chasm in the proceedings of his cause, the defendant was no longer bound to attend. Discontinuance resulted from the necessity of continuances to be formerly entered. As our statutes dispense with the necessity for the entry of formal continuances in order to keep a case in court, and require the attendance of the defendant, it is not perceived that there can be in this state such a thing as a technical discontinuance." Code 1871, § 679, declaring that an action shall be discontinued if the representatives of a deceased person shall not appear and become a party by the second term after the death of the plaintiff, means a nonsuit or dismissal for want of prosecution. *Germania Fire Ins. Co. v. Francis*, 52 Miss. 457, 467, 24 Am. Rep. 674.

A discontinuance is somewhat similar to a nonsuit, for when a plaintiff leaves a chasm in the proceedings of his case, as by not continuing the process regularly from day to day, and from time to time, as he ought to do, the suit is discontinued. *Hunt v. Griffin*, 49 Miss. 742, 748. Thus, there is a "discontinuance" of a case by the plaintiff, within the meaning of the statute allowing him to renew the action within six months after his discontinuance, where the case is dismissed by the court for want of prosecution by the plaintiff. *Rountree v. Key*, 71 Ga. 214.

#### **Same—As final hearing.**

See "Final Hearing or Trial."

#### **Same—As indicating settlement.**

A charge to the jury that a former suit was discontinued for want of prosecution did not indicate a settlement, nor did it indicate that there was no settlement. It indicated merely that the suit was dropped. *Davis v. Hammond* (Mich.) 42 N. W. 690, 693.

#### **Of postal service.**

Under the act of February 28, 1861, which authorizes the postmaster general to discontinue, under certain circumstances specified, the postal service on any route, a suspension during the late Rebellion, at the postmaster general's discretion, of the route in certain rebel states, with notice to the contractor that he would be held responsible for a renewal when the postmaster general should deem it safe to renew the service there, was held to be a discontinuance. *Reeside v. United States*, 75 U. S. (8 Wall.) 38, 43, 19 L. Ed. 318.

### **DISCONTINUOUS EASEMENT.**

Easements or servitudes are divided by the Civil Code of France into "continuous"

and "discontinuous." "Discontinuous" are those the enjoyment of which can be had only by the interference of man, as rights of way. *Lampman v. Milks*, 21 N. Y. 505, 515; *Outerbridge v. Phelps*, 45 N. Y. Super. Ct. (13 Jones & S.) 555, 570.

"Discontinuous servitudes" are such as need the act of man to be exercised. Such are the rights of passage, drawing water, pasturage, and the like. Civ. Code La. 1900, art. 727.

### **DISCOUNT.**

"The word 'discount' denotes the act of giving money for a bill of exchange or promissory note, deducting the interest." *Newell v. First National Bank of Somerset*, 13 Ky. Law Rep. 775, 777; *State v. Boatmen's Sav. Inst.*, 48 Mo. 189, 191.

By "discount," in the Constitution, is understood to be meant "bank discount," and a bank discount is the purchase of a promissory note, bill of exchange, or other negotiable paper at less than its face. *Building Ass'n v. Seemiller* (Pa.) 3 Phila. 115, 119.

"Discount" is used in different senses, some judges employing the term to designate the reception of paper in payment of a loan or debt, while others use it to designate the reception of paper on a sale as a piece of property. *Baxter v. Duren* (16 Shep.) 29 Me. 434, 441, 1 Am. Rep. 602.

"Discounting," as used in Banking Act 1838, § 18, providing that such association shall have power to carry on the business of banking by discounting bills, etc., includes the taking of uncurrent bank bills, due on their face and payable at a distant place, for an amount less than their face value, as well as the taking of paper not yet due for an amount less than its face value. *People v. Metropolitan Bank* (N. Y.) 7 How. Prac. 144, 148.

#### **Buy distinguished.**

See "Buy."

An authority to a bank to discount evidences of debt includes authority to buy; for "discounting," at most, is but another term for "buying at a discount." *Atlantic State Bank v. Savery*, 82 N. Y. 291, 302; *Tracy v. Talmadge* (N. Y.) 9 How. Prac. 530, 536; *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 668, 677; *Tracy v. Talmadge*, 12 N. Y. Leg. Obs. 302, 306.

#### **Commission distinguished.**

The word "discount" is not synonymous with the word "commission." "Discount" is a percentage taken from the face value of the security or property negotiated, while "commission," in its technical as well as its

ordinary sense, generally signifies a percentage upon the amount involved in the transaction. *Swift v. United States* (U. S.) 18 Ct. Cl. 42, 57.

#### **Sale distinguished.**

A "discount," as distinguished from a sale of a note, is that where a note is discounted money is loaned thereon by a bank taking interest in advance, and the person offering the note for discount becomes liable thereon as an indorser; while a sale of the note implies a transfer of title only, by which the seller parts with all interest in and liability on the paper. *Neillsville Bank v. Tut-hill*, 30 N. W. 154, 155, 4 Dak. 295.

"Discount," as applied to the ordinary transaction of discounting a note, is the lending of money. The party discounting does in fact lend money on interest, to be repaid either by the person receiving, or by some other party to the bill, at a certain period. The term "discount," in its appropriate mercantile sense, is distinguished from a "sale" of the note or bill, for whoever gets a bill or note discounted at a bank is required to indorse the note, and thereby assume the obligations of an indorser. By the transaction he gets a loan, and literally borrows money, while in the case of a sale of negotiable paper all that would be required would be an assignment, sufficient merely to pass title as an indorsement without recourse. *Freeman v. Brittin*, 17 N. J. Law (2 Har.) 191, 206.

#### **As a deduction on advances.**

By the language of the commercial world and the settled practice of bankrupts, a "discount" by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank. *Fleckner v. Bank of United States*, 21 U. S. (8 Wheat.) 338, 350, 5 L. Ed. 631; *Niagara County Bank v. Baker*, 15 Ohio St. 68, 87; *Youngblood v. Birmingham Trust & Savings Co.*, 12 South. 579, 95 Ala. 521, 20 L. R. A. 58, 36 Am. St. Rep. 245 (citing 5 Am. & Eng. Enc. Law, 678, 679); *Nicholson v. National Bank* (Ky.) 17 S. W. 627 (quoting 5 Am. & Eng. Enc. Law, p. 618); *Greenville First Nat. Bank v. Sherburne*, 14 Ill. App. 566, 568; *First Nat. Bank v. Carleton*, 59 N. Y. Supp. 635, 636, 43 App. Div. 6 (citing *Commonwealth v. Commercial Bank of Pennsylvania*, 28 Pa. [4 Casey] 396).

The term "discount," when used in a general sense, is applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount, when a sum is counted off or taken from the face or amount of the paper at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the price agreed upon a sale. *Salmon*

*Falls Bank v. Leyser*, 116 Mo. 51, 71, 22 S. W. 504, 509 (citing *Niagara County Bank v. Baker*, 15 Ohio St. 68).

A discount is an allowance or deduction generally of so much per cent. made for prepayment or for prompt payment of a bill or account; a sum deducted, in consideration of cash payment, from the price of the thing usually sold on credit; any deduction from the customary price, or from a sum due or to be due at a future time. *Carroll v. Drury*, 49 N. E. 311, 312, 170 Ill. 571.

The term "discounting," as applied to a banking transaction, means the deduction of a sum, according to the standards of recognized uniformity, as applied to the amount and time for which the paper has to run which is the subject of negotiation. *Ridgway v. National Bank of New Castle*, 12 Ky. Law Rep. 216, 220.

"Discounting," as used in a note payable in a certain time from date, but bearing the written consent of the makers that the bank may collect it at any time by discounting a proportional amount of interest that shall have been paid in advance, means that a deduction should be made from the face of the note. This is the ordinary meaning of "discount" and "discounting," especially as used by banks and in banking business. *Dawley v. Wheeler*, 52 Vt. 574, 576.

The "discounting" of notes is the advancing of money on them, the interest being deducted and received by the person discounting, and retained and reserved at the time of, or as a part of, the advance. *Bobo v. People's Nat. Bank*, 21 S. W. 888, 889, 92 Tenn. 444.

#### **As the difference between the price and debt.**

"Discount" is the difference between the price and the amount of the debt, the evidence of which is transferred. *First Nat. Bank v. Sherburne*, 14 Ill. App. (14 Bradw.) 566, 570; *Anderson v. Cleburne Building & Loan Ass'n* (Tex.) 16 S. W. 298, 299; *National Bank v. Johnson*, 104 U. S. 271, 276, 26 L. Ed. 742; *Youngblood v. Birmingham Trust & Savings Co.*, 12 South. 579, 95 Ala. 521, 20 L. R. A. 58, 36 Am. St. Rep. 245. That difference represents interest charged, but at some rate according to which the price paid, if invested until the maturity of the debt, would produce its amount. *National Bank v. Johnson*, 104 U. S. 276, 26 L. Ed. 742. The discount payable, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed in advance. *Niagara County Bank v. Baker*, 15 Ohio St. 68, 87.

#### **As interest.**

"Discount" is defined to be interest reserved from the amount lent at the time of

making a loan. The Century Dictionary defines "discount" in finance, "to purchase, or pay the amount of in cash, less a certain per cent., as a promissory note, bill of exchange, etc., to be collected by the discounter or purchaser at maturity. Bank discount is simple interest paid in advance and received, not on the sum advanced in the purchase, but on the amount of the note or bill." *Eastin v. Third Nat. Bank of Cincinnati*, 19 Ky. Law Rep. 1043, 1044, 42 S. W. 1115, 1116, 102 Ky. 64.

Discount is the taking out of the principal sum, and the retention by the lender, at the time of the loan, of the interest charged for the use of the principal. *Planters' & Merchants' Bank v. Goetter*, 19 South. 54, 55, 108 Ala. 408 (citing *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 668, 677; *Youngblood v. Birmingham Trust & Savings Co.*, 95 Ala. 521, 12 South. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245).

The term "discount," as a substantive, signifies the interest allowed in advancing on bills of exchange or negotiable securities. *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 668, 677. To discount a bill is to buy it for a less sum than that which upon its face is payable. *Anderson v. Timberlake*, 22 South. 431, 433, 434, 114 Ala. 377, 62 Am. St. Rep. 105 (citing *Youngblood v. Birmingham Trust & Saving Co.*, 95 Ala. 521, 12 South. 579, 20 L. R. A. 58, 36 Am. St. Rep. 245).

"Discount is interest, either paid in advance or reserved in the note." *First Nat. Bank v. Childs*, 133 Mass. 248, 252, 43 Am. Rep. 509.

"Discount" is the interest reserved from the amount lent at the time of making a loan, or, used as a verb, the term means to purchase or pay the amount of in cash, less a certain per cent., as a promissory note, bill of exchange, etc., to be collected by the discounter or purchaser at maturity. "Bank discount" is simple interest paid in advance, and received, not on the sum advanced in the purchase, but on the amount of the note or bill. *Eastin v. Third Nat. Bank of Cincinnati*, 42 S. W. 1115, 1116, 102 Ky. 64, 19 Ky. Law. Rep. 1043.

The term "discount," as a substantive, means the interest reserved from a sum of money lent at the time of making the loan. *State v. Boatmen's Sav. Inst.*, 48 Mo. 189, 191.

#### As loan.

When interest is taken in advance it is a "discount," but when taken at the expiration of a credit it is a "loan." *Bailey v. De Graff* (Mich.) *Walk*, Ch. 424, 425.

The "discounting" of a note by a bank consists in lending money on it, and deduct-

ing the interest or premium in advance. *City Bank of Columbus v. Bruce*, 17 N. Y. 507, 515. "The word 'discount' does not necessarily imply a purchase and sale. It is quite consistent with a loan upon the security of the notes of a third party, as well as with the sale of them." *In re Weeks* (U. S.) 29 Fed. Cas. 575; *Smith v. Exchange Bank*, 26 Ohio St. 141, 151; *Niagara County Bank v. Baker*, 15 Ohio St. 68, 87; *Penn Mut. Life Ins. Co. v. Carpenter*, 40 Ohio St. 260, 265.

To "discount" paper is only a mode of loaning money with a right of taking the interest allowed by law in advance. The ordinary meaning of the term "to discount" is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. *Black v. First Nat. Bank*, 54 Atl. 88, 94, 96 Md. 399.

Although the "discounting" of notes or bills, in its most comprehensive sense, may mean lending money and taking notes in payment, as is said in 2 Cow. (N. Y.) 699, yet it is believed that in its more ordinary sense the "discounting" of notes or bills means advancing a consideration for a bill or note, deducting or discounting the interest which will accrue for the time the note has to run. *Philadelphia Loan Co. v. Towner*, 13 Conn. 249, 259.

"The 'discounting' of notes is only lending money and taking notes in payment." *New York Firemen's Ins. Co. v. Sturges* (N. Y.) 2 Cow. 664, 669.

To "discount" a note before its maturity is to advance a sum of money thereon, less than that expressed in the note, on the payee's transfer of the title to the one advancing the money. *United States v. Fay* (Ala.) 9 Port. 465, 469.

"Discounting," as used in General Incorporation Law, art. 16, § 127 (Gen. St. p. 225), giving saving associations the power of discounting negotiable notes and notes not negotiable, includes purchase as well as loan. "To 'discount' signifies the act of buying a bill of exchange or promissory note for a less sum than that for which on its face is payable." "It is also undeniably clear that the term 'discount,' when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied either to loans or sales by way of discount when a sum is counted off or taken from the face or amount of the paper at the time the money is advanced on it, whether that sum is taken for interest on a loan or as the price agreed on a sale." *Pape v. Capitol Bank of Topeka*, 20 Kan. 440, 446, 27 Am. Rep. 183 (citing *Niagara County Bank v. Baker*, 15 Ohio St. 85).

"The ordinary meaning of the term 'to discount' is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable." As used in Act Cong. June 3, 1864, authorizing national banks to "discount" negotiable notes, it does not include the selling of railroad bonds for third parties on commission. *Weckler v. First National Bank*, 42 Md. 581, 592, 20 Am. Rep. 95.

The "discount" of paper, as it is understood in the business of banking, is only a mode of loaning money, with the right to take the interest allowed by law in advance. To "discount" a bill is to buy it for a less sum than that which on its face is payable. *Anderson v. Cleburne Building & Loan Ass'n (Tex.)* 16 S. W. 298, 299.

"Discount," in its literal sense, means to pay back or to count back, and a "discount" is the sum expended in a bargain; but the word has acquired a restricted meaning, at least in its legal and commercial use, and is now used among traders, merchants, and bankers as meaning a deduction of a sum for advanced payment, particularly the deduction of the interest on a sum loaned at the time the loan is made; and the word is generally used in its banking sense. *Building Ass'n v. Seemiller*, 35 Pa. (11 Casey) 225, 226, note.

"Discount," as used in Loc. Laws, vol. 32, p. 343, providing that it shall be lawful for a bank to loan money, buy, sell, or negotiate bills of exchange, checks, and promissory notes, and to discount, on banking principles and usages, bills of exchange, post notes, promissory notes, and other negotiable paper or obligation for the payment of any sum or sums of money certain, providing that such bank shall not take more than 6 per cent. per annum in advance on its loans and discounts, should be construed as referring only to transactions in the nature of a loan. The term "discount" is used in a more limited and technical sense than as a "counting off" of an allowance or deduction made from a gross sum on any account whatever, but is applied to transactions in which the bank may take interest in advance, and is a power distinct from and additional to the power to buy, sell, and negotiate promissory notes. *Dunkle v. Renick*, 6 Ohio St. 527, 534.

#### As either loan or purchase.

"The term 'discount,' when used in its general sense, is equally applicable to either loans or sales by way of discount, when a sum is counted off or taken from the face or amount of the paper at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the agreed

price upon a sale." *Neillville Bank v. Tutbill*, 30 N. W. 154, 156, 4 Dak. 295.

The terms "purchase" and "discount," when used in reference to the transfer of a negotiable paper, are generally used as correlative terms. Nevertheless the legal meaning of "discount" varies according to the transaction to which it is applied. When an accommodation note or bill made for the sole purpose of raising money is "discounted" for that purpose, and with knowledge on the part of the party discounting that it was made for that purpose only, the cases call it a "loan," and hold it subject to the usury laws. But when a valid and subsisting obligation is made by one person and discounted by another, whether at the rate fixed as the legal interest or at some other rate, such discount is held to be a purchase of the paper. *Niagara County Bank v. Baker*, 15 Ohio St. 68, 74, 75.

#### As purchase.

A charter authorizing a party to "discount" and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt, is held to expressly confer power to purchase checks. *First Nat. Bank v. Harris*, 108 Mass. 514, 516.

Under the terms of the national banking act giving national banks power to "discount and negotiate" promissory notes, etc., it is held that such banks have no power to acquire a note by purchase. *Lazear v. National Union Bank*, 52 Md. 78, 124, 36 Am. Rep. 355.

An allegation that a note was discounted by plaintiff means that plaintiff purchased or acquired the note and advanced upon it, in money, the amount thereof, less such percentage as it retained for interest. *First Nat. Bank v. Carleton*, 57 N. Y. S. 674, 675, 26 Misc. Rep. 536 (citing *National Bank v. Johnson*, 104 U. S. 271, 276, 26 L. Ed. 742).

In *Saltmarsh v. Planters' & Merchants' Bank*, 14 Ala. 677, it is said to "discount" a bill is to buy it for a less sum than that which upon its face is payable. *Anderson v. Cleburne Bldg. & Loan Ass'n (Tex.)* 16 S. W. 298, 299, 4 Willson's Civ. Cas. Ct. App. 174.

Where a note was taken by a bank and indorsed by the holder, and the proceeds credited to such holder's account, the transaction amounted to a "discount" of the note, within the authority given in the bank charter, though the complaint by the bank alleged that the holder "sold and delivered the note," and the bank's cashier also testified that he "purchased" the note from the holder. *Neillville Bank v. Cuthill*, 30 N. W. 154, 4 Dak. 295.

Rev. St. § 5197, providing that any national bank may not take more than the rate of interest allowed by the laws of the state

where it is located on any loan or "discount" made, should be construed to include the purchase of accepted drafts from the holder without his indorsement, for a "discount" by a bank means a deduction or drawback made on its advances or loan of money on negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank, and embraces as well a transaction where money is advanced on paper transferred without the indorsement of the previous holder, as a case of a strict loan thereon, where the relation of debtor and creditor is created. The term "discounting" includes purchase as well as loan. "Discount," in the ordinary acceptance of the term, includes what is called "purchase." *Danforth v. National State Bank of Elizabeth* (U. S.) 48 Fed. 271, 272, 1 C. C. A. 62, 17 L. R. A. 622.

#### As set-off or counterclaim.

A "discount," properly speaking, is of some cause, matter, or defense not necessarily arising out of or connected with the cause of action. *Brown v. McMullen* (S. C.) 1 Hill, 29, 31.

The word "discounts" conveys the idea of something to be discounted, or taken from the claim itself by reason of any agreement, express or implied, between the parties; and hence the phrase "over and above all discounts and set-offs," in an affidavit for attachment, does not mean the same as "over and above all counterclaims." *Lampkin v. Douglass* (N. Y.) 63 How. Prac. 47, 48.

An affidavit of a claimant against the estate of a deceased person, averring that the demand was just and due him and was wholly unpaid, and there was no just set-off against the claim, was insufficient under the statute providing that the claimant shall state that there is no discount against his demand, since the word "set-off" is not sufficiently comprehensive to embrace the word "discount" as used in the statute. A "set-off" is an independent debt or demand which the debtor has against his creditor, while a "discount" is a right which the debtor has to an abatement of the demand against him in consequence of a partial failure of the consideration, or on account of some equity arising out of the transaction on which the demand is founded. *Trabue's Ex'r v. Harris*, 58 Ky. (1 Metc.) 597, 598.

## DISCOVERY.

In St. 1868, c. 320, providing for an additional assessment on personal property on a discovery by the assessors that the taxable personal estate of any person has been omitted from the last annual assessments, "discovery" means becoming satisfied as a board that there has been such omission. The stat-

ute contemplates joint action on their part, and private information obtained by one or more individual assessors may prove unsatisfactory to the board. *Noyes v. Hale*, 137 Mass. 266, 271.

#### Of fraud.

"Discovery," as used in a statute of limitation requiring an action for relief on the ground of fraud to be brought within a certain time after the discovery of fraud, means when the fraudulent act is revealed—made known—to the party aggrieved. Notice or knowledge of the act is a "discovery" of the fraud. *Francis v. Wallace*, 42 N. W. 323, 324, 77 Iowa, 373.

The word "discovery," when used in reference to past transactions or omissions, cannot have the same literal meaning as when applied to the discovery of a new continent, or a principle in physics. Fraud in a past and consummated transaction cannot be the subject of direct "discovery" or knowledge. The "discovery," then, of which the statute speaks, is of evidence or evidential facts leading to a belief in the fraud, and by which its existence or perpetration may be established, and not of the fraud itself as an existing entity. *Parker v. Kuhn*, 32 N. W. 74, 80, 21 Neb. 413, 59 Am. Rep. 838.

Within the meaning of the statute providing that a cause of action for fraud shall be deemed to have occurred at the time of the "discovery" of the fraud, the time of discovery means notice of the fraud, and as to what constitutes notice the court quotes with approval the statement of the federal Supreme Court to the effect that "whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led." *Irwin v. Holbrook* (Wash.) 73 Pac. 360, 362.

As used in Code, § 2530, providing that actions for relief on the grounds of fraud, in cases formerly solely cognizable in a court of chancery, shall not be deemed to have occurred until the fraud shall have been discovered by the party aggrieved, means "when the fraudulent act is revealed or made known to the party aggrieved. Notice or knowledge of the acts is a discovery of the fraud." The execution of a fraudulent conveyance being the act which constitutes the fraud on creditors, such creditor is chargeable with notice thereof by the record of the deed. *Laird v. Kilbourne*, 30 N. W. 9, 11, 70 Iowa, 83.

#### Same—Knowledge distinguished.

"Discovery," as applied to discovery of facts constituting fraud as affecting the statute of limitations, is not convertible with "knowledge." It must appear that there was no notice of facts or information which would



put one on inquiry which would lead to knowledge. *Lady Washington Consol. Co. v. Wood*, 45 Pac. 809, 810, 113 Cal. 482.

The knowledge which comes to an unsuccessful litigant that he is unable to convince the court of the righteousness of his cause may be a disappointment or even a surprise, but can hardly be called a "discovery" within the meaning of Code, § 8448, providing that in actions for mistake or trespass the cause of action shall not be deemed to have accrued until such mistake or trespass has been "discovered" by the party aggrieved. *Sioux City & St. P. Ry. Co. v. O'Brien County*, 92 N. W. 857, 858, 118 Iowa, 582.

#### **Same—Recollection distinguished.**

"Discovery," as used with relation to evidence as ground for new trial, does not mean the same as "recollection." "Newly discovered" evidence is not the same as evidence which is "newly recollected." In the latter case no new trial can be given because evidence the existence of which was formerly known has been "recollected." "Discovery" refers only to the ascertainment of the existence of that which was previously unknown; "recollection" deals with the known. *Howton v. Roberts (Ky.)* 49 S. W. 340, 341.

#### **Same—Suspicion distinguished.**

"Discovery" of the fraud, within the language of the statute of limitations, implies knowledge, and is not satisfied by the mere "suspicion" of wrong. The suspicion may be such as to call for future investigation, but is not of itself a discovery. A party, even though his suspicions have been aroused, may be lulled into confidence, and take no action, by such representations as are made. *Marbourg v. McCormick*, 23 Kan. 38, 43; *Parker v. Ruhn*, 32 N. W. 74, 80, 21 Neb. 413, 59 Am. Rep. 838.

#### **In mining law.**

When a locator of a mining claim finds rock in place, containing mineral in sufficient quantity to justify him in expending his time and money in developing the claim, he has made a "discovery" of a vein or lode, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a "lode" must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. *Migeon v. Montana Cent. R. Co. (U. S.)* 77 Fed. 249, 23 O. O. A. 156; *Bonner v. Melkie (U. S.)* 82 Fed. 697, 703.

"Discovery," within the meaning of Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1425], providing that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located, means when the locator finds rock

in place containing mineral, regardless of whether the earth or rock is rich or poor, or whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery and warrants the prospector in locating the mining camp. *Book v. Justice Min. Co. (U. S.)* 58 Fed. 106, 120; *McShane v. Kenkle*, 44 Pac. 979, 981, 18 Mont. 208, 33 L. R. A. 851, 56 Am. St. Rep. 579. So in respect to placer claims, if a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is a sufficient "discovery," within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains mineral in sufficient quantities to pay; but where a person found only such rock as indicated the presence of oil, without finding the oil itself, there is no "discovery," though oil exists on adjoining ground. *Nevada Sierra Oil Co. v. Home Oil Co. (U. S.)* 98 Fed. 673, 676.

The finding of ore or metalliferous rock in place in a defined vein is sufficient to constitute a "discovery," within the provisions of Rev. St. U. S. § 2320 [U. S. Comp. St. 1901, p. 1424], that no right can be acquired to quartz claim before a discovery of a vein or lode within its limits, though it does not contain ore in paying quantities. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient as against a subsequent locator for mining purposes. *Muldrick v. Brown*, 61 Pac. 428, 429, 37 Or. 185.

Where, in running a tunnel, small veins of iron oxide, quartz, and small quantities of carbonate of lead were found two or three inches wide, and these indications were of such a character as miners in that district would follow in the expectation of finding ore, and which would justify miners in working the claim for such purpose, and the rock in these seams was different from the country rock, and was of such character as designated by the witnesses who were practical miners as a vein containing "rock in place," bearing minerals, there was a "discovery" of a mineral lode or vein within the meaning of the statute. *Shoshone Min. Co. v. Rutter (U. S.)* 87 Fed. 801, 806, 31 C. C. A. 223.

In mining parlance, "discovery" has a technical meaning. When applied to the finding of a vein or lode, it means a finding of the top or apex of such vein or lode. *Upton v. Larkin*, 17 Pac. 728, 733, 7 Mont. 449.

To constitute a "discovery" of a well, the law requires something more than conjecture, hope, or even indications. The

geological formation of the country may be such as scientific research and practical experience have shown to be likely to yield oil in paying quantities. Taken with this there may be other surface indications, such as seepage of oil. Though all these things combined may be sufficient to justify the expectation and hope that, upon driving a well to sufficient depth, oil may be discovered, they do not amount to a "discovery." *Miller v. Chrisman*, 73 Pac. 1083, 1084, 140 Cal. 440.

#### In patent law.

Webster says: "'Discover' differs from 'invent.' We 'discover' what before existed; we 'invent' what did not before exist." The word "discovery," as used in the Constitution and patent laws, is synonymous with "invention," and no discovery will entitle a discoverer to a patent which does not amount to the contrivance or production of something which did not exist before. Const. c. 4, art. 1, § 8, cl. 8, among the enumerated powers given to Congress, says: "To promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." There it is evident that the "discoveries," the use of which is to be secured, are the discoveries of inventors only. The applicant must invent, contrive, or produce something that did not exist before. A man may "discover" (i. e., may disclose) his invention, and for that discovery or disclosure he will be entitled to the exclusive use of his invention for a limited time. *In re Kemper* (U. S.) 14 Fed. Cas. 286, 287.

Invention or "discovery" is the requirement which constitutes the foundation of the right to obtain a patent, and it is held that, unless more ingenuity and skill are required in making or applying the improvement than are possessed by an ordinary machinist acquainted with the business, there is an absence of that degree of skill and ingenuity which constitutes the essential element of every invention. *Dunbar v. Meyers*, 94 U. S. 187, 197, 24 L. Ed. 34.

The term "discovery," within the meaning of Const. art. 1, § 8, cl. 8, which confers on Congress the power to secure for limited time, to authors and inventors, the exclusive right to their respective writings, inventions, and discoveries, does not include a trademark. *Trade-Mark Cases*, 100 U. S. 82-93, 25 L. Ed. 550.

#### In practice.

See "Bill of Discovery."

The right of "discovery" in courts of equity arose from the necessity of searching the conscience of the opposing party in order

to ascertain facts and obtain documents, within his knowledge and control, which the complainants could not reach at law because of their inability to compel the examination of the defendant under oath. Every bill for relief exhibited in a court of equity is in effect a bill of "discovery," because it asks or may ask from the defendant an answer upon oath relative to the matters which it charges. The power to enforce such discovery is one of the original and inherent powers of a court of chancery. The federal and state statutes now in force which enable the complainant to obtain such examination have greatly diminished the need of these discoveries. *Kelley v. Boettcher* (U. S.) 85 Fed. 55, 57, 29 C. C. A. 14.

"Discovery," in relation to evidence, includes only facts or papers which the party or witness is compelled by subpoena, interrogatory, or other judicial process to disclose, whether he will or no, and is inapplicable to testimony voluntarily given, or to documents voluntarily produced. *Tucker v. United States*, 14 Sup. Ct. 299, 301, 151 U. S. 164, 38 L. Ed. 112.

#### DISCOVERY IN AID OF EXECUTION.

"Discovery in aid of execution" is the name of a special statutory proceeding, in a court of law, which was not known to the common law. *Adler v. Turnbull*, 30 Atl. 819, 57 N. J. Law (28 Vroom) 62.

#### DISCREDIT.

"Discredit," as defined by Webster, means to refuse credence to; not to accept as true; to disbelieve. *Howard v. State*, 8 S. W. 929, 931, 25 Tex. App. 636.

"Discredit," as used in an instruction of the court to a jury as follows: "If you believe that any witness has willfully testified falsely to any material fact, it is your duty to discredit him"—means to distrust; that is, to look at with suspicion. *People v. Clark*, 24 Pac. 813, 816, 84 Cal. 573.

#### DISCRETION.

See "Judicial Discretion"; "Legal Discretion"; "Sound Discretion"; "Sound Memory and Discretion"; "Abuse of Discretion."

"Discretion" implies knowledge and prudence, and that discernment which enables a person to judge critically of what is correct and proper; judgment directed by circumspection. *Towle v. State*, 3 Fla. 202, 214.

"Discretion" is defined as the knowledge of what is right and proper—as deliberate judgment. *Citizens' St. R. Co. v. Heath*, 62 N. E. 107, 111, 29 Ind. App. 395.

In its proper sense, the word "discretion" implies judgment—soundness of judgment. Thus, we speak of a "discreet" man, and of his "discretion"; and in this sense the word applies well enough to those qualities of a fence which are in their nature undefined, as when the statute describes it as "of strong materials, put up in a good and substantial manner, with sufficiently small spaces," etc. These things were within their "discretion" or sound judgment, not in their mere option. *McManus v. Finan*, 4 Iowa (4 Clarke) 283, 286.

"Discretion," when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor. It must not be arbitrary, vague, and fanciful, but legal and regular. *Rex v. Wilkes*, 4 Burrows, 2527, 2539; *Harris v. Harris* (Va.) 31 Grat. 13, 16; *Sea Isle City Imp. Co. v. Assessors of Taxes of Borough of Sea Isle City*, 39 Atl. 1063, 1064, 61 N. J. Law, 476; *Lovinier v. Pearce*, 70 N. O. 167, 171; *Miller v. Wallace*, 76 Ga. 479, 484, 2 Am. St. Rep. 48; *People v. Superior Court of City of New York* (N. Y.) 5 Wend. 114, 126; *Platt v. Munroe* (N. Y.) 34 Barb. 291, 292; *Sharp v. Greene*, 62 Pac. 147, 150, 22 Wash. 677; *Haupt v. Independent Tel. Messenger Co.*, 63 Pac. 1033, 1035, 25 Mont. 122; *State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221, 222; *Ex parte Mackey*, 15 S. C. 322, 328.

"Discretion" is defined as deliberate judgment. *Stewart v. Stewart*, 62 N. E. 1023, 1024, 28 Ind. App. 378.

"Discretion" is defined as the discernment of what is right and proper—as deliberate judgment. *Citizens' St. R. Co. v. Health*, 62 N. E. 107, 111, 29 Ind. App. 395; *Stewart v. Stewart*, 62 N. E. 1023, 1025, 28 Ind. App. 378.

"Discretion" does mean and can mean nothing else but exercising the best of the court's judgment upon the occasion that calls for it. *Tompkins v. Sands* (N. Y.) 8 Wend. 462, 468, 24 Am. Dec. 46; *Rex v. Young*, 1 Burrows, 556, 560.

When it is said that something is left to the "discretion" of the judge, it signifies that he ought to decide according to the rules of equity and the nature of circumstances. *Civ. Code La. 1900*, art. 3556, subd. 10.

"Discretion," as applied to public functionaries, means the power or right of acting officially, according to what appears just and proper under the circumstances. *Rio Grande County Com'rs v. Lewis*, 65 Pac. 51, 28 Colo. 378 (citing *Murray v. Buell*, 74 Wis. 14, 18, 41 N. W. 1010).

"Discretion" is defined, when applied to public functionaries, to be a power or right,

conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. *Farrelly v. Cole*, 56 Pac. 492, 497, 60 Kan. 356, 44 L. R. A. 464 (citing *Judges of Oneida Common Pleas v. People* [N. Y.] 18 Wend. 79; *State v. Hultz*, 16 S. W. 940, 942, 106 Mo. 41).

To say that granting an application rests "in discretion" does not mean that it may be granted or refused at the mere will or pleasure of the judge, but that he is to exercise a sound judicial judgment, in the interest of justice and prudence. *Abbott v. L'Homedieu*, 10 W. Va. 677; *Rose v. Brown*, 11 W. Va. 122, 123.

"Discretion, when vested in an officer, does not mean absolute or arbitrary power. The discretion must be exercised in a reasonable manner, and not maliciously, wantonly, and arbitrarily, to the wrong and injury of another. This is held to be the rule applicable to public officers, who are bound to exercise their deliberate judgment in the discharge of their official duties, and is applicable to all inferior magistrates and others called to the performance of functions, in their nature and character, quasi judicial, while acting within their jurisdiction and the legal scope of their powers as fixed by law." *Taylor v. Robertson*, 52 Pac. 1, 3, 16 Utah, 330.

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise "discretion," it is a mere legal discretion; a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law. *Osborn v. United States Bank*, 22 U. S. (9 Wheat.) 738, 866, 6 L. Ed. 204; *State v. Cunningham*, 53 N. W. 35, 53, 83 Wis. 90, 17 L. R. A. 145, 35 Am. St. Rep. 27.

"The most odious and dangerous of all laws would be those depending on the discretion of judges." Lord Camden, one of the greatest and purest of English judges, said that: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper, and passion. At best it is often caprice. In the worst it is every vice, folly, and passion to which human nature can be liable." *State v. Cummings*, 36 Mo. 263, 278.

It is said: "The discretion of a judge is the law of tyrants; it is always unknown;

It is different in different men; it is casual, and depends upon constitution and passion. In the best it is often at times capricious; in the worst it is every vice, folly, and madness to which human nature is liable." 1 Bouv. Law Dict., vide "Discretion," p. 473. This may be to some extent an extreme statement of the objection, but every practitioner of experience well knows that it is not without much truth. The writer of this opinion has known a popular judicial officer grow quite angry with a suitor in his court, and threaten him with imprisonment, for no ostensible reason save the fact that he wore an overcoat made of wolfskins. Moreover, it cannot safely be denied that mere judicial discretion is sometimes very much interfered with by prejudice, which may be swayed and controlled by the merest trifles, such as the toothache, the rheumatism, the gout, or a fit of indigestion, or even through the very means by which indigestion is frequently sought to be avoided. In further illustration of what judicial discretion ought to be, but not infrequently is not, I add an extract from an opinion, in a case of national importance, by one of our country's greatest men, and ablest and purest judges. Chief Justice Marshall says: "Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion; a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law." *Osborn v. United States Bank*, 22 U. S. (9 Wheat.) 738, 866, 6 L. Ed. 204. Whatever may have been the construction of this important statute heretofore, it is now evidently unwise longer to keep so indispensable a right as that of a fair and impartial trial in a criminal case under the uncertain security of a power so uncontrollable and liable to error as mere judicial discretion—a power that may possibly be misdirected by a fit of temporary sickness, an extra mint julep, or the smell or looks of a peculiar overcoat, or things more trivial than these, which may imperil the due course of justice in the administration of the law. *Ex parte Chase*, 43 Ala. 303, 310.

There are different kinds of discretion that may be exercised by the trial court. There is the discretion in the sense of the exclusive right to decide as that court pleases, which will not be revised by the appellate tribunal. There is a discretion in the decision of what is just and proper under the circumstances. The latter kind of discretion will not be reviewed unless there is an abuse of it; that is, unless it appears

that it was exercised on grounds or for reasons clearly untenable, or to an extent clearly unreasonable. That would be its abuse. In all cases courts must exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment. *Murray v. Buell*, 41 N. W. 1010, 1012, 74 Wis. 14.

The use of the word "discretion," in an instruction authorizing a jury to exercise their discretion, was held to be erroneous, as being calculated to convey the impression that the jury were not confined to the facts, but were at liberty to exercise a discretion independent of the evidence; the court saying that, if the word "judgment" had been substituted for "discretion," the charge might have been unobjectionable. *Seaboard Mfg. Co. v. Woodson*, 11 South. 733, 736, 98 Ala. 878.

The word "discretion," in a statute authorizing an appeal from an order of a municipal court, and providing that it shall be in the discretion of such court, after hearing and considering said application, to allow such order or deny the same, means that the whole matter is to be submitted to the sound judgment of the court, to be exercised according to the rules of law. *Lent v. Tillson*, 14 Pac. 71, 77, 72 Cal. 404; *Lent v. Tillson* (U. S.) 11 Sup. Ct. 825, 830, 140 U. S. 316, 35 L. Ed. 419.

The term "discretion," in a statute allowing the county commissioners to make allowance at their discretion, means according to law, at their discretion. *Scott v. City of La Porte* (Ind.) 68 N. E. 278, 281.

The word "discretion," in an act authorizing the removal of certain officers for cause, means a discretion to be exercised after a hearing for cause, as provided in the act. The mere fact that in the opinion of the council an officer has been guilty of misconduct in office, or that good cause for his removal exists, will not justify the exercise of this discretion in a summary manner. The officer must be furnished with specific charges, and then have an opportunity to call witnesses in explanation of his conduct or acts. *People v. McAllister*, 10 Utah, 357, 370, 37 Pac. 578, 581.

#### Absence of fixed rule implied.

"Discretion" implies that, in the absence of positive law or fixed rule, the judge is to decide by his view of expediency, or of the demands of equity and justice. *Goodwin v. Prime*, 42 Atl. 785, 787, 92 Me. 355 (citing *State v. Wood*, 23 N. J. Law [3 Zab.] 560).

Within the rule that a master of a vessel must act in good faith and exercise his best discretion for the benefit of all concerned, the term "discretion" implies the ab-

sence of a hard and fast rule, for the establishment of a clearly defined rule of action would be the end of discretion. And yet "discretion" should not be a word for arbitrary will or inconsiderate action. "Discretion" means the equitable decision of what is just and proper under the circumstances; it means the liberty or power of acting, without other control, in one's own judgment. *The Styria v. Munroe*, 22 Sup. Ct. 731, 734, 186 U. S. 1, 46 L. Ed. 1027.

The term "discretion" implies the absence of a hard and fast rule, and the establishment of a clearly-defined rule would be the end of discretion; but the term is not a word for arbitrary will and unstable caprice. Judicial discretion should not be, as Lord Coke pronounced it, "a crooked cord," but rather, as Lord Mansfield defined it, "exercising the best of their judgment upon the occasion that calls for it." *Norris v. Clink-scales*, 25 S. E. 797, 801, 47 S. C. 488.

Whenever a clear and well-defined rule has been adopted, not depending upon circumstances, the court has parted with its discretion as a rule of judgment. Discretion may be, and is to a very great extent, regulated by usage, or by principles which courts have learned by experience, when applied to the great majority of cases, will best promote the ends of justice; but it is still left to the court to determine whether a case is exactly alike in every color, circumstance, and feature to those upon which the usage or principle is founded, or in which it has been applied. *State v. Hultz*, 16 S. W. 940, 942, 106 Mo. 41.

#### **As authorizing submission to arbitration.**

"Discretion," as used in a vote authorizing the selectmen of a town to settle a claim against it at their discretion, should be construed to authorize the selectmen to submit the claim to arbitration. *Campbell v. Inhabitants of Upton*, 118 Mass. 67, 70.

#### **As impartial discretion.**

The term "discretion," in Hill's Ann. Laws, § 102, providing that the court rendering a judgment may in its discretion relieve a party from the judgment, means an impartial discretion, guided and controlled in its exercise by fixed legal principles; a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to defeat the ends of substantial justice; and for a manifest abuse thereof it is reviewable by an appellate jurisdiction. *Thompson v. Connell*, 48 Pac. 467, 468, 31 Or. 231, 65 Am. St. Rep. 818.

#### **As judicial discretion.**

The term "discretion," in the rule that the granting or refusing to grant a tem-

porary injunction is within the discretion of the court, means a sound judicial discretion. When it appears, from the nature of the case and all the facts, that a party is not entitled to an injunction, the granting thereof is error, because unauthorized. The granting of an injunction is not in such cases a matter of discretion. *Shilling v. Reagan*, 48 Pac. 1109, 1110, 19 Mont. 508.

#### **As legal discretion.**

"Discretion," as used in an agreement by one to whom property had been conveyed in satisfaction of a debt, by which he agreed to pay certain demands against the transferor of the goods, and dispose of such goods to the best advantage in his discretion, and pay the balance to the other bona fide creditors of the transferor, means a legal discretion; that is, a discretion to be exercised within the limits which the law fixes in such cases. It must be held to apply to the mode of sale, as to whether it shall be public or private, by the quantity or single article, and the various other details of such transaction, and does not necessarily imply an authority to sell on credit. *Norton v. Kearney*, 10 Wis. 443, 450.

The "discretion" vested by the Legislature in the city council of Salt Lake City by Comp. Laws 1888, § 1755, subd. 40, to license, regulate, and tax the sale of intoxicating liquors, is not an arbitrary power, to be exercised as the caprice or prejudice of that body may dictate, but a legal discretion, whereby the council is to determine whether or not the applicant has substantially complied with the provisions of law. The common council of a city must be governed by the same rules of law in their action upon the granting of these licenses as other bodies who are called upon by the statute to pass upon the qualifications of others to engage in any business or calling requiring special conditions preliminary to its exercise, and they are bound in all cases to act fairly, and to treat each application upon its own merits impartially; and the mere fact that there is one saloon in the neighborhood already licensed, and the council think this sufficient for the needs of the neighborhood, does not give them the right to deny an application for another license. The council did not decide that the place or neighborhood was improper wherein to carry on the traffic, nor that the relator was disqualified in any manner, but merely said, in effect, that in that neighborhood one man may engage in the business, but another may not. This is not a question of prohibiting the traffic in that locality, but of prohibiting a particular individual against whom no disqualification is alleged, and who has complied with law, from engaging in the business, and at the same time permitting another, under no worse legal circum-

stances, to do so. This cannot be within the discretionary powers of the council. *Perry v. Salt Lake City Council*, 25 Pac. 998, 1000, 7 Utah, 143, 11 L. R. A. 446.

Where anything is left to any person to be done according to his "discretion," the law intends it must be done with a sound discretion and according to law. *Schlaudecker v. Marshall*, 72 Pa. (22 P. F. Smith) 200, 206 (citing Tomlins, Law Dict.).

#### As subject to control of court.

A will creating a trust, the management of which was left in the "discretion" of the executors or trustees, did not confer an authority not subject to the control of the court. *Holcomb v. Holcomb's Ex'rs*, 11 N. J. Eq. (3 Stockt.) 281, 290.

### DISCRETIONARY POWER.

"A power is discretionary when it is not imperative, or, if imperative, when the time or manner or extent of its execution is left to the discretion of the donee. Generally the courts will not compel the execution of discretionary powers, nor review the discretion, when exercised in good faith." *Gosson v. Ladd*, 77 Ala. 223, 232.

A "discretionary power" involves an alternative power; that is, a power to do or refrain from doing a certain thing. *Bennett v. Norton*, 32 Atl. 1112, 1116, 171 Pa. 221.

The terms "discretionary power" and "judicial power" are often used interchangeably; but there are many acts requiring the exercise of judgment which may fairly be considered of a judicial nature, and yet do not in any proper sense come within the judicial power as applicable to the courts. The phrase "judicial power" is commonly employed to designate that department of government which it was intended should interpret and administer the laws and decide private disputes between and concerning persons. By the "judicial power" of courts is generally understood the power to hear and determine controversies between adverse parties and questions in litigation. *State v. Le Clair*, 30 Atl. 7, 9, 86 Me. 522.

### DISCRETIONARY TRUST.

A "discretionary trust" is when, by the terms of the trust, no direction is given as to the manner in which the trust fund shall be invested until the time arrives at which it is to be appropriated in satisfaction of the trust. *Deaderick v. Cantrell*, 18 Tenn. (10 Yerg.) 263, 269, 81 Am. Dec. 576.

### DISCRIMINATION.

"Discrimination," as applied to rates charged for freight, consists of the single

fact, without other qualification or exception, of charging a greater rate to the one person than to the other or others. *Houston & T. C. Ry. Co. v. Rust*, 58 Tex. 98, 107.

"Discrimination," as used in Interstate Commerce Act, § 3, cl. 2, relating to the discrimination between connecting carriers, does not apply to that which arises from a refusal to permit the forwarding company to perform an act which involves the use of the track or terminal facilities of the receiving company. *Little Rock & M. R. Co. v. St. Louis, L. M. & S. Ry. Co.* (U. S.) 59 Fed. 400, 402.

Rev. St. art. 4574, subd. 2, declares that every railroad company failing or refusing to receive or transport the tonnage and cars of any connecting line without delay or discrimination, as prescribed by the regulations of the railroad commission, shall be deemed guilty of unjust discrimination; and article 4575 imposes a penalty on any company guilty of discrimination. Held, that the terms "delay" and "discrimination" were to be used as convertible, and that "delay" was "discrimination," within the terms of the statute; and hence, delay in a shipment having been admitted, it was proper to direct a verdict for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 63 S. W. 1025, 1026, 26 Tex. Civ. App. 531.

The expression "discrimination in freights," as used in Acts 1874-75, c. 240, entitled "An act to prevent discrimination in freight tariffs by railroad companies operating in the state," is a term well understood in the nomenclature of transportation over railroads. "It may have a wider significance, but for the present purpose it implies, to charge shippers of freight as compensation for carrying the same over railroads unequal sums of money for the same quantity of freight for equal distances; more for a shorter than a longer distance, more in proportion to distance for a shorter than a longer distance; more for freight called 'local freights,' than those designated otherwise; more for the former in proportion to distance such freights may be carried than the latter." *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 446, 59 Am. Rep. 250.

### DISCUSS.

The word "discussed," within the rule that assignments of error which are not discussed will not be considered on appeal, does not include a mere reference by counsel in his brief to the grounds of objection stated in the trial court, and insisting that the objection there made should have been sustained. *Baldwin v. Threlkeld*, 34 N. E. 851, 853, 8 Ind. App. 812.

The phrase "discussing the propriety of finding a bill of indictment" in Code Civ.

Proc. art. 394, providing that the state's attorney may come before the grand jury at any time except when they are discussing the propriety of finding a bill of indictment, is equivalent to the phrase "deliberating upon the accusation against the defendant" in article 523, providing that an indictment may be set aside for the presence of any person, not authorized by law, when the grand jury were deliberating upon the accusation against the defendant. *Stuart v. State*, 34 S. W. 118, 35 Tex. Cr. R. 440.

## DISEASE.

See "Bad Disease"; "Heart Disease"; "Infectious Diseases."

The term "disease," in an insurance application that insured is free from disease, can hardly be said to characterize an ailment which produces no disorder, and of the presence of which the person affected is unconscious. *Continental Life Ins. Co. v. Yung*, 15 N. E. 220, 222, 113 Ind. 159, 3 Am. St. Rep. 630.

The word "disease" may include, and is often used to designate, ailments more or less trivial. The false answer by an applicant for insurance, to a question constituting a warranty, as to whether he ever had any of certain enumerated diseases and ailments, will constitute a breach of the contract, though such disease or ailment is not material to the risk, unless the same was not inherent, but temporary, and due to extraordinary and exceptional outside causes, such as excessive work or heat. *Mutual Life Ins. Co. v. Simpson*, 31 S. W. 501, 502, 88 Tex. 333, 28 L. R. A. 765, 53 Am. St. Rep. 757.

### As accident.

See "Accident—Accidental."

### Cold.

In an application for reinstatement of an insurance policy which stated that the insured had not since the policy was issued been "sick or afflicted with any disease," a cold will not be included, and, in the absence of proof that the cold referred to produced disease or sickness, the words cannot be construed as meaning absolute freedom from any bodily ills, but rather freedom from such ills as would ordinarily be called "disease" or "sickness." *Metropolitan Life Ins. Co. v. McTague*, 9 Atl. 766, 768, 49 N. J. Law (20 Vroom) 587, 60 Am. Rep. 661.

### Fainting spell.

In a broad generic sense, any temporary trouble by reason of which a man loses consciousness is a "disease." It is a condition of the body not normal, and produced by the imperfect working of some function; but as

the imperfect working is not permanent, and the body returns at once or in a short period of time to its normal condition, it does not rise to the dignity of a "disease." A fainting spell produced by indigestion or a lack of proper food for a number of hours, or from any other cause which would not indicate any disease in the body, but would show a mere temporary disturbance or enfeeblement, would not come within the meaning of the words "disease and bodily infirmity," as used in an insurance policy providing that the risk shall not extend to death caused by disease and bodily infirmity. *Manufacturers' Accident Indemnity Co. v. Dorgan* (U. S.) 58 Fed. 945, 955, 7 O. C. A. 581, 22 L. R. A. 620.

### Headache

A headache which is produced temporarily by overwork, and leaves no permanent effect upon the constitution, is not, in the sense of an application for insurance, a "disease." *Mutual Life Ins. Co. v. Simpson* (Tex.) 28 S. W. 837, 838.

### Insanity.

"Disease," when used without restrictive words, includes "diseases of the mind as well as of the body," so that a clause in a life policy providing that the policy shall be avoided by suicide, unless the same is the direct result of disease, does not render the policy void upon self-destruction as the result of insanity. *Connecticut Mut. Life Ins. Co. v. Akins*, 14 Sup. Ct. 155, 157, 150 U. S. 468, 37 L. Ed. 1148.

As used in an accident policy providing that the insurer shall not be liable for death or disability which may have been caused wholly or in part by bodily infirmities or disease, "disease" does not include a self-inflicted injury or death during the insanity of the insured. *Accident Ins. Co. v. Crandal*, 7 Sup. Ct. 685, 687, 120 U. S. 527, 30 L. Ed. 740.

### Kidney trouble.

An answer in the proofs of death that the injured had had kidney trouble is not inconsistent with an answer in an application that he never had "disease of the kidneys," since there might have been kidney trouble from accident, or from some other temporary cause, such as to produce sickness, when it could not properly be said that there was disease of those organs. *Hogan v. Metropolitan Ins. Co.*, 41 N. E. 663, 664, 164 Mass. 448.

### Malignant pustule.

"Disease," as used in a policy of accident insurance providing that the benefits thereof should not extend to any death or disability which might be caused wholly or in part by bodily infirmities or disease ex-

isting prior or subsequent to the date of the policy, should be construed to include a malignant pustule, caused by the infliction upon the body of putrid animal matter containing poisonous bacillus anthrax, which results from touching or handling vermin coming from the hide or hair or wool of animals suffering from this disease, from their flesh sometimes, or from the feathers of birds that have been feeding upon this peculiar kind of carrion, and then bringing the matter in contact with the skin or thin mucous membrane, or it may be transported by insects, flies, or mosquitoes. It has been called "wool sorter's disease," because it happens among people who handle wools and hides, such as tanners, butchers, and herdsmen, and those people that are engaged in business where they are brought in contact with that sort of thing, and there have been epidemics of it. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

#### **Sunstroke.**

In a policy of insurance against injuries sustained through external, violent, and accidental means, and excepting disease or bodily infirmity, "disease" should be construed to include sunstroke or heat prostration, which is a disease of the brain. "Sunstroke" is a term applied to the effects on the central nervous system, and through it on other organs of the body, by exposure to the sun or to overheated air. *Dozier v. Fidelity & Casualty Co. of New York (U. S.)* 46 Fed. 446, 447, 13 L. R. A. 114.

#### **Temporary ailment or disorder.**

A temporary ailment from which a person recovers cannot be considered a "disease" within the meaning of a life insurance policy. *Corbett v. Metropolitan Life Ins. Co.*, 55 N. Y. S. 775, 780, 37 App. Div. 152 (citing *Cushman v. United States Life Ins. Co.*, 70 N. Y. 72).

In an application for a life policy stating that insured had no disease, the term "disease" does not include any slight ill in no way seriously affecting the applicant's health or interfering with his usual avocations; but a temporary ailment in the nature of a headache or a cold may be of such a serious nature that it is a sickness, within the meaning of such a representation. *Manhattan Life Ins. Co. v. Francisco*, 84 U. S. (17 Wall.) 672, 680, 21 L. Ed. 698.

The words "disease or bodily infirmity," as used in a provision in an accident policy exempting insured from liability for injuries caused thereby, mean practically the same thing, and only include an ailment or disorder of a somewhat established or settled character, and merely a temporary disorder arising from sudden and unexpected derangement of the system, though it produces un-

consciousness. *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374.

The term "disease," in an application for a life policy containing representations as to the freedom of insured from disease, does not include any temporary ailment, unless it be such as to indicate a vice in the constitution, or so serious as to have some bearing, at least, on the general health and conditions of life, or such as, according to common understanding, would be called a "disease." *Rand v. Provident Sav. Life Assur. Soc.*, 37 S. W. 7, 8, 97 Tenn. 291.

"Disease," as used in a life insurance policy providing that the insurance did not cover injuries resulting from any disease or bodily infirmity, is practically synonymous with "infirmity," and will not be held to refer to a slight or temporary disorder. *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 330, 96 Iowa, 378, 59 Am. St. Rep. 374 (citing *Northwestern Mut. Life Ins. Co. v. Helman*, 93 Ind. 24; *Metropolitan Life Ins. Co. v. MeTague*, 49 N. J. Law [20 Vroom] 587, 9 Atl. 768, 60 Am. Rep. 661; *Pudritzky v. Supreme Lodge, Knights of Honor*, 76 Mich. 428, 43 N. W. 373; *Brown v. Metropolitan Life Ins. Co.*, 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; *Mutual Benefit Life Ins. Co. v. Davless' Ex'r*, 87 Ky. 541, 9 S. W. 812).

#### **Wounds or injuries.**

The representation, in an application for life insurance, that the insured had not been subject to or had any "disorders or diseases," such as open sores, lumps, or swellings of any kind, should be construed to mean only such as result by defective action of some function, and which were to some extent permanent or continuous, and of such nature as would be of reasonable significance for the purpose of the inquiry, and not from wounds or injuries. *Home Mut. Life Ass'n v. Gillespie*, 1 Atl. 340, 343, 110 Pa. 84.

## **DISFIGURE.**

"Disfigure," as used in Code, § 2678, making it criminal to maliciously kill, maim, or disfigure any horse, cattle, etc., includes injuries which are not of a permanent character. "It embraces any injury, however slight, which is made with malice toward the owner, and which is of a character to lessen the value of the animal." *State v. Harris*, 11 Iowa, 414, 415.

Within a statute punishing the mutilation or disfigurement of an animal the shaving off of all the hair from the mane and tail of a horse would be sufficiently described by the word "disfigure." It is the very term which would be used, and maliciously to impair the use and value of a horse by injuring his appearance and marring his



beauty in removing of those parts alike ornamental and useful, falls entirely within the mischief which the act seeks to prevent. *Boyd v. State*, 21 Tenn. (2 Humph.) 39, 40.

## DISFRANCHISEMENT.

Distinguished from amotion, see "Amotion."

Disfranchisement destroys or takes away one franchise or right of being a member of a corporation. *Richards v. Clarksburg*, 4 S. E. 774, 778, 30 W. Va. 491.

The disfranchisement of a member of a corporation is an expulsion of the member and the taking away of his franchise, which cannot be done unless the power is given by the charter creating the corporation, or the member has been guilty of a crime, the conviction of which would work a forfeiture of all civil rights, or has committed acts which tend to the destruction of the corporation, such as the defacing of its charter, the alteration of its records, or other acts tending to impair or destroy its title to its rights or privileges. *White v. Brownell* (N. Y.) 4 Abb. Prac. (N. S.) 162, 192.

## DISGRACE.

Disgrace is a sense of shame or reproach; that which dishonors; a state of ignominy, dishonor, or shame. And this is the gravamen of an aggravated assault, which is defined as an assault which inflicts disgrace. *Slawson v. State*, 45 S. W. 575, 39 Tex. Cr. R. 176, 73 Am. St. Rep. 914.

## DISGUISE.

"In disguise" is an expression importing a meaning totally different from the phrase "in ambush," or the word "concealed." The word "disguised," when employed as a noun, means a counterfeit habit; a dress intended to conceal the person who wears it. So it is held that, where the evidence showed that a murder was committed by one in ambush or concealed in bushes, a charge relative to the commission of the crime by a person in disguise was unsupported by the evidence. The attempt, says the court, to construe the mere position of a person in ambush or concealed in the bushes as synonymous with, or similar to, the mere dress or mask of a person in disguise, would be a wanton outrage upon good sense and logic. A person in disguise is one who is visible to the eye, but who cannot be identified because of the dress or mask which he wears. A person in ambush or who is concealed is one not visible to the eye, and may not be in disguise. "Disguise" has reference solely to the dress or mask assumed by which the party cannot be recognized when

near. "Ambush" and "concealment" have reference alone to the position in which the person hides himself. *Dale County v. Guntter*, 46 Ala. 118, 128.

## DISHERISON.

Waste is the "disherison" of the remainderman or reversioner. "Disherison" is defined to be disinheriting, depriving, or putting out of an inheritance (*Burrill, Law Dict.*), and the old writ of waste called upon the tenant to appear and show cause why he had committed waste and destruction in the place named to the "disherison" of the plaintiff. *Abernethy v. Orton*, 71 Pac. 327, 329, 42 Or. 437, 95 Am. St. Rep. 774.

## DISHONOR.

See "Notice of Dishonor."

"Webster defines the word 'dishonor' to be to refuse or decline to accept or pay, when it is used in a commercial sense; and Mr. Bouvier, in his Law Dictionary, gives a similar meaning. In *Shelton v. Braithwaite*, 7 Mees. & W. 436, the Court of Exchequer held that the word 'dishonor' had a technical signification, and imported that the bill had been presented for payment and had not been paid." *Brewster v. Arnold*, 1 Wis. 264, 276.

A negotiable instrument is dishonored when it is either not paid or not accepted according to its tenor on presentment for the purpose, or without presentment where that is excused. Civ. Code Mont. 1895, § 4070; Rev. St. Wyo. 1899, § 2368; St. Okl. 1903, § 3634; Rev. Codes N. D. 1899, § 4895; Civ. Code S. D. 1903, § 2210.

## DISHONORABLE CONDUCT.

Unprofessional or dishonorable conduct, as ground for refusing a certificate to practice medicine, is (1) the procuring or aiding or abetting in procuring a criminal abortion; (2) the obtaining of a fee on the assurance that a manifestly incurable disease can be permanently cured; (3) betrayal of a professional secret to the detriment of a patient; (4) causing the publication and circulation of advertisements of any medicine or means whereby the monthly periods of women can be regulated, or the menses can be established if suppressed; (5) causing the publication and circulation of advertisements of any kind relative to diseases of the sexual organs, tending to injure the morals of the public. *Cobbey's Ann. St. Neb.* 1903, § 9428.

## DISINTER.

To "disinter" means to unbury; to take out of the grave; to exhume; so that as used

In Pen. Code, § 290, providing that every person who disinters or removes a dead body of a human being without authority of law is guilty of a felony, it will not include one who merely dug down to a coffin to search the body for valuables, without removing it. *People v. Baumgartner*, 66 Pac. 974, 975, 135 Cal. 72.

## DISINTERESTED.

### As impartial or fair-minded.

A statute providing that a motion for change of venue must be supported by the oath of two disinterested persons will be held to mean not merely persons qualified at common law to testify, but, rather, that those who were to inform the court and set in motion judicial action should be indifferent to the cause in the broader sense of being impartial and fair-minded. *Territory v. Leary*, 43 Pac. 688, 689, 8 N. M. 180 (citing *Warren v. Baxter*, 48 Me. 193, 194; *Ætna Ins. Co. v. Stevens*, 48 Ill. 81, 33).

The term "disinterested," as applied to appraisers, does not simply mean lack of pecuniary interest, but requires the appraiser to be one not biased or prejudiced. *Hickerson v. German-American Ins. Co.*, 33 S. W. 1041, 1043, 96 Tenn. 193, 32 L. R. A. 172; *Bradshaw v. Agricultural Ins. Co.*, 32 N. E. 1055, 1058, 137 N. Y. 137; *Brock v. Dwelling House Ins. Co.*, 61 N. W. 67, 70, 102 Mich. 583, 26 L. R. A. 623, 47 Am. St. Rep. 562; *Hall v. Western Assur. Co.*, 32 South. 257, 258, 183 Ala. 687; *Insurance Co. of North America v. Hegewald (Ind.)* 66 N. E. 902, 905 (citing *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, 61 N. W. 67, 26 L. R. A. 623, 47 Am. St. Rep. 562).

In Connecticut, where a statute provides that appraisers at an execution sale shall be indifferent freeholders, it has been held that, where one of the appraisers was a nephew by marriage, the levy was void for that reason. *Fox v. Hills*, 1 Conn. 295. The court say that "indifferent" means "impartial," and that it may reasonably be presumed that a near relative will be under the influence of partiality. Worcester defines "indifferent" as having no choice or preference. *Wolcott v. Ely*, 84 Mass. (2 Allen) 338, 340.

A son-in-law of a judgment creditor is not a disinterested person within Rev. St. c. 73, § 3, providing for the appointment of appraisers on execution sale of a disinterested and discreet person. One of the definitions of "disinterested" given by Webster is "indifferent." Worcester gives as one meaning "superior to private regards," and he defines "indifferent" as having no choice or preference. It does not mean only one having no pecuniary interest. *Wolcott v. Ely*, 84 Mass. (2 Allen) 338, 340.

### As without pecuniary interest.

"Disinterested," as used in a statute requiring that the commissioners appointed on a petition for laying out a highway should be disinterested freeholders, meant those so situated that the establishment of the highway, or refusal to establish it, would not directly affect their pecuniary interests, and did not exclude one who happened to be related to one of the petitioners. *Chase v. Town of Rutland*, 47 Vt. 393, 399.

"Disinterested freeholders," as used in Act April 22, 1856, providing for the appointment of seven disinterested freeholders whenever the burgesses and town council shall open or widen a street, which viewers shall assess and allow to all persons injured thereby such damages as they should have sustained, cannot be construed to include property owners whose lands abutted on the street to be improved, for they were directly interested in the assessment. In re *Burgess and Town Council of Borough of Big Run*, 20 Atl. 711, 187 Pa. 590.

A statute requiring a commissioner for the establishment of a highway to be a disinterested freeholder residing in another town from that in which the highway petitioned for was located should be construed to include one who was not interested in laying out and establishing the highway further than every citizen is interested in having convenient and proper highways established. The fact that he had a grand list in the town in which the highway was to be laid out for the current year, and not beyond that period, did not affect it, for he had no direct interest in the establishment or nonestablishment of the highway, as petitioner, landowner, or person who would be peculiarly accommodated by its establishment. His interest was indirect and remote—the liability that some portion of the expense of its construction might be assessed on his grand list for that current year, which was an impossibility, because the highway could not be constructed in season so that a tax could be assessed on such list. *Gray v. Middletown*, 56 Vt. 53, 55.

### As not previously interested.

Within the statutes relating to highways, and providing for appeals in certain cases from the action of the board of supervisors of the town, and that on such appeal commissioners shall be appointed who are disinterested persons, the term would not include a person who had previously acted as supervisor of the town in the matter of the same highway relative to which the appeal was made. *Brock v. Hishen*, 40 Wis. 674, 679. Persons who have signed a petition for a proposed alteration in a highway cannot be said to be disinterested, so as to authorize their appointment as commissioners. *Williams v. Mitchell*, 5 N. W. 798, 801, 49 Wis. 234.

Rev. St. c. 113, § 28, requires an application by a debtor to disclose and take the poor debtor's oath to be made before two disinterested justices of the peace. Held, that the word "disinterested" meant a legal, positive interest, either by way of relationship to some of the parties, or by way of some accruing pecuniary gain or loss from the result, and not a mere intellectual, moral, or sympathetic interest; hence it did not follow, because a justice had heard and adjudged a prior application by the same petitioner, that he was disqualified, or was not disinterested to hear subsequent applications. *McGilveray v. Staples*, 16 Atl. 404, 405, 81 Me. 101.

#### As not related.

"Disinterested," as used in Rev. St. c. 1, § 4, rule 22, requiring disinterestedness on the part of those performing judicial acts, means those who are not related to the parties to the action by blood or marriage, and who have not any pecuniary interest in the matter to be decided. *Lovering v. Lamson*, 50 Me. 334.

In a statute providing that the appraisers on an execution shall be judicious and disinterested freeholders, "disinterested" means something more than being devoid of pecuniary interest. The appraisers should stand in no such relation to either party as would disqualify them for the execution of judicial power between them. *Blodget v. Brinsmaid*, 9 Vt. 27, 30.

Rev. St. c. 1, § 4, rule 22, requiring disinterestedness and indifference on the part of those performing judicial acts, excludes those who are related to the parties in the action within the fourth degree, as well as those who are pecuniarily interested in the adjudication. *Lyon v. Hamor*, 73 Me. 56, 58 (citing *Conant v. Norris*, 58 Me. 451).

Comp. Laws, § 5057, declares that, where beasts are distrained damage feasant, there shall be an appraisal by two disinterested persons. Held that, while the statute does not undertake to define precisely what it means by "disinterested persons," the phrase clearly means persons free from prejudice or partiality, and it is evident that one cannot be regarded as disinterested who is a relative of the parties. *Hascelg v. Tripp*, 20 Mich. 216, 218.

A justice of the peace is not disinterested if he was once married to a sister of the plaintiff, whether at the time of the suit she were living or not. *Spear v. Robinson*, 29 Me. (16 Shep.) 531, 543.

A justice is not disinterested, where within the fourth degree of relationship, though he is equally related to each party. *Bard v. Wood*, 30 Me. (17 Shep.) 155, 156.

#### DISINTERESTED WITNESS.

In Rev. St. 1857, c. 74, § 1, authorizing the subscription of wills by "three disinterested and credible witnesses," "disinterested" means the opposite of "interested," as applied to a witness; that is, one who would neither gain nor lose by the direct, legal operation and effect of the judgment, and for whom the record would not be legal evidence in some other action. *Jones v. Larrabee*, 47 Me. 474, 475.

"Disinterested and credible witnesses," as used in St. 1857, c. 74, § 1, authorizing the attestation of wills by three "disinterested and credible witnesses," means competent witnesses who have no present, certain, legal, vested interest. *Warren v. Baxter*, 48 Me. 193, 195 (citing 4 Stark. Ev. 745; *Armory v. Fellowes*, 5 Mass. 219).

A disinterested witness to a will, within a statute requiring that wills should be attested by such witnesses, is one who has no legal interest in the will. *Appeal of Combs*, 105 Pa. 155.

The term "disinterested," as applied to a witness, means devoid of pecuniary interest; having no prospect of gain or loss. Therefore the mere relationship of brother to one of the parties is not such interest as would disqualify him from being a witness to the contract. *State v. Easterlin*, 39 S. E. 250, 251, 61 S. O. 71.

The term "disinterested witnesses," in Act April 26, 1855, requiring wills containing a bequest to charity to be attested by two credible and at the same time disinterested witnesses, includes a person who is named as executor in the will. In *re Jordan's Estate*, 29 Atl. 3, 161 Pa. 393.

#### DISMISS.

See "Motion to Dismiss for Want of Equity."

"Dismiss," when applied to proceedings in law, means the removal of a cause out of court without any further hearing. *Bouv. Law Dict.* It is applied to the removal or disposal of the cause itself, and not to the mere annulment of the writ. *Bosley v. Bruner*, 24 Miss. (2 Cushm.) 457, 462.

The usual course of a person who for any reason desired to abandon the further prosecution of his libel for divorce is to move that it may be dismissed. In such a case the entry dismissed is distinguishable from the same entry made by order of the court on a full examination on the merits. The latter, as a decision on the merits, is final, while the former, as a mere *nol. pros.*, is no evidence. *Brown v. Brown*, 37 N. H. 536, 538, 75 Am. Dec. 154.

**As discharge.**

Where a court, in causing the dissolution of an injunction, uses the words "dismissed and vacated," the word "dismissed" will be held to mean "discharged." *Browne v. Edwards & McCullough Lumber Co.*, 62 N. W. 1070, 1071, 44 Neb. 361.

**As end.**

In *Taft v. Northern Transp. Co.*, 56 N. H. 417, the court said: "The entry, 'dismissed by order of court,' appears to have been devised by the court for the purpose of absolutely putting an end to such defective actions; and the term 'dismissed' has acquired a technical meaning in suits at law, and signifies a final ending of the suit—not a final judgment of the controversy, but an end of that proceeding." So that, where a judgment is entered that the complaint be dismissed, such proceeding was ended. *Greeley v. Winsor*, 52 N. W. 674, 675, 3 S. D. 138.

"The term 'dismissed' has acquired a technical meaning in suits at law in our practice. \* \* \* It is a final ending of the suit—not a final judgment in the controversy, but an end of that proceeding." *Taft v. Northern Transp. Co.*, 56 N. H. 414, 417.

**As final disposition.**

A bill or suit in equity is said to be dismissed when finally disposed of adversely to the plaintiff, and, unless the decree of dismissal is declared to be without prejudice, it is a bar to any further litigation of the matter between the parties. *Goldsmith v. Smith* (U. S.) 21 Fed. 611, 614.

Where the decision of the court that has examined a bill in equity with the pleadings and evidence is entered on the docket, "dismissed," without any words of qualification, such word shows a final determination of the controversy between the parties, both in equity and at law. *Gove v. Lyford*, 44 N. H. 525, 528.

**As nonsuit.**

The entry of a judgment, "that the said suit is not prosecuted, and be dismissed," was nothing more than the record of a nonsuit, though the customary technical language was not used. Such an amendment did not imply that the plaintiffs had no cause of action, or if they had that they intended to renounce it, or that it was adjusted. *Halde- man v. United States*, 91 U. S. 584, 585, 23 L. Ed. 433.

**As reject.**

In an action against heirs to recover a sum paid to the administrator of an estate as the purchase price for land sold at an administrator's sale which was set aside as illegal, the defendants alleged that a claim for the

same money was presented as a claim against such estate, and, on due hearing, was by the court dismissed, and that such judgment had never been appealed from, modified, or vacated. The plaintiff claimed that such findings showed only a dismissal of the claim. This is a dispute about words, rather than to reason upon things. Perhaps the more appropriate word to have used would be "disallowed" instead of "dismiss," although the term "dismiss" is quite commonly used to show the rejection of a claim against an estate. It is clear that there had been a final adjudication of the case upon the merits, and such adjudication is a bar to the present action. *Stults v. Forst*, 84 N. E. 1125, 1128, 135 Ind. 297.

**Remand distinguished.**

The words "dismiss" and "remanded" are not used interchangeably or indiscriminately in section 5 of the act of 1875, relating to the disposal of cases in the circuit courts. The former has reference only to a suit brought in the circuit court, and the latter to one removed there from the state court. In the one case, if it appear that the suit is not cognizable in the circuit court, it is dismissed, and in the other it is remanded to the state court. Consequently a motion under the jurisdiction of the circuit court in regard to an action brought there from the state court would properly have been an action to remand, rather than to dismiss. *Northern Pacific Terminal Co. v. Lowenberg* (U. S.) 18 Fed. 339, 341.

**DISMISSAL.**

A dismissal of a motion for a new trial is really nothing more than a denial of it. *Davis v. Hurgren*, 57 Pac. 684, 685, 125 Cal. 48.

**As a final decree or judgment.**

See, also, "Final Hearing or Trial."

A dismissal of an action is a final decree determining the cause, which concludes the parties. Striking the case from the docket is not equivalent to the dismissal of a bill for want of equity. *Frederick v. Connecticut River Sav. Bank*, 106 Ill. 147, 149.

In effect, a dismissal is a final judgment in favor of the defendant; and, although it may not preclude the plaintiff from bringing a new suit, there is no doubt that, for all purposes connected with the proceedings in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication on the merits. *Dowling v. Polack*, 18 Cal. 625, 627 (quoted and approved in *Lewis v. Smith*, 43 Atl. 542, 543, 21 R. I. 324).

A dismissal of a case is to send it out of court without a trial upon any of the is-

sues involved in it. It is the final disposition of a particular case, and not a trial of it. *Brackenridge v. State*, 11 S. W. 630, 632, 27 Tex. App. 513, 4 L. R. A. 360.

A dismissal of a suit without prejudice is no decision of the controversy on its merits, and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought. *Newberry v. Ruffin* (Va.) 45 S. E. 733.

#### **Discontinuance synonymous.**

"In practice, a dismissal and a discontinuance amount to the same thing, and are but different words employed to convey the same idea, namely, that the case is sent out of court." *Thurman v. James*, 48 Mo. 235, 236.

Where an order had been rendered which had the effect of discontinuing an action, it was contended that the courts had no authority to order a discontinuance of the cause, such a thing as a discontinuance being unknown to our practice; but it was held that "discontinuance" and "dismissal" are synonymous terms. *English v. Dickey*, 27 N. E. 495, 497, 128 Ind. 174, 13 L. R. A. 40.

#### **As nonsuit.**

A dismissal, as the term is used in modern practice, does not amount to a retraxit at common law. Nor does a dismissal constitute a nonsuit. *Bullock v. Perry* (Ala.) 2 Stew. & P. 319.

#### **Voluntary nonsuit.**

See "Voluntary Nonsuit."

#### **DISMISSAL AGREED.**

A "dismissal agreed" is an adjudication of the matters in dispute between the parties by themselves. *Root v. Topeka Water Supply Co.*, 26 Pac. 398, 400, 46 Kan. 183.

"Agreed dismissal," as used in an entry of judgment reciting an agreed dismissal, does not show a termination of a controversy between the parties. "The words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. The general entry of the dismissal of the suit by agreement is evidence of an intention not to abandon the claim on which it was founded, but to reserve the right to bring a new suit thereon if it becomes necessary." *Haldeman v. United States*, 91 U. S. 584, 586, 23 L. Ed. 433.

#### **DISOBEDIENCE.**

See "Lawful Disobedience."

Resistance distinguished, see "Resistance."

Rev. St. § 725 [U. S. Comp. St. 1901, p. 583], provides that the power of the federal courts to punish contempts shall not be construed to extend to any case except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of such courts in their official transactions, and the "disobedience or resistance to any lawful writ," etc. Held, that the intention of Congress by the use of the clause "disobedience or resistance to any lawful writ," etc., was to refer only to a case wherein the course of judicial proceedings was or would be actually obstructed, and thus did not include a case where a civil right only had been invaded, which right could be tried according to the usual course of the law. *Steam Stone Cutter Co. v. Windsor Mfg. Co.* (U. S.) 3 Fed. 298, 301.

#### **DISORDER.**

##### **As ailment or disease.**

The representation in an application for life insurance that the insured had not been subject to or had any disorders or diseases such as open sores, lumps, or swellings of any kind, should be construed to mean only such as result by defective action of some function, and which were to some extent permanent or continuous, and of such nature as would be of reasonable significance for the purposes of the inquiry, and was not to be construed to include trivial ailments or injuries which were literally within the meaning of the representation. *Home Mut. Life Ass'n v. Gillespie*, 1 Atl. 340, 343, 110 Pa. 84.

Dyspepsia is not a disorder that tends to shorten life, in regard to a life insurance application. *Watson v. Mainwaring*, 4 Taunt. 763, 764.

Belgium Treaty, March 9, 1880, art. 11, provides that consuls shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts. The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order. Held, that disorder, as the word is there used, meant a disturbance of the public peace, or, as some writers term it, the "public repose" of the people, who look to the state for protection, and therefore the local authorities were not deprived of jurisdiction of a homicide committed on board a Belgian steamship moored to a dock in the port of the United States, arising from an affray between two Belgians belonging to the crew of the vessel, though the affray oc-

curred below deck, and was only witnessed by other members of the crew. *Mall v. Keeper of the Common Jail*, 7 Sup. Ct. 385, 390, 120 U. S. 1, 30 L. Ed. 565.

## DISORDERLY.

### As disobedience of law.

"Disorderly," as used in a liquor dealer's bond, conditioned that the principal will not suffer his place to be disorderly, is used in its ordinary sense, and is not limited to its legal signification, as applied to a disorderly house, but means not regulated by the restraint of morality; not complying with the restraints of order and law. Thus the selling of liquor to a minor rendered the premises disorderly, within the condition of the bond. *People v. Eckman*, 18 N. Y. Supp. 654, 658, 63 Hun, 209.

## DISORDERLY CONDUCT.

As to the phrase "disorderly conduct," standing alone, there is no such offense. If, under that phrase, policemen and magistrates were free to call anything they chose "disorderly conduct," and to arrest and hold therefor, no one would be safe. But policemen and magistrates cannot create or define criminal offenses. That can only be done by the Legislature, and cannot, under our form of government, be delegated. *People v. Keeper of State Reformatory for Women*, 77 N. Y. Supp. 145, 152, 38 Misc. Rep. 233.

A conviction of disorderly conduct is not a valid conviction for a misdemeanor, and therefore within the purview of the state charities law, unless the offense constitutes a misdemeanor as defined by other statutes; and where the record fails to show that the disorderly conduct came within the meaning of Consolidation Act, § 1458 (Laws 1882, p. 366, c. 410), or that of Pen. Code, § 675, relating to the offense of disorderly conduct as therein defined, and therefore a misdemeanor, the person so convicted is properly discharged from custody on habeas corpus. *People v. Keeper of New York State Reformatory for Women at Bedford*, 68 N. E. 884, 176 N. Y. 465.

### Disorderly person distinguished.

The offenses which constitute disorderly conduct under Acts 1833, c. 11, and Acts 1860, c. 508, are different from the offenses which will constitute a disorderly person under the act of 1833 and the Revised Statutes. In common parlance, one who is guilty of disorderly conduct may be regarded as a disorderly person, but these terms, "disorderly person" and "disorderly conduct," are used in the statutes as distinguishing distinct and different offenses. In *re Miller* (N. Y.) 1 Daly, 562, 566.

### As disturbance of public peace.

Disorderly conduct does not constitute any crime known to the law. It is only when it tends to a breach of the peace that it constitutes a minor offense cognizable by the police magistrates of the city of New York. *People v. Davis*, 80 N. Y. Supp. 872, 875, 80 App. Div. 448.

While disorderly conduct may in many cases be a breach of the peace, it is not necessarily so. Therefore the offense of disorderly conduct is not the same as the offense of a breach of the peace. *City of Mt. Sterling v. Holly*, 57 S. W. 491, 492, 108 Ky. 621.

### Drunkenness.

"Disorderly conduct," as used in Rev. St. art. 363, authorizing a city marshal and his deputies to arrest without warrant all who are guilty of any disorderly conduct, should be construed to include drunkenness in a public place. "Disorderly" does not only mean "confused" or "out of order," but also lawless or contrary to law. Webster. There is good authority for holding that any conduct which is contrary to law is within the definition of "disorderly conduct" as given by standard lexicographers. *Pratt v. Brown*, 16 S. W. 443, 445, 80 Tex. 608.

### Gambling in private.

Quietly playing and betting for money at a game of cards in a private room, although the room be situated over a barroom, and the gaming be done on a Sabbath morning, is not disorderly conduct, as against the municipal ordinances of the city; it not appearing that the offense was in any sense publicly committed, or that the public was in any manner disturbed thereby, or even had any knowledge of the same until the participants in the game were discovered and detected by the police officer who made a raid upon the room for that purpose. *Kahn v. City of Macon*, 22 S. E. 641, 95 Ga. 419.

### Keeping house of ill fame.

The keeping of a house of ill fame is declared to be disorderly conduct by an ordinance of the city of Buffalo. *Arhart v. Stark*, 27 N. Y. Supp. 301, 302, 6 Misc. Rep. 579.

Under the charter of the city of Buffalo, empowering the common council to pass ordinances "to define and prevent disorderly conduct," etc., the common council had power to pass an ordinance defining what disorderly conduct was, and who should be deemed disorderly persons, and might include keepers of houses of ill fame, and persons voluntarily residing therein, in the latter class, and provide for their punishment. The ordinances passed under such charter (chapter 2, § 1) defined "disorderly conduct" as "the conduct, or commission of any of the acts pro-

hibited by this chapter," etc., and, in section 2, prohibited the keeping of a house of ill fame, or the contribution in any manner to the support of such house, or the voluntary residence therein. The keeper of a house of ill fame is a disorderly person, and his conduct tends to disturb the peace of the community where the brothel is located, and it did not need legislation to declare him such. *People v. Miller* (N. Y.) 38 Hun, 82, 83.

#### Violation of official duty.

"Disorderly conduct," as used in a city charter giving the common council the power to expel a member for disorderly conduct, is not limited to acts of turbulence, violence, or disorderly conduct in the body and during the session of the common council, but refers to the conduct of a member of the council as such, not as a member of the corporation nor as a citizen; but as a member of the council, acting in his official character, no matter where or when. He who, intrusted with official power, violates his public obligation, betrays his official trust, and loses the public confidence by selling his official influence or vote in the body of which he is a member, is guilty of disorderly conduct of a far deeper dye than he who merely forgets the proprieties of official business and intercourse. The violation of a rule of morals is a more erroneous offense than the violation of a rule of order. His crime is more base and malignant than turbulent. Any conduct which is contrary to law is within the definition of disorderly conduct, as given by standard lexicographers, and, of course, violation of official duty on the part of a member of the common council is within the legal meaning of the words used in the charter. *Tyrrell v. Common Council of Jersey City*, 25 N. J. Law (1 Dutch.) 536, 540.

#### DISORDERLY HOUSE.

A disorderly house is one kept in such a way as to disturb, annoy, or scandalize the public generally, the inhabitants of a particular vicinity, or the passers-by on a particular highway. *State v. Wilson*, 93 N. C. 608, 609 (citing 2 Whart. Cr. Law, § 2392); *Commonwealth v. Bessler*, 30 S. W. 1012, 1013, 97 Ky. 498; *Hawkins v. Lutton*, 70 N. W. 483, 484, 95 Wis. 492, 60 Am. St. Rep. 131; *State v. Maxwell*, 33 Conn. 259.

A disorderly house is any house used or resorted to for the purpose of gaming, prostitution, or other immoral or illegal practices. *People v. Clark* (N. Y.) 1 Wheeler, Cr. Cas. 288.

A disorderly house is defined to be a house or other place to which people resort, to the disturbance of persons lawfully in the place, or the disturbance of the neighborhood. *Hickey v. State*, 53 Ala. 514, 516 (cit-

ing 1 Bish. Cr. Law, § 1046); *Price v. State*, 11 South. 128, 129, 96 Ala. 1; *Overman v. State*, 88 Ind. 6, 8.

The matter of repetition or frequency of the acts of disorder is an essential element in the acts to constitute the offense of keeping a disorderly house. *Commonwealth v. Bessler*, 30 S. W. 1012, 1013, 97 Ky. 498; *Overman v. State*, 88 Ind. 6, 8 (citing *State v. Reckards*, 21 Minn. 47).

To constitute a disorderly house, an habitual violation of law must be permitted by its occupant. *Brown v. State*, 7 Atl. 340, 341, 49 N. J. Law (20 Vroom) 61.

The term "disorderly house," as used in Revision 1886, tit. 12, § 133, providing for the punishment of every person who keeps a disorderly house, is synonymous with a house where lewd, dissolute, or drunken persons resort. A house may become a nuisance to its immediate neighborhood without acquiring a general reputation of being disorderly. It must become disorderly and a nuisance before it would acquire a general reputation of being so, and, as soon as it becomes a house of this description, it is, we think, liable to prosecution under this statute. The persons immediately injured by such a house would know that it was in fact disorderly long before its general character would be acquired, and it was not the intention to shield it from prosecution until its general character was established. *State v. Maxwell*, 33 Conn. 259. To constitute a disorderly house, it is not necessary that the whole building, with every room and apartment in it, shall be used for the unlawful purpose. *State v. Garity*, 46 N. H. 61, 62.

The term "disorderly house," as defined by the common law, is one of very wide meaning, and includes any house or place, the inmates of which behave so badly as to make it a nuisance—such as a gambling house, dancing house, or other like places. *State v. Groszofski*, 94 N. W. 1077, 1078, 89 Minn. 343.

A "disorderly house," in its restricted sense, is a house in which people abide, or to which they resort, disturbing the repose of the neighborhood; but, in its more enlarged sense, it includes bawdyhouses, common gaming houses, and places of like character, to which people promiscuously resort for purposes injurious to the public morals or health or convenience or safety. Nor is it essential that there be any disorder or disturbance, in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts there done are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or the statute. *Cheek v. Commonwealth*, 2 Ky. Law Rep. 339, 341, 79 Ky. 359.

Evidence that the witness got drunk at the house kept by defendant, on liquor obtained elsewhere, did not prove that defendant kept a disorderly house, where it did not appear that it was a drinking place, or that drinking and drunken people were wont to assemble there, or that defendant lived in a thickly settled neighborhood, or that the people about there were disturbed, or knew of the conduct at the house. *State v. Calley*, 10 S. E. 455, 456, 104 N. C. 858, 17 Am. St. Rep. 704.

In keeping a disorderly house, the nuisance consists in drawing together dissolute persons engaged in unlawful and injurious practices, thereby endangering the public peace and corrupting good morals. The gist of the offense is the keeping or managing such a house to the public detriment, and, under a general charge, particular instances may be proved. That notoriously reputed prostitutes and libertines were in the habit of frequenting the house during the time laid in the indictment had a direct tendency to support the allegations of the indictment and establish the guilt of the defendant, if the house were managed or controlled by him at the time. *State v. McGregor*, 41 N. H. 407, 413.

A complaint for keeping a disorderly house may be maintained by proof that only one person in the neighborhood or community was disturbed or annoyed, if the acts done were of such a nature as tended to annoy all good citizens. *Commonwealth v. Hopkins*, 133 Mass. 381, 43 Am. Rep. 527.

#### **Bawdyhouse.**

See "Bawdyhouse."

#### **Gambling house.**

An actual disturbance of the public peace is not indispensable, to constitute the offense of keeping a disorderly house, but it is enough that acts be done that are contrary to law, and subversive of public morals, health, or safety; and consequently it has been held that a common gambling house is, in legal contemplation, a disorderly house. *Kneffler v. Commonwealth*, 22 S. W. 446, 94 Ky. 359.

#### **As house of prostitution.**

As used in an ordinance providing for the punishment of any person found in a disorderly house or place, or a house of ill fame, or a place resorted to for purposes of prostitution, the term "disorderly house" does not necessarily mean a house of prostitution. *Hawkins v. Lutton*, 70 N. W. 483, 484, 95 Wis. 492, 60 Am. St. Rep. 131.

"A disorderly house is defined to be one kept for the purpose of public prostitution, or a common resort for prostitutes, vagabonds, etc." *Thompson v. State*, 2 Tex. App. 82, 83.

Pen. Code, art. 396, defining a "disorderly house" to be "one kept for the purpose of public prostitution, or as a common resort for prostitutes and vagabonds," does not include every house to which prostitutes and vagabonds resort, but every house kept for the purpose of public prostitution. *McElhaney v. State*, 12 Tex. App. 231, 232.

The common-law offense of keeping a disorderly house may be proved in various ways—by showing that the accused kept a common bawdyhouse, a common gaming house, or a disorderly place of entertainment. See Steph. Dig. Cr. Law, art. 179. A prosecution for the common-law offense of keeping a disorderly house may be sustained by proof that such house was resorted to by immoral persons for the purpose of prostitution, without evidence that it was otherwise disorderly. *Commonwealth v. Goodall*, 165 Mass. 588, 594, 43 N. E. 520, 521.

The term "disorderly house," as used in the Penal Code, includes all premises which by common fame or report are used for the purpose of prostitution or assignation. Pen. Code N. Y. 1903, § 718.

#### **As a noisy place.**

A disorderly house, in its restricted sense, is a house in which people abide, or to which they resort, disturbing the peace of the neighborhood; but, in its more enlarged sense, it includes bawdyhouses, common gaming houses, and places of like character, to which people promiscuously resort for purposes of injury to the public morals or health or convenience or safety. Nor is it essential that there be any disorder or disturbance, in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts there done are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or by statute. *Cheek v. Commonwealth*, 79 Ky. 359, 362.

That a disorderly house is a resort at which criminal practices are there pursued, offending the moral sense, or endangering the security of persons or property, fixes its character as a public nuisance. The quiet of the locality may be unbroken, but the injury flows from the evil influence it exerts; from the temptations and opportunities for the commission of crime it affords. It is not essential that there should be any disorder or disturbance in the sense that it disturbs the public peace or the quiet of the whole neighborhood. It is enough that the acts done at such house are contrary to law and subversive of public morals. *Price v. State*, 11 South. 128, 129, 96 Ala. 1.

Keeping a disorderly house may consist in allowing the house or place to be so noisy



and disorderly as to disturb the public peace and annoy the neighborhood, but it is not necessary to show such noise in all cases. The keeping of such a house may consist in its drawing together idle, vicious, dissolute, or disorderly persons, engaged in unlawful or immoral practices, thereby endangering the public peace and promoting immorality. If the doors are practically open to the public, alluring the young and unwary into it, to indulge in or witness anything corrupting to their general good morals, the keeper cannot excuse himself by alleging that the public is not disturbed. 1 Bish. Crim. Law (6th Ed.) §§ 1110-1120; *Thatcher v. State*, 2 S. W. 343, 344, 48 Ark. 60.

A "disorderly house," the inmates of which behave so badly as to become a nuisance to the neighborhood, has a wide meaning, and includes bawdyhouses, common gambling houses, and places of like character. In *Commonwealth v. Hopkins*, 133 Mass. 381, 48 Am. Rep. 527, it is held that a house is disorderly which tends to public annoyance, although only one person may have been disturbed, so that where there was evidence that there was noise and confusion inside and outside of a saloon, of such character as to disturb the public, that parties had been drinking there on Sunday, and that other persons had been singing vulgar songs and that witness had been annoyed by the same set of drunkards, there was sufficient evidence to give to the jury as to what constituted a disorderly house. *State v. McGahan*, 37 S. E. 573, 575, 48 W. Va. 438.

Instrumental music and songs and dancing by volunteers, the whole constituting an entertainment of doubtful decency, attracting a noisy crowd, which fills the room and obstructs the sidewalk, and resulting in the indiscriminate selling of liquor to intoxicated persons, renders a licensed tavern a disorderly house. *Commonwealth v. Elliott*, 16 Pa. Co. Ct. R. 122.

A barroom and dance hall, with music, kept with intent to bring together and entertain undesirable characters, if they habitually assemble there to drink and dance together, may be a disorderly house, though it is quietly kept, and no conspicuous improprieties are permitted there. *Beard v. State*, 17 Atl. 1044, 71 Md. 275, 4 L. R. A. 675, 17 Am. St. Rep. 536.

To constitute a house a disorderly house, in law, the noises, etc., must be ordinary and usual or common, and the disturbance must be general, and not of only one person in a thickly settled neighborhood. *Heard v. State*, 39 S. E. 118, 120, 113 Ga. 444 (citing *Palfus v. State*, 36 Ga. 280).

A disorderly house is punishable because it disturbs the peace and quiet of the neighborhood. The disorder must be such as can

be seen or heard by outsiders. *Commonwealth v. Murr*, 7 Pa. Super. Ct. 391, 394.

#### Poolroom.

A house to which people promiscuously resort for purposes injurious to the public morals is a disorderly house. It includes a room kept to which persons commonly resort for the purpose of betting on horse races. *Haring v. State*, 17 Atl. 1079, 1080, 51 N. J. Law (22 Vroom) 442 (quoting *McClellan v. State*, 9 Atl. 681, 47 N. J. Law [18 Vroom] 471).

#### Saloon.

The term "disorderly house," as used in Pen. Code, art. 339, defining a disorderly house as one kept for purposes of prostitution, or as a common resort of prostitutes and vagabonds, cannot be construed to include a combined retail grocery store and beer saloon, frequented by prostitutes and vagabonds for the purpose of drinking beer. *Harmes v. State*, 9 S. W. 487, 26 Tex. App. 190, 8 Am. St. Rep. 470.

The term "disorderly house" has in law a well-settled and well-defined meaning, which is not identical with, and does not necessarily include, the term "tippling shop," which is defined by *Bouvier* as a place where spirituous liquors are sold and drank in violation of law. *City of Emporia v. Volmer*, 12 Kan. 622, 633.

#### Single room.

A disorderly house, within the meaning of a statute prohibiting the keeping of disorderly houses, may include the keeping of a single room. *Moore v. State*, 4 Tex. App. 127, 128.

To constitute a disorderly house, it is not necessary that the whole building, with every room and apartment in it, shall be used for the unlawful purpose. Ordinarily but a single apartment would be used for the disorderly purpose, though the whole might be so used, and the nuisance to the public would be the same, whether it was in one room or several in the same house. *State v. Garity*, 46 N. H. 61, 62.

#### DISORDERLY MANNER.

The words "disorderly manner," in Rev. St. 1881, § 2097, providing that whoever keeps a place where intoxicating liquors are sold, bartered, or given away, or suffered to be drank in a disorderly manner, to the annoyance or injury of any part of the citizens of the state, shall be fined, etc., applies not only to a selling, etc., in a disorderly manner, but also applies to the manner of keeping the house. *Nace v. State*, 19 N. H. 729, 117 Ind. 114.

**DISORDERLY PERSON.**

Disorderly conduct distinguished, *see* "Disorderly Conduct."

The term "disorderly person" is broader than the term "vagrant." "Disorderly" means lawless; contrary to law; violating, or disposed to violate, law and good order; inclined to break loose from restraint; unruly; in a manner violating law and good order; contrary to rules or established institutions. It is very extensive in its significance, and includes all who violate the peace and good order of society, either as vagrants, disorderly, or for breach of the public peace. In *re* Aldermen and Justices of the Peace (Pa.) 2 Pars. Eq. Cas. 458, 464.

The words "disorderly person," as used in Laws 1896, c. 112, § 40, providing that any person intoxicated in a public place is a disorderly person, and may be arrested, etc., is the nomination of the offense as a crime, being merely descriptive of it, or, as said by Mr. Judge Strong in *Hill v. People*, 20 N. Y. 368, persons who are found intoxicated in public places may well be considered disorderly at the time. So may persons when perpetrating almost any crime. *People v. Markell*, 45 N. Y. Supp. 904, 907, 20 Misc. Rep. 149.

Where a complaint against one was for wilful refusal and neglect to provide for his wife, which neglect constitutes one a disorderly person, under the fifth section of the act relative to disorderly persons, a finding that such person was "guilty of being a disorderly person, under the provisions of the act concerning disorderly persons," was insufficient; it not being equivalent to a determination that he had been guilty of wilfully refusing and neglecting to provide for his wife. *O'Shaughnessy v. McLorinan*, 43 N. J. Law (14 Vroom) 410, 413.

Under Code Cr. Proc. § 899, describing, among others, disorderly persons as persons who actually abandon their wives or children in the city of New York without adequate support, or who leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means, a husband may be proceeded against as a disorderly person, in that he failed to support his wife, though she had previously, in an action for a limited divorce, obtained a decree of separation without alimony, as such decree did not terminate the marital relation. *People v. Cullen*, 40 N. Y. Supp. 1, 2, 7 App. Div. 118.

One convicted of playing at bowls is not a disorderly person. *Rex v. Clarke*, 1 Cowp. 35, 36.

One who keeps a public saloon, to which persons resort for the purpose of playing pool, is a disorderly person, under Code Cr. Proc. § 899, subsecs. 4, 7, defining disorderly per-

sons as, among others, keepers of houses for the resort of gamblers, and persons who keep in a public place an apparatus or device for the purpose of gaming. *People v. Cutler*, 1 N. Y. Cr. R. 178, 179.

The following are disorderly persons: (1) Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means; (2) persons who threaten to run away and leave their wives or children a burden upon the public; (3) persons pretending to tell fortunes, or where lost or stolen goods may be found; (4) keepers of bawdyhouses, or houses for the resort of prostitutes, drunkards, tipplers, gamblers, habitual criminals, or other disorderly persons; (5) persons who have no visible profession or calling by which to maintain themselves, but who do so, for the most part, by gaming; (6) jugglers, common showmen, and mountebanks, who exhibit or perform for profit, puppet shows, wire or rope dancers, or other idle shows, acts, or feats; (7) persons who keep in a public highway or place an apparatus or device for the purpose of gaming, or who go about exhibiting tricks or gaming therewith; (8) persons who play in a public highway or place with cards, dice, or any other apparatus or device for gaming; (9) habitual criminals within the provisions of this Code. Code Cr. Proc. N. Y. 1903, § 899.

Pub. Acts 1889, No. 264, entitled "An act relative to disorderly persons," section 1 of which enumerates those who come under the term "disorderly persons," is not unconstitutional, as embracing more than one object; the term "disorderly persons" being comprehensive, and properly including all those who are designated in the body of the act. *People v. Kelly*, 99 Mich. 82, 84, 57 N. W. 1090.

**DISPARAGEMENT.**

"Disparagement," as used in statutes prohibiting a guardian from allowing marriage of his ward in disparagement, contemplates some personal or social defect or disqualification, such as deformity, lunacy, disease, villenage, alienage, or corruption of blood, and does not include inequality of fortune. A marriage which brought no disgrace on the ward or her kin, which did not put her or them below their proper station, but only united her to a man of less fortune than herself, is not a marriage in disparagement. *Shutt v. Carliss*, 36 N. C. 232, 240.

**DISPATCH.**

*See* "Cipher Dispatch or Message."

Dispatches, treated of in the decisions as warlike or contraband communications,

are defined to be official communications of official persons on the public affairs of the government. *The Tropic Wind* (U. S.) 24 Fed. Cas. 212, 214.

## DISPATCH.

See "Convenient Dispatch"; "Customary Dispatch"; "Quick Dispatch"; "With All Dispatch"; "With All Possible Dispatch."

In a charter party, by which the owners guaranteed that for a certain rate per ton the ship should be dispatched from a certain place within a certain time after arrival, "dispatched" means not detained at the place mentioned. It cannot be said that a vessel which has continued in the harbor for more than 21 days has been dispatched within that time. *Sharp v. Gibbs*, 40 Eng. Law & Eq. 383, 387.

Where a charter party provided that a vessel was to have "dispatch in discharging," it was not obliged to await its turn in respect of other vessels which the consignees of her cargo were discharging, nor yield to any custom to that effect obtaining with such consignees. *Keen v. Audendried* (U. S.) 14 Fed. Cas. 177.

### As without delay.

The word "dispatch," employed in bills of lading requiring a cargo to be discharged with dispatch, has been held to mean that the consignee is to take the cargo as rapidly as the vessel can deliver it. *Terjesen v. Carter* (N. Y.) 9 Daly, 193, 194.

A charter party, obligating the charterer to furnish and receive cargo with all possible "dispatch," meant that the charterer should designate a berth and furnish cargo at the place of loading as fast as it might be possible for the vessel to receive it. *Moody v. 500,000 Laths* (U. S.) 2 Fed. 607, 608.

The term "dispatch," as used in a charter party requiring the vessel to be discharged with dispatch, means without delay. It does not mean with diligence, nor does it refer to, nor is it controlled by, any usages, customs, or rules of the port where the discharge is made. It is a term that does not need construction by reference to extrinsic circumstances. A charterer, who stipulates for a dispatch in a discharge, takes all risks of being able to effect such discharge. Though without his fault, by stress of weather, ice, the impossibility of obtaining necessary hands to receive the cargo, or other cause, he is obliged to detain the ship, he must pay the stipulated damage. *Sleeper v. Puig* (U. S.) 22 Fed. Cas. 321, 322.

## DISPENSARY.

As a saloon, see "Saloon."

In the legislation of the state the phrases "question of dispensary," and "the issue of dispensaries" were in common and universal use when reference was had to the agitation prevalent throughout the state or in any county or municipality looking to committing and confining the sale of spirituous, vinous, or malt liquors to government agencies and on governmental account; and wherever this has been done it was said that a dispensary had been established. Hence, while there may be dispensaries for the disposition of commodities other than these liquors, when reference is made to them by use of the word "dispensary," there must be some express differentiation, or else the reference will be understood to be dispensary of liquors; and hence the use of such word in the title of an act sufficiently expresses the purpose of the act. *Mitchell v. State*, 32 South. 687, 689, 134 Ala. 392.

The Dispensary Act of December 24, 1892, is not a law prohibiting the sale of intoxicating liquors, as it not only permits, but absolutely encourages, such sale to an unlimited extent; for by its profit feature it holds out an inducement to every taxpayer to encourage as large sales as possible, and thereby lessen the burden of taxation to the extent of the profits realized. *McCullough v. Brown*, 41 S. C. 220, 273, 279, 19 S. E. 458, 470, 23 L. R. A. 410.

## DISPENSE.

To dispense is to deal out, to distribute, to give. So that giving liquors is included in a charge of dispensing liquor, in a prosecution under an ordinance making it a misdemeanor to sell, deal out, or give away liquors on Sunday. *Johnson v. City of Chattanooga*, 36 S. W. 1092, 1093, 97 Tenn. (13 Pickle) 247.

### As suspend.

Under Code Iowa, § 489, providing that a municipal ordinance shall be read on three different days, unless three-fourths of the council vote to dispense with the rules, an ordinance is valid if passed by three-fourths vote upon a motion to suspend the rules; there being no substantial difference in the terms. *Town of Bayard v. Baker*, 40 N. W. 818, 819, 76 Iowa, 220.

## DISPENSATION.

"License," as a term of real estate law, is defined to be an authority to do a particular act or series of acts upon another's land, without possessing any estate therein, and is generally created by parol, though it may

be inferred from circumstances in the relationship of the parties. It is distinguished from an easement, which must be created by grant or prescription, in the fact that the latter always implies an interest in the land upon which it is imposed, while a dispensation or license passes no interest, nor does it alter or transfer property in anything, but only makes an action lawful which without it would have been unlawful. *Baldwin v. Taylor*, 31 Atl. 250, 251, 166 Pa. 507.

The waiver or dispensation is not in the nature of a contract, which requires the support of a consideration, but rather of an estoppel, whereby the underwriter is precluded from denying the validity of the contract on account of acts or admissions, either recognizing it as of binding force after the forfeiture or holding out to the assured that the performance of the condition is dispensed with. *Viele v. Germania Ins. Co.*, 26 Iowa, 9, 56 (quoted in *Knarston v. Manhattan Life Ins. Co.*, 73 Pac. 740, 742, 140 Cal. 57).

## DISPLACE.

In a provision in articles for a whaling voyage that, if any officer or seaman should be judged by the master incompetent, the master may displace him and substitute another, the word "displace" imported that, if the master found an officer or seaman incompetent or otherwise unfit to perform the duties of his station, the master might degrade or reduce him to a lower station, but did not authorize the discharge of one who had shipped under the articles. *Potter v. Smith*, 103 Mass. 68, 69.

## DISPLAY.

"Display," as used in Act Cong. Sept. 28, 1888, c. 1089, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2661], prohibiting the mailing of any matter in envelopes with a style of display intended to reflect on the character or conduct of another, is as applicable to delineations as it is to writing or printing, and includes the use of a black envelope addressed in white letters, which signifies to those who may see it that the letter is a third demand for an overdue debt. *United States v. Dodge* (U. S.) 70 Fed. 235, 236.

### A gaming table.

Displaying a gaming table for the purpose of obtaining bettors is a different and distinct act from keeping a table for gaming, though the punishment may be the same. Keeping tables for gaming is an offense continuous in its nature, but it does not follow that the act of displaying such table is continuous. The act of displaying the table for the purpose of obtaining bettors is not

included in the charge of keeping a table for the purpose of gaming. *Kain v. State*, 16 Tex. App. 282, 309.

## DISPONET.

Disponet means to have the disposal or administration of a thing. *Smith v. Bonhoff*, 2 Mich. 115, 116, 121.

## DISPOSAL

See "Absolute Disposal."

"Disposal" is a word of broad significance, and is thus defined by Webster: "To determine the faith of; to exercise control over; to fix the condition, application, employment, etc., of; to direct or assign for a use; to exercise finally one's power of control over; to pass over into the control of some one else; to alienate; to bestow; to part with; to get rid of, as to dispose of a house, or dispose of one's time." The word being so varied in meaning, the sense to be attributed to it in a statute providing that an action may be maintained for a debt contracted during infancy, where defendant after becoming of age has ratified the contract by a disposal of the property, must be determined with reference to the law as it stood prior to the passage of the act. The law as it stood in this state was that the contract could not be enforced unless it had been ratified by a writing of the infant after he became of age. If a mere retention of the property after full age had been intended as an act of ratification, the addition of the clause as to disposal of the property would have been meaningless. We think the sense to be attributed to the word, as used in the statute, should be its most common one, to wit, to alienate as by sale, gift, or devise. *Koerner v. Wilkinson*, 70 S. W. 509, 511, 96 Mo. App. 510.

In Comp. Laws, c. 32, § 28, prohibiting the fraudulent sale, transfer, secretion, or disposal of property with intent to defraud creditors, "disposal" means to pass the property over into the control of another, to part with it or get rid of it, to exercise finally one's power of control over it. *Herold v. State*, 31 N. W. 258, 261, 21 Neb. 50, 51.

Act Cong. June, 1878, Rev. St. § 2380 et seq. [U. S. Comp. St. 1901, p. 1455], authorizes the county judge to enter land so settled and occupied, and hold the same in trust for the sole use and benefit of the occupants thereof according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may

be situated. So far as the word "disposal" referred to lots actually occupied when the entry was made, it must be understood to mean distribution; the words "disposal" and "distribution" being often used synonymously, since as to such lots they were already disposed of, and there was no authority to sell them at public sale. *Goldberg v. Kidd*, 58 N. W. 574, 577, 5 S. D. 169.

#### As power to mortgage.

Gen. Laws 1874, p. 283, § 869, subd. 6, providing that the county court as a court of probate has power to order the renting, sale, or other disposal of the real and personal property of minors, cannot be construed to include a power to mortgage. The word "disposal" has no technical meaning, and must be of the same character as a sale; that is, a transfer of the estate. A mortgage, not being a conditional sale, does not transfer an estate. It may create a power which may lead to a disposal, but is not in itself a disposal of real estate. A disposal is effected by a foreclosure and sale, but a county court has no power to order a foreclosure and sale. A foreclosure in the circuit court is not a disposal by order of the county court. The power to dispose implies and requires a disposal for full value. It might possibly authorize an exchange. A power to mortgage is neither necessarily implied in the word "disposal," nor does its association with the word "sale" indicate that any such interpretation can be legitimately put on it. *Trutch v. Bunnell*, 4 Pac. 588, 589, 11 Or. 58, 50 Am. Rep. 456.

### DISPOSE OF.

See "Specially Disposed Of"; "Sell and Dispose Of"; "Sell, Exchange, and Dispose Of"; "Sold and Disposed of." Otherwise dispose of, see "Otherwise."

To dispose of means "to part with; to relinquish; to get rid of—as to dispose of a house." Webster's Dictionary. After every appeal actions commenced in the circuit court are remanded to that court for final disposition. Until the action is thus "disposed of" therein, no second notice of trial is required. In *re Olson's Estate* (S. D.) 94 N. W. 421, 422.

Acts 1899, p. 55, c. 40 (Shannon's Code, § 6057), provides that, if any case is pending and on trial and undetermined at the time the existing term expires, the term shall be extended and continued into the succeeding term for the purpose of disposing of the case. Held, that a motion for a new trial, partially considered and not determined at the beginning of a new term, was within the meaning of the phrase "disposing of the case": it being considered that a case is not disposed of so long as the motion for a new

trial is not considered. *Jackson & S. St. R. R. & Tel. Cos. v. Simmons*, 64 S. W. 705, 706, 107 Tenn. 392.

In the Chickasaw treaty of July 1, 1834, and the treaty of Pontotoc of March 1, 1833, providing that the reservations to individuals should not be sold, leased, or disposed of, except in the particular manner pointed out by the treaty, the words "disposed of" might seem to embrace other dispositions than those of sale and lease, and yet they cannot, on the principle "*noscitur a sociis*," be extended so as to include any other than those of a character like those specially named; that is, of a voluntary nature, effected by the personal will of the possessor. *Love v. Pamplin* (U. S.) 21 Fed. 755, 760.

"Dispose of" means "to alienate; to effectually transfer." The clause specifying intent in Act June 3, 1878, c. 151, 20 Stat. 90, 1 Supp. Rev. St. 168 [U. S. Comp. St. 1901, p. 1529], declaring it unlawful "to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, \* \* \* or remove or cause to be removed, any timber from said public lands, with intent to export or dispose of the same," qualifies the cutting, as well as the removal, of timber; and an indictment for cutting timber on the public lands specified in the act, which does not allege that the defendant intended to export or dispose of the timber so cut, is fatally defective. *United States v. Hacker* (U. S.) 73 Fed. 292, 294.

"Disposed of," as used in Sess. Laws 1867, p. 110, c. 76, authorizing an attachment whenever the plaintiff shall make affidavit that the defendant has assigned, secreted, or disposed of his property with intent to delay or defraud his creditors, signifies any actual removal or disposition in fact of the property other than the transfer of the legal title or a hiding in fact. *Guile v. McNanny*, 14 Minn. 520, 522 (Gil. 391, 393) 100 Am. Dec. 244.

"Dispose," as used in a statute punishing the disposal of forged paper, means to transfer to any person, to put into the hands of another, or to put away by any means. *People v. Rathbun* (N. Y.) 21 Wend. 509, 526.

In Rev. St. 1879, § 398, authorizing an attachment where the defendant has fraudulently concealed, removed, or disposed of his property or effects, so as to hinder or delay his creditors, "disposed" covers all such alienations of property as may be made in ways not otherwise pointed out in the statute; for example, such as pledges, gifts, pawns, bailments, and other transfers and alienations as may be effected by mere delivery and without the use of any writing, assignment, or conveyance. *Bullene v. Smith*, 73 Mo. 151, 161.

A will giving a house and lot to testator's widow to use, occupy, or dispose of as she may think proper, authorizes her to dispose of the property in any manner, whether by sale, mortgage, lease, or otherwise. *Benz v. Fabian*, 35 Atl. 760, 763, 54 N. J. Eq. 615.

A power in a will to executors to "dispose and sell real estate at their discretion" does not operate to create a conversion of the property. *Sage v. Lockman* (N. Y.) 53 How. Prac. 276.

"Disposed of," as used in the restrictive clause in the residuary bequest to one of property not heretofore disposed of, should be construed as though the testator had said that "all of my estate which shall not pass by the preceding bequests in my will to the legatees therein named, I give to the residuary legatee," for "heretofore" has relation to the several preceding paragraphs in the will, and "disposed of" means an effectual transfer or disposition by the will, which could not be until the death of the testator. *In re Crane* (Conn.) 2 Root, 487, 488.

The word "dispose," as used in the provision of a will, giving property to a wife, "to use and dispose of the same" as she may think proper, includes a conveyance absolute and in fee simple. *Woodbridge v. Jones*, 67 N. E. 878, 879, 183 Mass. 549.

The word "dispose" has a broader signification than the word "transfer." A fraudulent transfer of property is a fraudulent disposition of it. *Howard v. Caperton*, 3 Willson, Civ. Cas. Ct. App. § 318.

#### **Absolute title implied.**

"Dispose of as they think best," as used in a will providing that, when testatrix was done with her property, she wanted certain persons to pay her debts, give certain articles, and pay money to persons named, and the remainder to keep and "dispose of as they think best," did not qualify or cut down the interest in the estate, which was an absolute one. *Cheney v. Plumb*, 48 N. W. 668, 79 Wis. 602.

A will by which testator gave and bequeathed to his son a certain estate, "to do and dispose of as he may think proper," should be construed as conveying a fee, and not a life estate. *King v. Ackerman*, 67 U. S. (2 Black) 406, 415, 17 L. Ed. 292.

Construing the clause of a will giving property to the wife of testator, with power to dispose of the same at her death, the court, under a long line of decisions, adopts this construction: "If land be devised to a person with general power to dispose of the same, an estate in fee simple passes. Such power of disposition amounts to an absolute gift of the property." So, where the clause in the will provides that "if, at her death,

there is any property in her possession, one-half shall revert to his nephew." She would receive an estate in fee simple from trust. *Dalrymple v. Leach*, 61 N. E. 443, 445, 192 Ill. 51.

The words "dispose of all or any part thereof at her discretion," as used in a will, where testator bequeathed the use and income of his residuary estate to his widow during her life, she to use as much of the principal as she might need, with power to dispose of all or any part at her discretion, and with a gift over at her death, meant that testator intended the widow should have only a life estate in that part of the estate which she did not need to consume. *Stevens v. Flower*, 19 Atl. 777, 780, 46 N. J. Eq. 340.

#### **Advancement.**

In a lease providing that, if the landlord shall not "dispose of said premises" before the expiration of the term, the tenant shall have a renewal, etc., the term "dispose of" includes a conveyance by way of advancement. *Elston v. Schilling*, 42 N. Y. 79.

#### **Assignment for security.**

The word "dispose" in the rules and regulations of a board of exchange, providing that each member could dispose of his seat, subject to the condition that, before the purchaser could participate in the proceedings of the board, he must be elected a member thereof, includes the power to dispose of it absolutely or conditionally, and he may assign it as security for indebtedness. *Clute v. Loveland*, 9 Pac. 133, 136, 68 Cal. 254.

#### **Confession of judgment.**

Pamph. Acts 1896-97, pp. 1089, 1090, providing that every person who sells, removes, or otherwise disposes of property subject to execution, with intent to hinder or defraud his creditor, may be punished by fine, etc., means some act of the debtor operating on the property itself to place it beyond the reach of the creditor, such as the removal or secreting of the property; but the act of the debtor in confessing a judgment or procuring an attachment against himself is not a disposition of his property, within the meaning of the term as used in the statute. *Builders' & Painters' Supply Co. v. Lucas*, 24 South. 416, 418, 119 Ala. 202.

#### **Disposition by will.**

"Dispose of," as used in St. April 17, 1850, providing that the husband shall have the entire control of the common property, "with absolute power to dispose of it," should be construed to include power to dispose of it by devise. *Beard v. Knox*, 5 Cal. 252, 256, 68 Am. Dec. 125.

A will by which the testator willed and bequeathed to his wife all his property, real and personal, including the house and lot of ground that he resided on, during her natural life, with power to "dispose of the same as she may think best," should be construed as giving a general power to dispose of the property in specie, and not a mere interest in it, in any manner, including the power to dispose of it by will. *Forsythe v. Forsythe*, 108 Pa. 129, 130.

A will in which testator directed that, after his wife's death, part of his estate should be transferred to G. for her sole and entire use during her life; that she should not alienate it, but enjoy the interest; and at her decease she might dispose of it as she thought fit—gave only a power of disposal by will, and not an absolute interest with a superadded power. *Archibald v. Wright*, 9 Sim. 161, 165.

In a will giving to testator's daughters, whatever may be found and disposed of by his executor, the residue and remainder, not otherwise "disposed of," the words "disposed of" as first used mean transferred to others in pursuance of the trust reposed in the executor, and as last used mean disposed of by the testator in his will. *Mace v. Mace*, 49 Atl. 1038, 1039, 95 Me. 283.

The words "dispose of," in a will authorizing one as trustee to execute and deliver any and all deeds, leases, contracts, and other instruments of writing that he may deem necessary in order to dispose of any and all of the described real estate, is a far more generic expression than "to sell," and has been held to include a greater number, higher, lower, and more varied acts than "to sell"; but they ought not to be extended to a disposition by devise. *Andrew v. Auditor*, 5 Ohio Dec. 242, 251.

#### As to divide.

The word "dispose" is sufficiently comprehensive in its meaning to include every possible mode of alienation or disposition of property, and therefore, in an antenuptial contract, includes the right to divide the property. *American Home Missionary Soc. v. Wadhams* (N. Y.) 10 Barb. 597, 601.

A will left property in trust to R., subject to the power of the beneficiary to dispose thereof by grant or devise. The beneficiary exercised the power by will, devising the property to her husband, in trust to receive the rents and profits to apply on the education and maintenance of their children, and authorized the husband at any time to sell and convey the estate and receive the consideration, and to invest and dispose of the same for the benefit of the children. Held, that the word "dispose" was used in a double meaning. With reference to the power to dispose, given to the daughter, it

meant an unrestricted power to give to any ownership the entire property. As used by the daughter, giving the power to her husband, it meant at the most power to determine the proportions among the owners of the ownership already given, and to substitute one form of the property so owned for another. He could not dispose of the estate, or any part of it, in the first sense of the word; for others already owned the whole. *Crooke v. Kings County*, '97 N. Y. 421, 441.

#### Exchange.

A deed of gift, conveying realty to certain minors and giving their legal guardian power to "sell and dispose" of the same whenever in his discretion it should be necessary for their support, includes not only a power to sell, but a power to sell and receive other lands in exchange therefor. *Thurmond v. Faith*, 69 Ga. 832, 838.

#### Give.

An ordinance of a city, providing that no person shall sell, vend, deal in, or dispose of any spirituous, vinous, fermented, or malt liquors within such city without a license, should be construed to include other forms of disposal than indicated by the preceding words in the ordinance, though consistent with them as respects its intent and purpose. The word "dispose," as used in the ordinance, covers and forbids the furnishing and delivery to a person of malt liquors without a license, whether he receives any compensation for such liquor or not. A person may dispose of liquor by gift, as well as by sale or barter, within the meaning of the ordinance. *State v. Deusting*, 22 N. W. 442, 33 Minn. 102, 53 Am. Rep. 12.

"Dispose of" as used in Act Feb. 26, 1881 (Pamph. Acts, p. 171), making it unlawful for any person or persons, except on a written prescription, to make, sell, or otherwise dispose of any spirituous or malt liquors or other intoxicating drinks within certain counties, cannot be construed to include the giving of two or more drinks of whisky to a friend by a person at his private residence. "To dispose of, in popular sense, when used in reference to property, means to part with a right to or ownership of it; in other words, a change of property. If this does not take place, it would scarcely be said the property is disposed of. Taking a glass of spirits or wine with a friend or visitor in one's own residence is one of the forms in which hospitality not infrequently shows itself. In this act of hospitality, no one would entertain the thought of a change of property or ownership—that he was thereby disposing of the article thus used and consumed." *Reynolds v. State*, 73 Ala. 3.

Under an act making it unlawful within certain described limits to sell or dispose

of any spirituous liquors, "dispose of" is equivalent to the word "give." *Franklin v. State*, 12 Md. 236, 248.

#### Lease.

"Dispose of," as used in a contract by a co-owner of a mine to another co-owner, by which the latter is to develop the mine and pay the former the purchase price from the first profits thereof, or that such price should become due and payable if the latter should dispose of or sell the mine, is broader than the term "sell," and includes leasing the mine for a term of years for a royalty. *Hill v. Sumner*, 10 Sup. Ct. 42, 43, 132 U. S. 118, 33 L. Ed. 284.

Const. U. S. art. 4, § 3, which provides that Congress shall have power to dispose of and make all legal rules and regulations respecting the territory or other property belonging to the United States, not only vests in Congress the right to sell the land belonging to the United States, but also to lease the same. *United States v. Gratiot*, 39 U. S. (14 Pet.) 526, 537, 10 L. Ed. 573.

#### Manage.

Where a clause of a will did not direct the trustees to sell, but to dispose of, all the testator's real and personal estate, the word "dispose" did not import to sell, but meant to manage to the best advantage for the family. *Sheffield v. Orrery*, 3 Atk. 282, 287.

#### Mortgage.

Act Cong. July 1, 1862, § 3, incorporating the Union Pacific Railroad Company, declares that for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, it was enacted that all such land not sold or disposed of by the company before the expiration of three years after the completion of the entire road should be subject to settlement and pre-emption, like other lands. Held, that the words "or disposed of" were not redundant, nor were they synonymous with "sold," but contemplated a use of the lands granted different from the sale of them, which properly included a mortgaging of the land for the benefit of the company. *Platt v. Union Pac. R. R. Co.*, 99 U. S. 48, 59, 25 L. Ed. 424.

A charter authorizing a corporation to purchase all such lands as should be necessary and convenient, and giving it power to sell and dispose of the same at its pleasure, conferred power to mortgage. According to the principle in the case of *Lancaster v.*

*Dolan* (Pa.) 1 Rawle, 231, 18 Am. Dec. 625, the power to sell includes the power to mortgage, even under the statute of uses; and the superadded words "dispose of," which would otherwise be redundant, leave no doubt of the existence of an intent to confer power to the corporation to part with its real estate by any voluntary act, without regard to the mode of its operation. *Gordon v. Preston* (Pa.) 1 Watts, 385, 386, 26 Am. Dec. 75.

The phrase "dispose of, sell, and exchange," following a general authority of control given to trustees, was not a restriction of such authority, but conferred a more absolute power and extended the trustee authority of disposition. But, even if the clause be regarded as a limitation on the trustee's power, he still has authority to incumber the estate by deeds of trust, authorizing the trustee, on the failure to pay the money borrowed, to sell the land. It is laid down in many cases that a power of sale implies a power to mortgage. *Faulk v. Dashiell*, 62 Tex. 642, 649, 50 Am. Rep. 542.

"Dispose of," as used in a will giving the executors full power and authority to dispose of testator's real estate at any time they deemed it for the benefit of the estate, does not authorize mortgaging the property. To dispose of imports finality, and only where a power to sell would include a power to mortgage would these words, unmodified or undefined, imply such a power. *Rutherford Land & Improvement Co. v. Sannrock*, 46 Atl. 648, 60 N. J. Eq. 471.

"Sell and dispose," as used in a will providing that "my said trustee shall have power to invest and change the investment of such moiety, and for that purpose to sell, convey and dispose thereof, or any part thereof, as often as he may think proper," means an out and out sale, and did not authorize the trustee to mortgage the property to secure the payment of a loan. *Wilson v. Maryland Life Ins. Co.*, 60 Md. 150, 153.

#### Sell.

As used in a will giving power to dispose of all testator's real estate, "dispose of" means to sell. In the ordinary, and according to the common, understanding of the word, the power to dispose of the property must be considered as a power to sell it. *Williams' Lessee v. Veach*, 17 Ohio, 171, 181, 49 Am. Dec. 453; *Hunt v. Hunt*, 11 Nev. 442, 449.

"Dispose of," as used in the articles of association of an unincorporated trust, or-



ganized for the purpose of acquiring, holding, and disposing of the capital stock of corporations engaged in a particular line of business, authorizing the trustees to acquire, receive, hold, and dispose of the title to shares of the capital stock of such companies, corporations, and joint-stock associations, should be construed to mean to sell any such stock to third persons; such being its obvious meaning in common acceptance. The term "dispose of," in its dictionary definition, has among its meanings that of "bargain; alienation; passing from one into the control of another; parting with." *Webst. Dict. Gould v. Head* (U. S.) 41 Fed. 240, 245.

In the preamble to a statute passed in 1753, reciting that the proprietors of lands lying in common have power to manage, dispose of, and divide the same in such way and manner as has been or shall be concluded and agreed on by the major part of the interested, and as used in a law of the colony of Massachusetts passed in 1636, giving authority to the freemen of every town to dispose of their lands, "dispose of" includes the power to sell and convey the lands. *Rogers v. Goodwin*, 2 Mass. 475, 477.

"Dispose of," as used in an attachment affidavit charging that the defendant has sold, assigned, and disposed of a portion of his property with intent to defraud his creditors, etc., and in an allegation in the answer denying that defendant is about to sell and dispose of, is much broader and more comprehensive than the word "sell," as the selling of property is but one means of disposing of it. Therefore the allegation in the denial that defendant was about to sell and dispose of was simply a denial that he was about to dispose of by selling, which was insufficient. *Noyes v. Lane*, 45 N. W. 327, 328, 1 S. D. 125.

An act giving a right of way over intervening lands, with authority to dispose of any coal within the boundaries of such right of way on paying for the same, gives a power of sale; the words "dispose of" being defined by Webster as "to part with, to sell, to alienate," as "the man has disposed of his house and removed." *Appeal of Waddell*, 84 Pa. 90, 96.

An allegation in an answer that mortgaged property was "squandered and disposed of," to defendant's injury, necessarily implies that the property was sold, or an interest in it transferred to others. *Burr v. Boyer*, 2 Neb. 265, 267.

In a will providing that testator's property shall be disposed of as deemed best by his executor, the phrase "disposed of" is equivalent to the phrase "shall be sold." In *re Hesdra's Estate*, 20 N. Y. Supp. 79, 80, 2 Con. Sur. 514.

The words "disposed of," "conveyed," and "sold," though not necessarily synonymous, are often used to properly describe the same transaction. *Cook v. Burnham*, 44 Pac. 447, 3 Kan. App. 27.

#### **Sell on credit.**

"Disposing," as used in an assignment wherein the assignee accepts the trust and agrees to execute the same by disposing of the property and applying the proceeds to the payment of the debts, should not be construed to authorize the assignee to sell on credit, though the term "disposing" may mean a sale for cash or on time, or an exchange for other property. *Sprecht v. Parsons*, 25 Pac. 730, 7 Utah, 107.

#### **Vest by law.**

In Gen. St. 1899, § 5583, providing that, when a person is imprisoned for life, his estate shall be administered and disposed of as if he were naturally dead, the expression "disposed of" is not broad enough to reach to and embrace the act of law which vests the ownership of property in an heir of inheritance. *Smith v. Becker*, 64 Pac. 70, 62 Kan. 541.

#### **Secrete distinguished.**

"Dispose," as used in a statute giving a right to attach defendant's goods where he had attempted to secrete or dispose of the same, was employed in its ordinary sense, meaning to "alienate it; assign it to a use; bestow it; direct its ownership." In the statute it had a distinct meaning from that imported by the word "secrete," and an affidavit for attachment, alleging that defendant had secreted his property and had disposed of his property was inconsistent and contradictory. *Pearre & Co. v. Hawkins*, 62 Tex. 434, 437.

Gen. St. 1878, c. 66, tit. 9, § 147, authorizes an attachment on proof that the debtor has assigned, secreted, or disposed of part of his property. Held, that the words "assigned, secreted, or disposed of" were not intended to have a separate, distinct, and exclusive meaning, but the word "disposed," as used in the statute, was a comprehensive term, intended to include any disposition intended to put the property of the debtor beyond the reach of creditors. *Auerbach v. Hitchcock*, 9 N. W. 79, 28 Minn. 73.

#### **DISPOSABLE PORTION.**

The term "disposable portion" was used in ancient common law to designate the property of a man's goods which he could dispose of without reference to his wife or children. 2 Bl. Com. p. 492, says: "By the ancient common law a man's goods were divided into three equal parts, of which one

went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal; or, if he should die without a wife, he might then dispose of one moiety, and the other went to his children, and so, *converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but, if he die without either wife or issue, the whole was at his own disposal." *Hopkins v. Wright*, 17 Tex. 30, 36; *Crain v. Crain*, 17 Tex. 80, 93.

### DISPOSING MIND AND MEMORY.

See "Sound Mind and Memory."

A disposing mind has the mental capacity to know and understand what disposition testator may wish to make of his property and on whom he will bestow his bounty. *Freeman v. Easley*, 7 N. E. 656, 658, 117 Ill. 317, 321; *Yardley v. Cuthbertson*, 108 Pa. 395, 403, 1 Atl. 765, 56 Am. Rep. 218.

A disposing mind and memory is a mind and memory which has the capacity of recollecting, and discerning and feeling, the relations, connections, and obligations of family and blood. *Merritt v. Johnson*, 5 N. J. Law (2 Southard) 454, 458, 8 Am. Dec. 610; *Den v. Vancleve*, 5 N. J. Law (2 Southard) 589, 678.

A disposing mind and memory is a mind and memory which have a capacity for regarding and discriminating and feeling the relations, connections, and obligations of family and blood; and a person may have upon some subjects, and even generally, mind and memory and sense to know and comprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty and of a reasonable and proper distribution as to them of his estate he may be of unsound mind. *Farmer v. Farmer*, 31 S. W. 928, 129 Mo. 530.

"A disposing mind and memory, in the view of the law, is one which the testator is shown to have had at the making and execution of a last will; a full and intelligent consciousness of the nature and effect of the act which he was engaged in; a full knowledge of the property he possessed; and an understanding of the disposition he wished to make of it by the will, and of the persons and objects he desired to participate in his bounty." *Leech v. Leech*, 21 Pa. (9 Harris) 87, 68; *Id.*, 1 Phila. (Pa.) 244, 246, 247. This description of testamentary capacity has been many times approved, and never questioned. While modifications of it may be needed in particular cases to meet particular facts developed, it contains all the substance of a correct general definition, and may at all times be expounded to juries, as a guide to them in their deliberations, with entire safety. *Reichenbach v. Ruddach*, 127 Pa. 564, 590, 18 Atl. 432, 436.

A disposing mind and memory may be said to be one which is capable of presenting to the testator all his property, and all the persons to come within the range of his bounty, and if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will. *Benolst v. Murrin*, 58 Mo. 307, 322; *Jackson v. Hardin*, 83 Mo. 175, 180. Mere peculiarities and eccentricities of character are not inconsistent with his sanity; and where the testator always attended to his own business affairs, and from all that appears did it as well as anybody could have done it, he will be held to have had a disposing mind and memory. *Fulbright v. Perry County*, 46 S. W. 955, 958, 145 Mo. 432.

A disposing mind involves the exercise of so much mind and memory as would enable a person to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and a disposing memory exists when one can recall the general nature, condition, and extent of his property and relations; those to whom he gives, and also those from whom he excludes, his bounty. The requirement of a sound and disposing mind does not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. A person may be incapacitated by age and failing memory from engaging in intricate business, and incapable of understanding all parts of a contract, and yet be able to give simple directions for the disposing of property by will. *Hall v. Perry*, 33 Atl. 160, 161, 87 Me. 569, 47 Am. St. Rep. 352.

### DISPOSING POWER.

The right which was in the settlor to defeat the voluntary settlement by selling the estate was not a "disposing power," within the meaning of St. 1 & 2 Vict. § 13, enacting that a judgment entered up shall operate as a charge on all the lands of which the person shall at the time of entering up the judgment be seised or possessed or entitled for any estate or interest whatever, at law or in equity, or over which such person shall at the time of entering up judgment or at any time afterwards have any disposing power, which he might, without the consent of any other person, exercise for his own benefit. *Beavan v. Oxford*, 35 Eng. Law & Eq. 267, 279.

### DISPOSITION.

See "Final Disposition"; "Testamentary Disposition."

In the articles of association of an incorporated trust, organized for the purpose of acquiring by purchase, exchange, or other-

wise, and the holding, management, and disposition of shares of the capital stock of companies, corporations, and joint-stock associations organized for certain purposes, the word "disposition" should be restricted to its more primitive and general import, which does not necessarily imply a barter, sale, or alienation. *Gould v. Head* (U. S.) 41 Fed. 240, 244.

The term "disposition," in the factors act of 1830, providing that factors shall be deemed the owners of goods for the purpose of sale or disposition of the whole or any part thereof, is certainly broad enough to embrace a contract of pledge made by a factor to a person believing him to be the owner, although the word in the English act has been given a much more limited interpretation. *Bonito v. Mosquera*, 15 N. Y. Super. Ct. (2 Bosw.) 401, 431.

#### **Absolute title implied.**

Testator declared: "It is my will that my daughter E.'s portion be paid to her, to make whatever disposition of it she may think proper. \* \* \* It is my will that my daughter T.'s portion be paid over to the guardian of her children for their special benefit." Held that, construing both clauses together, the words "to make whatever disposition of it she may think proper" only operated to vest an absolute title in the daughter, and did not operate to exclude her husband from his marital rights in the property, either during coverture or as her survivor. *Noland v. Chambers*, 2 S. W. 121, 122, 84 Ky. 516.

"Disposition," as used in a will providing that the portions of property given thereby to testatrix's granddaughters should be so secured to their use and benefit as not to be subject to the control and disposition of their husbands, means the disposition in the exercise of the husband's marital rights, and not from any disposition procured by the just and natural influence arising from the marital relation. *Deering v. Tucker*, 55 Me. 284, 288.

#### **As arrangement.**

In a city ordinance providing for the appointment of a dock master to direct the removal and disposition of vessels, the word "disposition" clearly implies arrangement or classification, and it clearly imports authority to give those orders and directions upon a plan or system. These officers have by immemorial usage exercised the authority for promoting public convenience and increasing the accommodation for ships and vessels, and classifying them in their use of the basins, piers, and wharves by habitually sending large ships to basins having deep water and small vessels to slips having shallow water, distributing them also according to the locations for business, and generally so arrang-

ing the use of the basins and slips as in their judgment would best promote the general convenience. *Hecker v. New York Balance Dock Co.* (N. Y.) 24 Barb. 215, 221, 222.

### **DISPOSSESS.**

A lease provided that, in case the sale of the land from the state to the lessee should be rescinded during the term, the lessee should pay only for that portion of the term up to the time he should be legally dispossessed. Held, that the word "dispossessed" meant put out of possession. *Mattoon v. Munroe* (N. Y.) 21 Hun, 74, 82.

### **DISPOSSESSION.**

Disseisin is an estate gained by wrong and injury, and therein it differs from dispossession, which may be by right or wrong. This is the uniform language of the best authorities from the time of Littleton. *Smith v. Burtis* (N. Y.) 6 Johns. 197, 217, 5 Am. Dec. 218; *Slater v. Rawson*, 47 Mass. (6 Metc.) 439, 444; *Draper v. Monroe*, 28 Atl. 340, 18 R. I. 398.

### **DISPROVE.**

The amendment of April, 1887, to Code, § 831, provides that "a husband or wife is not competent to testify against the other, except \* \* \* to disprove an allegation of adultery." Held, that the word "disprove" means to prove to be false or erroneous; and hence a husband or wife is competent to give all testimony material in convincing or persuading the minds of the jury, either directly or by necessary inference, that the allegations are unfounded, and is not confined merely to denying such allegation. *Irsch v. Irsch*, 12 N. Y. Civ. Proc. 181, 182.

### **DISPUTABLE PRESUMPTION.**

Disputable presumptions are inferences which the law requires to be drawn from given facts, and which are conclusive until disproved by evidence to the contrary. Thus an infant between 7 and 14 is considered incapable of committing a felony, but evidence may be given to prove a felonious intent. *Joyner v. South Carolina Ry. Co.*, 1 S. E. 52, 55, 26 S. C. 49.

Disputable presumptions are inferences of law, which hold good until they are invalidated by proof or a stronger presumption. *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1004, 81 App. Div. 183.

### **DISPUTE.**

See "Amount in Dispute"; "Matter in Dispute."

All disputes, see "All."

A dispute, as it is found in Wharton's definition of the word "lis," as meaning a suit, action, controversy, or dispute, means a conflict or contest. *State ex rel. Hamilton v. Guinotte*, 57 S. W. 281, 283, 156 Mo. 513, 50 L. R. A. 787 (citing *Stand. Dict.*).

"Dispute," as used in Act May 29, 1885 (P. L. 34, § 12), providing that the court shall settle a dispute between natural gas companies and boroughs, etc., should be construed to include a dispute arising from the passage of an ordinance requiring a gas company to pay a license fee alleged to be exorbitant before it could make excavations for relaying its pipes. A dispute which arises from the denial of the right to the company to make excavations in order to reach and repair its pipes is as clearly a dispute within the meaning of the statute as one which arises from the refusal of the company voluntarily to make needed repairs; and a dispute may exist, although the denial of the right is not absolute and unqualified, but is conditional upon the payment of a license fee which the company considered unreasonable in amount and unauthorized by law. *Ft. Pitt Gas Co. v. Borough of Sewickley*, 47 Atl. 957, 958, 198 Pa. 201.

A dispute arises when there are conflicting claims made to the same property, which, unless abandoned by the one or the other of the parties, or compromised, will result in litigation; and it is as to such a matter that communications made in a consultation in relation thereto with an attorney are privileged. *Slaven v. Wheeler*, 58 Tex. 23, 25.

#### Controversy synonymous.

The term "dispute," as employed in Rev. St. § 639, declaring that any suit commenced in any state court wherein the amount in dispute, exclusive of costs, exceeds the sum or value of \$500, may be removed for trial in the Circuit Court, is to be construed as exactly synonymous with the term "controversy" in the second section of the third article of the Constitution, which declares that the judicial power of the United States shall extend to "controversies" between citizens of different states, etc. In order, therefore, that there be a controversy or dispute, there must be a matter either of law or fact asserted on one side and denied on the other. Thus, if the matter alleged by the plaintiff is admitted by the defendant, there is no controversy and no dispute, and therefore no case for removal. *Keith v. Levi* (U. S.) 2 Fed. 743, 745.

#### Denial of liability.

Public Health Act 1848, § 144, giving a board power to arbitrate as to the amount of compensation for damages done to land by certain improvements, where there was a "dispute as to the amount of compensation,"

gave the board power to arbitrate where it was denied that any damage was done and that any amount was due. *Bradby v. Local Board of Health*, 4 El. & Bl. 1014, 1020.

St. 11 & 12 Vict. c. 112, § 69, enacting that compensation is to be given to all persons sustaining damage to their property by reason of certain improvements, and that in case of a "dispute as to the amount" the matter shall be referred to arbitration, would not include cases where the liability to make any compensation is denied. *Reg. v. Commissioner of Sewers*, 1 El. & Bl. 694, 701.

#### DISPUTED CLAIM.

Rev. Laws, § 2148, authorizing the reference of a disputed claim between an executor and administrator, includes disputed claims of every character. *Noyes v. Phillips*, 57 Vt. 229, 230.

2 Rev. St. p. 89, § 38, in substance enacted that one having a disputed or rejected claim against a decedent should be barred of any action within a certain time. Held that, to entitle an administrator or executor to the benefit of the statute, his act in disputing or rejecting the claim must be decided and absolute, and whatever the language, if at the same time he does or says anything from which the claimant may reasonably infer that the determination to reject is not final, the claim is not disputed or rejected within the meaning of the statute. Plaintiff presented to defendant, as executor of W., claims against the estate, and the executor served a notice that he declined to pay the claims, stating that he had no means of information as to them and would like a bill of particulars. The claims were against two firms in which testator had been a partner. No steps had been taken to collect them of the surviving partners. Held, that the claims had not been disputed or rejected within the statute. *Hoyt v. Bonnett*, 50 N. Y. 538, 543.

#### DISPUTED DEMAND.

Within the rule that a promise by a creditor, having a liquidated and undisputed demand against his debtor which is wholly due and payable, to discharge the residue upon receiving payment of a part, is nudum pactum, a demand is not a disputed demand merely because the debtor refuses to pay or recognize it; for, if this were true, no case would ever arise for the application of the rule. It is disputed, within the meaning of the rule only, when it is so far disputable as to present a proper case for litigation. *Chicago, M. & St. P. R. Co. v. Clark* (U. S.) 92 Fed. 968, 985, 35 C. C. A. 120 (citing *Tuttle v. Tuttle*, 53 Mass. [12 Metc.] 551, 46 Am. Dec. 701; *Zoebrisch v. Von Minden*, 120 N. Y. 406, 24 N. E. 795; *Honeyman v. Jarvis*, 79 Ill. 318).

against the will of the occupant." *Spalding v. Mayhall*, 27 Mo. 377, 378.

A disseisin is the wrongful putting out of him that is seised of the freehold. *Mitchell v. Warner*, 5 Conn. 497, 518.

Actually taking possession of land under claim or color of title is a disseisin. *Inhabitants of Town of Weston v. Inhabitants of Town of Reading*, 5 Conn. 255, 257.

"Disseisin" is defined by Littleton to be "where a man entereth into any land or tenements where his interest is not congeable and ousteth him who hath the freehold." *Unger v. Mooney*, 63 Cal. 586, 590, 49 Am. Rep. 100; *Bates v. Norcross*, 31 Mass. (14 Pick.) 224, 228.

Disseisin is a privation of seisin; the act of wrongfully depriving a person of the seisin of land. *Roberts v. Niles*, 49 Atl. 1043, 1044, 95 Me. 244.

Disseisin is the act of divesting the owner of real estate of his seisin and possession of the land, and substituting in its place the ownership and possession of the disseisor. In its origin, when the seisin constituted the title of the owner to his freehold, it was the forcible expulsion of the tenant or the wrongful entry upon him, and the forcible holding by the intruder was called a "disseisin"; and in those days force would naturally be employed to effect a change of possession by a wrongdoer. But in after times, when titles to lands became more complex and possessions more diversified, other acts were held to be disseisins. It would be as preposterous to look for the same acts of disseisin in our day that usually occurred in the simple times of high antiquity as to expect to find the same customs and manners in these days that were characteristic in those. *Clapp v. Bromagham* (N. Y.) 9 Cow. 530, 553.

Disseisin is an estate gained by wrong and injury. The rightful owner must have been expelled, either by violence or by some act which the law regards as equivalent in its effect. A mere entry on another's land is no disseisin, unless it be accompanied by expulsion. *Arden v. Thompson* (N. Y.) 5 Cow. 371, 374.

Disseisin is not only the dispossession of the freeholder, but also a substitution of the disseisor as tenant to the lord and as one of the pares curiæ in place of the disseisee. *McCall v. Neely* (Pa.) 3 Watts, 69, 71.

There are two kinds of disseisin: A disseisin at the election of the owner of the land, and a disseisin in spite of the true owner. *Porter v. Hammond*, 3 Me. (3 Greenl.) 188, 190.

#### **Building on mortgaged premises.**

The erection of buildings on mortgaged premises by the mortgagor while remaining

in possession will not operate as a disseisin of the mortgagee, but will be regarded as improvements made to enhance the value of the equity of redemption. *Hunt v. Hunt*, 31 Mass. (14 Pick.) 374, 386, 25 Am. Dec. 400.

#### **Claim of right.**

"Disseisin is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim arising from the acts and circumstances attending the appropriation, to hold the land against him who was seised." *Portis v. Hill*, 3 Tex. 273, 279; *Gildehaus v. Whiting*, 18 Pac. 916, 919, 39 Kan. 706.

Disseisin is an actual entry on land, with palpable intention to claim possession as owner; and this claim of possession must not be the assertion of a previously existing right, but the assuming of a right to the land from that time and a subsequent holding with assertion of right. This intention to claim and possess the land is one of the qualities indispensable to constitute a disseisin, as distinguished from a trespass. *Washburn v. Cutter*, 17 Minn. 361, 368 (Gil. 335).

Blackstone defines "disseisin" as a wrongful putting out of him that is seised of the freehold. 3 Bl. Comm. 169. Disseisin, therefore, must mean in some way or other turning the tenant out of his tenure, and usurping his place and feudal relation. *Taylor v. Horde*, 1 Burrows, 107. It must be with intent to usurp the place of the true owner and put him out of possession. *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100. *Richardson, C. J.*, in *Towle v. Ayer*, 8 N. H. 57, says "there is an actual disseisin when one man wrongfully enters upon the land of another with intent to usurp, and, retaining the possession, actually turns the owner out, or at least keeps him out." Occupation such as will constitute a disseisin of the true owner and give title by adverse possession must be accompanied by a claim of title. *Altshel v. O'Neill* (Or.) 58 Pac. 95, 96.

#### **Dispossession distinguished.**

All the books seem to agree that the ancient learning on the subject of the general doctrine of disseisin has become abstruse. Disseisin, in the age of Bracton, was considered in an extensive sense, and far beyond the idea which was first applied to it. Disseisin by election, in opposition to actual disseisin, was introduced very early, and became prevalent, in order to extend the remedy by writ of assize, which was devised by Glanville in the reign of Henry II. It must therefore be difficult in many cases to know what species of disseisin was intended, though it is said that the old books, and particularly the book of assize, when they mentioned disseisins, generally relate to dis

seisins by election. A mere entry upon another is no disseisin, unless it be accompanied with expulsion or ouster from the freehold. Disseisin is an estate gained by wrong and injury, and therein it differs from dispossession, which may be by right or wrong. This is the uniform language of the best authorities from the time of Littleton. *Smith v. Burtis* (N. Y.) 6 Johns. 197, 217, 5 Am. Dec. 218.

It is essential to a disseisin that there shall be an entry with intention to usurp and oust the true owner of his freehold. There was a distinction between dispossession and disseisin, for disseisin was a wrong to the freehold, and made in defiance and contempt of the true owner. It was an open, adverse entry and expulsion, whereas dispossession might be by right or wrong, and it was necessary to look at the intention in order to determine the character of the act. Thus, where it appears that a person supposed that under his deed he had acquired a title to a lot and had taken possession, under such belief, his possession did not amount to disseisin. *Draper v. Monroe*, 28 Atl. 340, 18 R. I. 398.

According to the modern authorities there seems to be no legal difference between the words "seisin" and "possession," although there is a difference between the words "disseisin" and "dispossession"; the former meaning an estate gained by wrong and injury, whereas the latter may be by right or wrong; the former denoting an ouster of the disseisee or some act equivalent to it, whereas by the latter no such act is implied. *Slater v. Rawson*, 47 Mass. (6 Metc.) 439, 444.

#### Enjoyment of easement.

The mere enjoyment of an easement, being the exercise of a right, cannot amount to a disseisin of the owner of the land to which the easement is annexed, for a disseisin is of itself a wrong; nor is it any bar to the maintenance of a writ of entry, by the owner of a piece of land, that the tenant is entitled to an easement in it. *Stetson v. Veazle*, 11 Me. (2 Fairf.) 408, 410.

#### Occupation by mistake.

Mere occupation by inadvertence or mistake, without any intention to claim title, may not be a disseisin, as where a fence is erroneously erected, not on the dividing line. *Winn v. Abeles*, 10 Pac. 443, 445, 35 Kan. 85, 57 Am. Rep. 138 (citing *Abbott v. Abbott*, 51 Me. 575).

#### Payment of taxes.

The term "disseisin," in Gen. St. 1856, c. 187, concerning forcible entry and detainer, is not used in its ancient technical sense, but implies actual possession in plaintiff. Hence

mere payment of taxes and acts of ownership by plaintiff will not authorize an action for disseisin when another takes actual possession. *McCartney's Adm'x v. Alderson*, 45 Mo. 35, 38.

#### Possession.

To constitute a disseisin of the true owner, it is well settled that the possession must begin and continue to be adverse to his title. *Abbott v. Sturtevant* (17 Shep.) 30 Me. 40, 45.

To constitute disseisin, the possession must not only be in its nature adverse to the rights of the true owner, but it must be open, notorious, continued, and exclusive. *Kennebec Purchase v. Laboree*, 2 Me. (2 Greenl.) 275, 283, 11 Am. Dec. 79.

To constitute a disseisin, the person claiming to have gained a title by disseisin must prove that his possession has not only continued a sufficient length of time, but has been open, notorious, exclusive, and adverse. *Little v. Libby*, 2 Me. (2 Greenl.) 242, 247, 11 Am. Dec. 43.

The possession, to amount in law to a disseisin sufficient to bar the right of entry or confer a title, must be an actual occupation of such nature and notoriety as that the owner may be presumed to know that there is a possession of the land. The occupation must be actual, visible, and notorious. *Whitehead v. Foley*, 28 Tex. 268, 285.

To constitute a disseisin, the possession of the dissesor must be adverse in its character, importing a denial of the true owner's title in the land claimed. *Worcester v. Lord*, 56 Me. 265, 269, 96 Am. Dec. 456.

To constitute a disseisin by a co-tenant of his tenants in common there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information to give notice to the co-tenants that an adverse possession and an actual disseisin are intended to be asserted against them. *Busch v. Huston*, 75 Ill. 343, 347 (citing *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443).

To constitute a disseisin, there must be outward acts of exclusive ownership, of an unequivocal character, avowed and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenant that an adverse possession and actual disseisin are intended to be asserted against him. In order that the possession of one co-tenant may be regarded as adverse to the others, it is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the land, and pays the taxes; for all this may be consistent with the continued

recognition of the rights of his co-tenants. *Ball v. Palmer*, 81 Ill. 370, 372.

To constitute a disseisin by the entry and possession of another person, within the statute against selling pretended titles, an actual exclusive possession as owner is sufficient. Where a school district took possession of a parcel of land, and built a schoolhouse thereon, and occupied it for school purposes for nearly 40 years, when, on the building being destroyed by fire, the district contracted with a third person for the purchase of the land, received a deed thereof from him, and built a new schoolhouse on the site of the old one, which the district afterwards occupied exclusively, claiming the right to do so under the deed of purchase, and thereafter, while the district was thus in possession, the third person conveyed the same land to another, the third person was at the time of his last conveyance disseised within the statute. *Sherwood v. Waller*, 20 Conn. 262, 269.

Disseisin is the taking and holding of a hostile and exclusive possession of property, not in submission to the rights of the owner or under an acknowledgment of his claim. Where the occupation is open, exclusive, and adverse to the rights and claims of all others, the occupier claiming the right in himself, there is a disseisin. It must be hostile in its commencement to the rights of the true owner, and a mixed possession will not constitute a disseisin. *Kinsell v. Daggett*, 11 Me. (2 Fairf.) 309, 314.

To constitute a disseisin there must be an actual expulsion of the true owner for the full period prescribed by the statute to constitute adverse possession. *Springer v. Young*, 12 Pac. 400, 403, 14 Or. 280.

The doctrine of disseisin, its effect, and limitations is laid down with great precision in the leading case of *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. (2 Greenl.) 275, 11 Am. Dec. 79. It is there stated that if a man enters upon a tract of land under a deed duly registered, although from one having no legal title, and has a visible occupation of part of it only, the true owner is disseised of the whole tract. This tract must be continuous. The doctrine cannot be extended to detached parcels of a part, of one of which the party may have actual possession. By no fair construction or intentment could he be said to be in possession of the other parcels. It is the occupation and improvement, and not the deed alone, which creates the adverse seisin. The party, entering by apparent title and actually keeping part of the land, is deemed to be in possession of the whole tract to which his deed extends. *Farrar v. Eastman*, 10 Me. (1 Fairf.) 191, 195.

#### Taking of rents.

Disseisin is any act by the legal proprietor of real estate by which he enters and

takes possession of the land as his own. It is not necessary, in order that an entry may constitute a disseisin, that it should be made by a party claiming title, or denying the title of the legal owner. The taking of rents and profits by the disseisor and the management of the property as owner is sufficient. *French v. Pearce*, 8 Conn. 439, 443, 21 Am. Dec. 680.

#### Uncultivated lands.

Disseisin results from an entry on vacant or uncultivated land by one claiming to hold it, having no right, and without permission of the owner, accompanied with occupation or open visible possession. Disseisin does not necessarily imply a forcible entry, or an actual ouster by violence or fraud; for, in cases of vacant possessions, a simple tortious entry, and open, exclusive possession under claim of adverse title, are equivalent to such entry and ouster. A disseisin may be purged either by the disseisor's abandonment of the possession or his consent to hold under the disseisee. *Small v. Procter*, 15 Mass. 495, 498.

As to what constitutes disseisin is well stated by *Parsons, C. J.*, in the leading case of *Proprietors of Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227: "When a man is once seised of land, his seisin is presumed to continue until disseisin is proved. When a man, not claiming any right or title to the land, shall enter on it, he acquires no seisin but by the ouster of him who was seised, and he is himself a disseisor. To constitute an ouster of him who was seised of land, the disseisor must have the actual, exclusive occupancy of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession. To constitute a disseisin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety that the owner may be presumed to know that there is a possession of the land adverse to the title; otherwise, a man may be disseised without his knowledge, and the statute of limitations may run against him while he has no ground to believe that his seisin has been interrupted." *Schwallback v. Chicago, M. & St. P. Ry. Co.*, 34 N. W. 128, 131, 69 Wis. 292, 2 Am. St. Rep. 740. See, also, *Bates v. Norcross*, 31 Mass. (14 Pick.) 224, 228 (citing *Small v. Procter*, 15 Mass. 495).

To constitute a disseisin of forest lands in an uncultivated state, decisive acts, tending to a dispossession of him in whom the title might be, must be proved. The common-law definitions of disseisin are collected by *Mr. Justice Wilde*, in delivering the opinion of the court in *Bates v. Norcross*, 31 Mass. (14 Pick.) 224. The one quoted from *Lord Holt* is that "a bare entry on another,

without an expulsion, makes such a seisin only that the law will adjudge him in possession that has the right, but it will not work a disseisin or abatement without expulsion." And the one from Parsons, C. J., is that "to constitute an ouster of him who was seised the disseisor must have the actual and exclusive possession of the land, claiming to hold it against him who was seised, or he must actually turn him out of possession." By the statute of Maine, however, it is provided that "to constitute disseisin it shall not be necessary that such lands shall be surrounded with fences or rendered inaccessible by water, but it shall be sufficient if the possession and improvement are open and notorious, and comporting with the ordinary management of a farm, although that part of the same which composes the woodland belonging to such farm, and used therewith as a wood lot, shall not be inclosed." *Tilton v. Hunter*, 24 Me. (11 Shep.) 29, 32, 33.

### DISSEISIN BY ELECTION.

Two kinds of disseisin are mentioned in the English law books. The one was a disseisin in fact, which actually changed and divested the seisin of the original owner of the freehold, and deprived him of all right in relation thereto, except the mere right of entry and of property, and which, under certain circumstances, was still further reduced to a mere right of action; the right of entry being lost. By this species of disseisin the wrongdoer acquired a fee simple and the actual seisin of the property, together with nearly all the rights of the real owner, and all estates depending on the original seisin were divested or displaced. The other kind of disseisin was called "disseisin by election," because the owner might elect to consider himself disseised for the sake of the remedy by action of novel disseisin; but, if he did not elect to consider himself disseised, the freehold was not divested, but still continued in him. *Varich v. Jackson* (N. Y.) 2 Wend. 166, 201, 19 Am. Dec. 571.

### DISSEISOR.

"A disseisor," says Lord Coke, "is where one enters intending to usurp the possession and to oust another of his freehold." So that, in determining whether the acts of the disseisor will constitute adverse possession, the inquiry is reduced to the fact of entering and the intent of the disseisor to usurp possession for himself to the exclusion of others. *Carpenter v. Coles*, 77 N. W. 424, 75 Minn. 9.

A person who is in possession of the land demanded in a writ of entry, claiming an estate of freehold therein, may be considered as a disseisor for the purpose of trying the right, irrespective of the manner of his original entry therein. *Rev. Laws Mass.* 1902, p. 1614, c. 179, § 5.

## DISSIMULTANEOUS.

The adjectives "simultaneous" and "dissimultaneous" are words of comparison. The former means that two or more occurrences or happenings are identical in time; the latter that they are successive, that is to say, with an interval between each two in succession. The arc-forming separation which takes place between the first pair of carbons burned in the electric light and the arc-forming separation which takes place several hours later between an added pair of carbons are certainly successive and, loosely speaking, dissimultaneous; but these separations lack the unity or continuity of movement implied in the term "dissimultaneous," when used in a claim for a patent on an electric lamp having more than one set of carbons, the combination of said carbon sets with mechanism constructed to impart to them independent and dissimultaneous separating and feeding movements, whereby the electric light would be established between the members of but one of said pairs or sets at a time. *Brush Electric Co. v. Western Electric Co.* (U. S.) 43 Fed. 533, 538; *Id.* (U. S.) 69 Fed. 240, 244.

## DISSIPATED.

The common understanding of the expression "dissipated man" is that he uses intoxicating drinks frequently and excessively, or, in plainer terms, that he is often intoxicated; and evidence in a prosecution for sale of liquor to an habitual drunkard of such fact is evidence that the man was an habitual drunkard. *State v. Pratt*, 34 Vt. 323, 324.

## DISSOLUTION.

### Of corporation.

Assignment for benefit of creditors distinguished, see "Assignment for Benefit of Creditors."

The dissolution of a corporation is that condition of law and fact which ends the capacity of the body corporate to act as such, and necessitates a liquidation and extinguishment of all the legal relations existing in respect of the corporate enterprise. The dissolution of a corporation may happen in the following ways: (1) By the expiration of the time limit in the charter; (2) by the happening of a contingency prescribed by the charter; (3) by the surrender of the franchise of the state; (4) by act of the Legislature; (5) by failure of an integral part of the corporation; (6) by forfeiture of the franchise in a proper judicial proceeding. *Matthews v. Bank of Allendale*, 38 S. E. 437, 440, 60 S. C. 183.

By Rev. St. art. 607, "dissolution," as used in relation to the dissolution of a cor-



poration, means that result which follows the expiration of time limited by its charter, or the result of a judgment of a court of competent jurisdiction declaring the dissolution. The mere insolvency of a corporation, followed by a cessation of business, with no intent to resume, will not operate what is technically known as "dissolution"; but it has been held in many cases with much reason that such condition of affairs will confer on creditors practically the same rights as they would have under a technical dissolution. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 24 S. W. 16, 20, 86 Tex. 143, 22 L. R. A. 802.

The charter of a corporation provided that, in case of the dissolution of such company by act of law or otherwise, certain debts should have preference. Held, that in order to work a dissolution in effect, as distinguished from a dissolution in fact, the corporation must be insolvent to such an extent that its creditors will suffer, or must have lost the power to resume its business. The mere appointment of a receiver, with power to pay the debts of a corporation, but not to distribute the surplus among the stockholders, does not amount to a virtual dissolution thereof. *Dewey v. St. Albans Trust Co.*, 56 Vt. 475, 483, 48 Am. Rep. 803.

#### Of injunction.

"Dissolution," as used in Acts 1800, c. 9, requiring complainants in equity who obtain injunctions to enter into a bond with security conditioned for the sum complained of on the "dissolution" of the injunction, should be construed in a general sense, and includes every case where, on account of anything whatever, the injunction is dissolved. It is not confined to a dissolution on the merits. *Jones v. Hill*, 6 N. C. 131.

#### Of partnership.

There is a vast difference between the dissolution of a partnership and a mere suspension in the conduct of its business or operation. The terms are not synonymous. Partnership results from contract, and its dissolution, when not brought about by death, bankruptcy, or some operation, at law rests in the same source—the will or action of the partners themselves. Thus it can be correctly said that an assignee made by a partnership suspended the business of that firm, without saying that it dissolved the partnership. *Williston v. Camp*, 22 Pac. 501, 502, 9 Mont. 88.

Every alteration which shall be made in the names of the partners or nature of the business, in the capital or in the shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of such limited partnership. *Comp. Laws Mich. 1897*, § 6067.

Dissolution, as between partners, is a matter of intention, and it may be shown by the sale of the whole property and business, as well as in other ways. Thus, where it was found as a fact that a firm had sold its entire plant, equipment, and good will, and by common consent ended its business, a finding that the case was analogous to that of a partnership which was dissolved by mutual consent was justified. *Appeal of Haeblerly*, 43 Atl. 207, 191 Pa. 239, 44 Wkly. Notes Cas. 174, 177.

Dissolution of a partnership by operation of law is of a public, and not a private, nature, and is presumed to be taken notice of by every one, and hence no notice is necessary. Dissolution by marriage and by death are dissolutions by operation of law. *Little v. Hazlett*, 47 Atl. 855, 859, 197 Pa. 591.

A dissolution of a partnership does not necessarily involve the disposition of its property or a settlement between partners. The power to wind up its business, settle its accounts, and distribute the assets continues after dissolution. *Hamilton v. Smith*, 94 N. W. 268, 120 Iowa, 93.

"If, in an action for the dissolution of a copartnership, the parties cannot agree as to the value of their pecuniary interest, the only mode of determining it is by a sale of the whole of the partnership property at public auction." *Clark v. Brooks* (N. Y.) 2 Abb. Prac. (N. S.) 385, 402.

## DISSOLVE.

The words "dissolve" and "disband" are of similar import, and hence a vote taken to disband a school district is supported by a notice of a meeting for the purpose of voting on the proposition to dissolve the district. *Briggs v. Borden*, 38 N. W. 712, 714, 71 Mich. 87.

#### Corporation.

Under a statute providing that the capital stock of corporations shall be payable in two years from and after the incorporation of the company, or such corporation shall be dissolved, it is held that the provision that the corporation shall be dissolved applies only to proceedings instituted by the state for the dissolution of the corporation itself, and cannot be taken advantage of or enforced collaterally or incidentally, or in any other mode than by proceedings instituted for the purpose against the corporation; in other words, that the requirement that the corporation shall be dissolved is not self-executing. *Musgrave v. Morrison*, 54 Md. 161, 166.

The phrase "dissolving a corporation" is used sometimes as synonymous with annulling the charter or terminating the existence

of the corporation, and sometimes as meaning merely a judicial act which alienates the property and suspends the business of the corporation without terminating its existence. This is paralysis, not necrosis; a suspension of corporate action, not a cessation of corporate life. A corporation may for certain purposes be considered as so dissolved as to be incapable of injury to the public, and yet as retaining all the vitality which may be essential for the protection of the rights of others. *In re Independent Ins. Co.* (U. S.) 13 Fed. Cas. 13, 16.

#### **Marriage.**

To dissolve is to annul, so that a marriage which is dissolved is annulled or void. *Walt v. Walt* (N. Y.) 4 Barb. 192, 505.

The word "dissolve," as used in Civ. Code, § 61, declaring a subsequent marriage void, unless the former marriage has been annulled or dissolved, means and can only mean a dissolution of the marriage—a divorce. *In re Wood's Estate*, 69 Pac. 900, 901, 137 Cal. 129.

#### **DISSOLVING BOND.**

A dissolving bond simply stands in the place of the thing attached, and its effect is to eliminate the proof of grounds of attachment, and the bond is to be answerable for whatever judgment is rendered. *Sanger v. Hibbard*, 53 S. W. 830, 331, 2 Ind. T. 547.

#### **DISTANCE.**

See "Equal Distance."

The word "distance," as used in Rev. St. § 863, authorizing the taking of depositions of a witness living at a greater distance from the place of trial than 100 miles, means the ordinary, usual, and shortest route of public travel, and not the distance measured by a mathematically straight line between the place of residence of the witness and the place of trial. *Jennings v. Menaugh* (U. S.) 118 Fed. 612.

Distance should be computed by the usual traveled route, not the mail route, unless this be also the usual traveled one. *Smith v. Ingraham* (N. Y.) 7 Cow. 419.

#### **DISTILLATION.**

"Distillation," according to its scientific, as well as its popular, sense, embraces condensation. It is its primary meaning, and more nearly expresses the full sense of the term as it is used in scientific works and in the statutes of the United States than the mere generation of vapor. The genera-

tion or vapor is not distillation, else every old woman who boils her teakettle is a distiller, and every steamboat is a distillery, not of spirits, it is true, but of water. The chemist or other person who boils sea or other water, and thus vaporizes the more volatile parts, and then condenses the vapor into water, is, in truth and in fact, a distiller, and the product is distilled water; but, if the vapor be never condensed and collected, there is no distillation. *United States v. One Still* (U. S.) 27 Fed. Cas. 320, 322.

"It was ruled in *United States v. Tenbrook*, 2 Wheat. 248, that rectified spirits were not dutiable as a product of distillation, because rectification, though strictly a process of secondary distillation, by which alcohol is produced in its highest state of concentration, is not distillation in the sense to which Congress had regard." *Schuylkill Nav. Co. v. Moore* (Pa.) 2 Whart. 477, 491.

#### **DISTILLED LIQUOR.**

"Distilled liquor," within the meaning of a statute prohibiting the sale of fermented or distilled liquor, includes whisky, and an indictment charging the sale of whisky is sufficient, without alleging that it is a distilled liquor. *State v. Williamson*, 21 Mo. 496, 498; *Caldwell v. State* (Fla.) 30 South. 814, 815.

#### **DISTILLED SPIRITS.**

See "Domestic Distilled Spirits."

The term "distilled spirits" has an ordinary and literal meaning which implies distillation. It is so used in Rev. St. § 3296, prohibiting a removal of distilled spirits on which the tax has not been paid to a place other than the distillery warehouse. *United States v. Anthony* (U. S.) 24 Fed. Cas. 833.

Under Rev. St. § 3289, providing that "all distilled spirits found in any cask or package containing five gallons or more," without having a stamp thereon, shall be forfeited, and section 3299, providing that "all distilled spirits" found elsewhere than in a distillery shall be forfeited, all spirits which have been distilled, whether they have been subsequently rectified or not, are included. *Boyd v. United States* (U. S.) 3 Fed. Cas. 1098, 1099.

Distilled spirits, spirits, alcohol, and alcoholic spirits, within the true intent and meaning of an act relating to distilled spirits, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance. U. S. Comp. St. 1901, p. 2107.

**Apple brandy.**

Apple brandy is embraced in the term "distilled spirits." *United States v. Ridenour* (U. S.) 119 Fed. 411, 416.

**Malt liquor synonymous.**

The expression "distilled spirits," when used in the statutes of the United States, is not synonymous with "malt liquors." *Sarlls v. United States*, 152 U. S. 570, 572, 14 Sup. Ct. 720, 722, 38 L. Ed. 556.

**Patent medicines.**

"Distilled spirits," as used in the law requiring retail liquor dealers to pay a special tax to the United States before engaging in the business, does not include patent or proprietary medicines manufactured and sold in good faith for curative or health-imparting purposes, although they may contain a large percentage of distilled spirits as one of their essential ingredients; nor does the fact that men with strong appetites for drink occasionally buy such preparations and by the use of them become drunk furnish any adequate reason for classifying them as distilled spirits. *United States v. Wilson* (U. S.) 69 Fed. 144, 145.

**DISTILLER.**

"A distiller is one whose occupation is to extract spirits by distillation." *Johnson v. State*, 44 Ala. 414, 416 (quoting *Webst. Dict.*).

Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirits from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller. U. S. Comp. St. 1901, p. 2107.

14 Stat. 481, defines a distiller as every person, firm, or corporation who distills or manufactures spirits or alcohol, or who brews or makes mash, wort, or wash for distillation, or the production of spirits. *One Vaporizer* (U. S.) 18 Fed. Cas. 726, 727.

To make one in possession of a still a distiller, within Rev. St. § 3247, because he keeps mash, wort, or wash, the mash, wort, or wash kept must be such as will produce spirits on distillation. *United States v. Frerichs* (U. S.) 25 Fed. Cas. 1218.

Distillers were originally defined, under 12 Stat. 456, as persons who distilled or brewed for sale; but the word "brewers" has been left out of all the later statutes. It is conceded on all hands that a person who distills spirits or brews beer, though not for

sale, carries on the business of a distiller or brewer. *United States v. Wittig* (U. S.) 28 Fed. Cas. 744, 745.

**Chemist.**

A chemist, who distills spirits for the purpose of making, by the addition of nitric acid, sweet spirits of niter for sale, is a "distiller of spirits," within St. 6 Geo. IV, c. 80, §§ 6, 7, requiring an excise license, and imposing penalties on persons having any private or concealed still, etc., for making or distilling low wines or spirits. *Attorney General v. Bailey*, 16 Mees. & W. 74, 76.

**Manufacturer of apple brandy.**

A manufacturer of apple brandy is a distiller. *United States v. Ridenour* (U. S.) 119 Fed. 411, 416.

**Rectifier.**

The term "distiller," in common language and as used in 4 Stat. 42, authorizing a license tax on distilleries, does not include one who merely rectifies distilled spirits. *United States v. Tenbroek* (U. S.) 28 Fed. Cas. 83, 84.

**DISTILLERY.**

A distillery is a place or building where alcoholic liquors are distilled or manufactured, and not every place where the process of distillation is used; and a building in which the business of manufacturing paraffin oil is carried on is not a distillery, within a covenant in a deed prohibiting the purchaser from carrying on a distillery on the premises. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, 502.

Ky. St. § 4224, providing that licenses may be granted to distillers of spirituous liquors to retail such liquors at their distillery or place of manufacture, means actually and literally at the distillery or place of manufacture, and does not authorize the granting of a license to sell at a warehouse from 60 to 100 yards distant. *Commonwealth v. Holland*, 47 S. W. 216, 104 Ky. 323.

**Still.**

"Distillery," as used in Act July 13, 1866, § 45, making it criminal to aid or abet in the removal of distilled spirits from a "distillery" otherwise than to a bonded warehouse as provided by law, means "the place where spirits are distilled; not the tail of the worm or the still itself, but the distillery premises." *United States v. Blaisdell* (U. S.) 24 Fed. Cas. 1162, 1170.

**DISTILLERY BONDED WAREHOUSE.**

Under Ky. St. § 4105 et seq., providing for the assessment of distilled spirits in

"distillery bonded warehouses," such phrase means, not only the bonded warehouses kept at the distillery, but the bonded warehouses, wherever kept or by whomsoever owned, in which the products of the distillery were stored, pursuant to United States laws and under the supervision of its officers. *City of Louisville v. Louisville Public Warehouse Co.*, 53 S. W. 291, 292, 107 Ky. 184.

### DISTILLERY WAREHOUSE.

"Distillery warehouse," as used in Act Cong. July 30, 1868, § 15, providing that every distiller shall provide at his own expense a warehouse in which to store the liquor, is a bonded warehouse, within the joint resolution of Congress of March 29, 1869, which declares that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them. *United States v. Powell*, 81 U. S. (14 Wall.) 493, 494, 20 L. Ed. 723.

### DISTINCT.

The word "distinct," in *Horner's Rev. St. 1901*, § 4438, making each civil township and each incorporated town or city a distinct municipal corporation for school purposes, is used to differentiate the school corporation from the civil corporation, and not to separate school corporations into distinct classes. "As said by this court in *McLaughlin v. Shelby Tp.*, 52 Ind. 114, 117, the language is: 'Each civil township and each incorporated town or city is hereby declared a distinct municipal corporation for school purposes,' etc.," by which is meant that such corporations are distinct from the corporations of the civil townships, towns, and cities. *State v. Ogan*, 63 N. E. 227, 228, 159 Ind. 119.

Pub. St. c. 75, § 8, provides that if mortgaged premises consist of distinct farms, tracts, etc., they shall be sold separately on foreclosure. Held, that the word "distinct" means a separation by some natural means or boundary, or by intervening space, and not simply a portion which may be described by arbitrary imaginary lines. *Worley v. Naylor*, 6 Minn. 192, 202 (Gil. 123).

A statute providing that if mortgaged premises consist of distinct farms, tracts, or lots, they shall be separately sold, and no more farms, tracts, or lots shall be sold than shall be necessary to satisfy the amount due, is equivalent to saying that, if the mortgaged premises consist of separate farms or different farms, then they shall be sold separately. The word "distinct," as here used, means separate or different, not the same. A farm might be susceptible of being subdivided, according to the governmental survey, into sev-

eral distinct parcels or lots, or it might be divided by a highway, and yet its character as one farm remain the same. Neither highways nor sectional lots can cut and carve one farm into several, so long as the owner occupies and treats it as a whole, or as one farm. *Larzelere v. Starkweather*, 38 Mich. 96, 104.

The word "distinct," as used in Act June 18, 1883, § 2, providing that, whenever the road commissioners desire to expend on any bridge or other distinct and expensive work on the road a large sum of money, they may have a town meeting called, must be given its appropriate meaning, and that is that the work contemplated by the language used is distinct from the road itself, confined to some particular part of it, and is of a more expensive character, like that of a bridge; otherwise, the word "distinct" would be given no meaning whatever; and it would seem to follow that the word excludes the work of constructing the road itself, and provides only for some distinct and more expensive work on some part of it. *St. Louis, A. & T. H. R. Co. v. People*, 65 N. E. 715, 716, 200 Ill. 365.

### DISTINCT PARCEL.

A "distinct parcel" of real property is a part of the property which is or may be set off by boundary lines, as distinguished from an undivided share or interest therein. *Code Civ. Proc. N. Y. 1899*, § 3343, subd. 16.

### DISTINCTLY.

The term "distinctly," as used in a statement that questions of law which are made in a trial court must be distinctly stated, means so stated as to bring to the attention of the court the precise matter on which its decision is asked. *Woodruff v. Butler* (Conn.) 55 Atl. 167, 168.

The word "distinctly," as used in an instruction that, if the jury are satisfied beyond a reasonable doubt that when defendant shot and killed the deceased, he did so pursuant to an intent then distinctly formed in his mind, is used as synonymous with "clearly," "explicitly," "definitely," "precisely," "unmistakably," so that the jury must have understood the words "intent then distinctly formed" to be the equivalent of premeditated design as an element in the murder. *Perugi v. State*, 80 N. W. 593, 597, 104 Wis. 230, 76 Am. St. Rep. 865.

In Code, § 507, which provides that the defendant may set forth, etc., as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable, that each defense or counterclaim must be separately stated and numbered, and, unless it is interposed as an answer to the entire complaint,

it must distinctly refer to the cause or action which it is intended to answer, "distinctly" means definitely refer or plainly point out, and a separate defense, containing allegations and denials which under no possibility could refer to any but a particular cause of action set out in the complaint, would come within the meaning of the words. *Crasto v. White*, 5 N. Y. Supp. 718, 719, 52 Hun, 473.

## DISTINGUISHING MARK.

See "Device."

*Burns' Rev. St. 1894*, § 6248, providing that any ballot bearing a distinguishing mark shall be invalid, means such a mark as fairly imports upon its face a design and a dishonest purpose. The slight soiling of a ballot, which reasonably appears to have been the result of accident or want of due care, is not sufficient to condemn it, if otherwise fair. *Tombaugh v. Grogg*, 59 N. E. 1060, 1063, 156 Ind. 355.

## DISTRACTED PERSON.

*Rev. St. 1874*, c. 86, § 1, providing for the appointment of a conservator of any distracted person having any estate, means one incapable of acting rationally in the ordinary affairs of life and of comprehending the nature and value of property, so as to be incapable of transacting or procuring to be transacted ordinary business. *Snyder v. Snyder*, 81 N. E. 808, 804, 142 Ill. 60.

## DISTRAIN.

At common law to distrain was to take the personal property of another into possession and hold it as a pledge or security until satisfaction was obtained by the payment of a debt, the discharge of some duty, or reparation for an injury done, with the right in certain cases to sell it to obtain satisfaction, of which the impounding of cattle for damages feasant, or the taking by the landlord of the goods and chattels of the tenant upon the premises for the nonpayment of rent, are familiar examples. *Boyd v. Howden* (N. Y.) 3 Daly, 455, 457.

"Distrain," as defined by *Bouvier*, is "to take as a pledge property of another and keep the same until he performs his obligation or until the property is replevied by the sheriff." *Ackerman v. Delude* (N. Y.) 29 Hun, 187, 188.

*Byers v. Ferguson*, 68 Pac. 5, 41 Or. 77, contains a discussion of the meaning of the term "distrained" in *Hill's Ann. Laws*, § 42, which provides that actions for recovery of personal property distrained for any cause shall be commenced and tried in the county in which the subject of the action is situated,

and it is there held that, while the word "distrained" originally meant the taking of the property of another as security for the performance of some obligation, the term "distrained" as used in the section of the statute quoted undoubtedly signifies the holding of the personal property of another for any purpose whatever.

## DISTRESS.

See "Signal of Distress"; "Warrant of Distress."

### Action of.

Distress is itself not an action, but a remedy summary in its nature and extraordinary in its character, a process whereby a personal chattel is taken from the possession of one to secure satisfaction for a demand, formerly remaining in the hands of the distrainer as a pledge to compel performance, now from the first taking in the custody of the law. *Hewitson v. Hunt*, 8 S. C. (8 Rich. Law) 106, 110.

### Of vessel.

A vessel is in distress when in a state of danger or necessity, as from want of provisions or water, etc. (*Webst. Dict.*); or "in a situation of misfortune or calamity, as a steamer in distress" (*Stand. Dict.*). A vessel, of course, is also in distress when wrecked and needing salvage service. *The Saehelm* (U. S.) 99 Fed. 456, 458, 39 C. C. A. 600.

### For rent.

See "Sufficient Distress"; "Unreasonable Distress."

Distress is the right of the landlord to seize and hold property for the payment of rent. The liability to distraint arises from the fact that the property found on the premises and not from the ownership. The goods of a stranger are liable, with those of the tenant. This right is an ancient privilege of the common law, which had its origin in the feudal tenures. Lord Coke informs us that it was an inseparable incident of the seignior. It is a remedy which is confined to the land out of which the rent issues, and does not follow the person of the tenant. The tenant, it is true, owes the rent; but the remedy is enforced against the land, and not against him. His personal liability is not regarded, and the proceeding is conducted as if the land were the debtor. Distresses seem to have originated from two more ancient remedies of the common law. By the process of gavellet and cessavit the landlord could seize the land itself for rent in arrear and hold it until payment was made. These processes have been obsolete for ages, and exist only in the memory of legal antiquaries. *Emig v. Cunningham*, 62 Md. 453, 460.

Distress is the taking of a personal chattel out of the possession of a wrongdoer into the custody of the party injured to procure satisfaction for a wrong committed, as for nonpayment of rent. *Hard v. Nering* (N. Y.) 44 Barb. 472, 488 (citing 3 Bl. Comm. 6); *Owen v. Boyle*, 22 Me. (9 Shep.) 47, 61.

It is well settled in England that whatever goods and chattels a landlord finds on the premises of the tenant who is in arrears for rent are distrainable by the landlord, whether they in fact belong to the tenant or a stranger; but there are exceptions to this rule, and certain articles are exempt from distress, not only those belonging to strangers, but to the tenant himself. Animals *feræ naturæ* cannot be distrained. Whatever is in the personal use and occupation of any man is for the time privileged and protected. Valuable things in the way of trade are not liable to distress, as a horse standing at a smithshop to be shod or in a common inn, or cloth at a tailor's house, or corn sent to a mill; for all these are protected and privileged for the benefit of trade, and are supposed in common parlance not to belong to the owner of the house, but to his customers. *Owen v. Boyle*, 22 Me. (9 Shep.) 47, 61.

Distress is a remedy that can be employed only for the recovery of what is properly rent and is reserved as such. It may be sustained where the sum originally stipulated for has been increased by agreement, but covenants that relate to the use of the premises, but not to the payment to the lessor for the use, do not give the right to distress, and a breach of a covenant in a lease not to engage in a certain business on the premises under penalty does not give a right to distress for such penalty. *Evans v. Lincoln Co.*, 54 Atl. 321, 322, 204 Pa. 448 (citing *Latimer v. Groetsinger*, 139 Pa. 207, 227, 21 Atl. 22).

#### For taxes.

"Distress," as used in Gen. Laws, c. 58, § 5, authorizing the collection of delinquent taxes by distress or sale, means a seizure of personal property, and hence confers no power to arrest the person of the taxpayer. *Marshall v. Wadsworth*, 10 Atl. 685, 686, 64 N. H. 386.

### DISTRIBUTE.

Where a contract for the grading of a street provided that certain material should be distributed as the engineer in charge might direct, the word "distributed" meant spreading and grading. *Morgan v. City of Baltimore*, 58 Md. 509, 519.

#### As relating to division of money.

Where, throughout the whole of an act in regard to the descent and distribution of

intestate's property, the word "descend" is used where land is to go to the heirs, and the word "distribute" where money is to be divided, the use of the word "distribute" in a part of the act which provides that, if land be sold for more than the computation of the value thereof, then the administrator shall "distribute the same as by this act is required for the intestate's real estate," is significant as showing that the proceeds of the land, though to go to the heirs, is to have the character of and otherwise be treated as money. *Grider v. McClay* (Pa.) 11 Serg. & R. 224, 232.

#### As postponing vesting of estate.

A will giving to a beneficiary a certain sum absolutely, to be "distributed" to him at the expiration of three years, or in a certain contingency in five years, from the testator's death, gives to such beneficiary a vested interest in fee in the devise, postponed merely in enjoyment. *Williams v. Williams*, 14 Pac. 394, 396, 73 Cal. 99.

Testator devised to his children a certain portion of his real estate and all his personal estate to be distributed, when required, at mature age or maturity, in equal parts. Held, that the word "distributed" related to the division of the estate at the time fixed by the will, and not to the vesting of the estate, so that until that time the devisees took the lands as tenants in common. *Chighizola v. Le Baron*, 21 Ala. 406, 411.

### DISTRIBUTABLE PROPERTY.

The movable property of a railroad other than its rolling stock is termed, for the purpose of taxation, "distributable property." *State ex rel. Gottlieb v. Metropolitan St. Ry. Co.*, 61 S. W. 608, 605, 161 Mo. 188.

Distributable property of a railroad company, for the purposes of taxation, is defined in Acts Tenn. 1897, c. 5, § 7, as consisting of the roadbed, rolling stock, franchises, choses in action, and personal property having no actual situs. *Kansas City, Ft. S. & M. R. Co. v. King* (U. S.) 120 Fed. 614, 621, 57 C. C. A. 278.

### DISTRIBUTABLE SURPLUS.

With respect to decedents' estates, the term "distributable surplus" is applicable to personal estate only. *Williams v. Stone-street* (Va.) 8 Rand. 559, 561.

### DISTRIBUTE.

As legal representative, see "Legal Representative."

The word "distributees" means "persons who are entitled, under the statute of distribution, to the personal estate of one who

is dead intestate." *Henry v. Henry*, 31 N. C. 278, 279.

The word "distributees" is popularly used to mean the persons who are entitled, under the statutes of distribution of the state, to the personal estate of one dying intestate. No other word has been used to convey the same idea, and the word commends itself because it has not been appropriated to any other use. The word is in common use among the legal profession, and the fact that it had been adopted by the profession and by the legislature, notwithstanding the severe rebuke given to it by Hindman, C. J., in *Croom v. Herring*, 11 N. C. 393, is a convincing proof that a necessity for a new word really existed. *Henry v. Henry*, 31 N. C. 278, 279. Ruffin, C. J., in a dissenting opinion, however, says: "'Distributees' is not a word at all known in the law, and, until my Brothers told me that they understood what it meant, I must humbly beg pardon for saying that I looked upon it as a newly invented barbarism and without settled sense; indeed, I do not now understand from what source the meaning of the term is derived. I believe it is a phrase which is sometimes used in common parlance by persons who are not speaking of the profession, and do not aim at accuracy in speaking on legal subjects. Some members of the bar have fallen into the use of it, sometimes in discussion, when precision of expression is of the less importance, as there is opportunity for exception; but those who indulge themselves in that mode of speech are so sensible of its impropriety that, as Judge Henderson remarked in *Croom v. Herring*, 11 N. C. 393, they seldom use 'distributee' without an apology, knowing that it is not to be found in any English dictionary or English book, much less in a lawbook. I believe that up to this day it has not obtained admission into any American dictionary, though at least one of them has been supposed to have taken every word that can possibly be tolerated, but when used it has not seemed, to me at least, to be in any definite sense." In a subsequent case, *Mardree v. Mardree*, 31 N. C. 295, 306, Judge Ruffin himself uses the words "the only distributees," placing them in quotation marks.

A creditor of an estate who has recovered a judgment on his claim in the county court is not a "distributee" of the estate, within Rev. St. c. 3, §§ 116, 117. *Wolf v. Griffin*, 13 Ill. App. (13 Bradw.) 559, 560.

## DISTRIBUTION.

See "Final Distribution"; "Valid Distribution."

"Distribution is the act of dividing or making an apportionment." In re *Creighton*, 11 N. W. 818, 12 Neb. 280.

In a contract for the publication of an advertisement in a certain periodical, and to pay therefor at the rate of \$20 for each and every thousand copies of the total number printed and delivered for distribution, the term "distribution" means a delivery for the purpose of supplying subscribers or purchasers of the paper. The act of leaving the periodical at houses in the principal streets of the city, four copies at a time, by boys employed for that purpose, is not a "distribution" within the meaning of such contract. *Dawley v. Alsdorf* (N. Y.) 25 Hun, 226, 227.

In a will by one who had deeded his property to his wife subject to the distribution of his legal heirs, reciting that he deemed it proper that he should make a distribution of the property, "distribution" should not be construed in the sense of taking by the statute of distribution, but in the sense of division by himself among his heirs as he saw fit. *Sasser v. McWilliams*, 73 Ga. 678, 683.

## Of estate.

"Distribution," has been defined to be the division of an intestate's estate according to law. *Rogers v. Gillett*, 9 N. W. 204, 205, 56 Iowa, 266 (citing 1 Bouv. Law Dict. 438).

The "distribution" of an estate includes the determination of the persons who by law are entitled thereto, and also the proportions or parts to which each of these persons is entitled. A proceeding for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor, under the control of the court, and which he brings before the court for the purpose of receiving direction as to its final distribution. *William Hill Co. v. Lawler*, 48 Pac. 823, 116 Cal. 359.

## Same—As relating to real estate.

With respect to decedents' estates, the term "distribution" is applicable to personal estate only. *Williams v. Stonestreet* (Va.) 3 Rand. 559, 561.

Act 1839, art. 4, § 1, relative to married women, provides that any married woman may become seised or possessed of any property, real or personal, by direct bequest, demise, gift, or distribution. Held, that the word "distribution" applied as well to real estate derived by descent, as to personalty received from the estate of an ancestor. *Robinson v. Payne*, 58 Miss. 690, 707.

A father died leaving six children, devising all his land to a son, subject to a life estate to his mother. A controversy between a daughter and the administrator was settled by a stipulation, signed by all the children, that, in consideration of her dismissing her claim, she, in the distribution of their father's estate, should receive an

equal share with each other child. In such contract the word "distribution" was used in the statutory and ordinary sense, and had reference to the personal property and money arising from the sale of real estate by the administrator among the heirs after the payment of the debts and legacies. The distribution could not have had relation to the lands, because the other children were not to share in them under any contingency. *Beard v. Lofton*, 102 Ind. 408, 2 N. E. 129, 181.

#### **Same—Dower distinguished.**

Distribution and dower are two separate and distinct things. Dower is a lien created by law on the property of a husband at the time of the marriage, which necessarily takes precedence over all other subsequent, accruing rights, and attaches to the specific property, and is carved out of it. Distribution occurs after administration and the payment of debts, and the estate is then divided between the heirs and legatees. The widow is not entitled to any portion or distributive share after her dower has been allotted to her. *Johnson v. Knight of Honor*, 13 S. W. 794, 795, 53 Ark. 255, 8 L. R. A. 732 (citing *Hill's Adm'rs v. Mitchell*, 5 Ark. [5 Pike] 608, 618).

#### **Same—Partition distinguished.**

Distribution neither gives a new title to property, nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession, and the extent of their respective interests, while partition, in most, if not all, of its aspects, is an advisory proceeding, in which a remedial right to the transfer of the property is asserted, and resulting in a decree which, either *ex proprio vigore* or as executory, accomplished such transfer. *Robinson v. Fair*, 9 Sup. Ct. 80, 84, 128 U. S. 53, 32 L. Ed. 415.

#### **Same—Payment of debts.**

In general, the term "distribution," when applied to the estate of a deceased person, refers to the ultimate division of the estate of the deceased among the next of kin, in case of intestacy, or among the beneficiaries under a will after the estate is free from debt. Bouvier describes "distribution" to be the division, by order of the court having authority, among those entitled thereto, of the personal estate of an intestate after payment of the debts and charges, and sometimes the division of a residue of real and personal estate, and the division of an estate according to the terms of the will. There is no recognition in the work referred to of the applicability of that term to the payment of the debts of a deceased person, and such word, as used in an act providing that, on appeal from a decree

admitting a will to probate, the executors shall not distribute the effects, relates to the "distribution" in the legal sense of the term, and does not prevent the payment of the debts. *Thomson v. Tracy*, 60 N. Y. 174, 180.

#### **Of prizes.**

A scheme for the "distribution" of prizes by chance (definition of a lottery given by Webster and Bouvier) may provide for distributing them all at one time, or at several times, absolutely to one set of persons, or conditionally to that set or class. It may allow one person to exhaust all his chances before other persons accept a chance, and still the scheme is within that definition. *Fleming v. Bills*, 3 Or. 286, 291.

#### **DISTRIBUTION POLICY PLAN.**

The "distribution policy plan," in the insurance business, is a plan whereunder all the policies issued in any one year to policy holders in the different parts of the world constitute a class, and all profits and surplus derived from premiums on all said policies during a period of 20 years were accumulated until the end of said period, and then distributed for the benefit of such policies as should be in force at the end of such period, and thereby each of the said policy holders of said class acquired a contingent interest, in the event of survivorship of said period, in the profits and surplus which might be realized from the premiums on their policies in said class. *Horton v. New York Life Ins. Co.*, 52 S. W. 356, 357, 151 Mo. 604.

#### **DISTRIBUTIVE JUSTICE.**

"Distributive justice" is described as "that virtue whose object is to distribute rewards and punishment to each one according to his merits, observing a just proportion by comparing one person or fact with another." *Bowman v. McLaughlin*, 45 Miss. 461, 495 (quoting Bouv. Law Dict.).

#### **DISTRIBUTIVE SHARE.**

Dividend synonymous, see "Dividend."

"Distributive share" means the share which a person takes in personal property in case of intestacy. *People v. Beckwith*, 10 N. Y. St. Rep. 97.

An antenuptial contract providing that the wife, if the survivor, should only receive one-sixth part instead of a one-third part as her "distributive share" in the husband's personalty, entitled her to take such part though he died testate, since to confine the words "distributive share" to an intestate estate, or to an estate made intestate by the widow by her waiving the will, would be to



give the contract too strict and technical a construction. *Taft v. Taft*, 40 N. E. 860, 861, 163 Mass. 467.

Where sums of money are received by claimants under a deceased person's will, under a compromise contract made by them with the executor of the will, sanctioned by a court having jurisdiction of the will and of the estate devised, the sums of money so received do not fall within the category of legacies or "distributive shares" in intestates' estate, which are subjected to an internal revenue tax by the United States. *Page v. Rives*, 18 Fed. Cas. 990, 992.

## DISTRICT.

See "Assessment District"; "Collection Districts"; "Fire Districts"; "Judicial District"; "Land District"; "Levee Districts"; "Mineral District"; "Mining District"; "Road District"; "School District."

Acts 17th Gen. Assem. c. 162, authorizes cities of the first class to divide themselves into sewerage districts for the construction of city sewers and for the assessment of the cost on adjacent property. Held, that the word "districts" as so used did not necessarily show an intention of the Legislature to require a city of the first class to be divided into two or more sewerage districts, but the word "districts" in the plural included the singular, and therefore authorized such a city to create itself into one single sewerage district. *Grimmell v. City of Des Moines*, 57 Iowa, 144, 10 N. W. 830.

"District," as used in Wyoming Railroad Assessment Act Dec. 13, 1879, providing that it shall be the duty of the assessors of the county or "district" in which the shops, other buildings, or real estate of the railroad is situated to assess the same, etc., refers to any subordinate territorial division less than a county. *Union Pac. R. Co. v. Ryan*, 5 Sup. Ct. 601, 604, 113 U. S. 516, 28 L. Ed. 1098.

The word "district," as used in the Nebraska Constitution, in reference to general elections, is held to refer to districts created by the Legislature, as well as those provided for in the Constitution, inasmuch as the Constitution expressly excepts school districts, thus mentioning a district which must be created by the Legislature, but which would be included unless so specially excepted. *State v. Moores* (Neb.) 96 N. W. 1011, 1014.

The word "district" shall be construed to mean township, village, city, or ward, as the case may be. *Gen. St. Minn. 1894, § 1511*; *Rev. Codes N. D. 1899, § 1176*; *Rev. St. Tex. 1895, art. 5064*.

## As city or town.

In Act 1874, providing that water companies incorporated under its provisions should have the power to supply water in the town, borough, city, or "district" where they may be located, having no qualifying adjective to indicate its extent or meaning, "district" is not to be construed as extending the territorial limits in which the corporation may supply water beyond those given it by the prior words used in that connection. It may embrace a township, or a part of one of the political divisions mentioned immediately preceding it, but not two or more of them. *Bly v. White Deer Mountain Water Co.*, 46 Atl. 929, 932, 197 Pa. 80.

The term "district," as used in Const. art. 1, § 6, providing that in all criminal prosecutions the accused shall enjoy trial by a jury of the county or district wherein the crime was committed, may properly be held to designate an area larger or smaller than a county. A city, though a part of a county, might by proper legislation be elected into a district by itself, and the meaning of the constitutional provision is that the accused shall have a right to a trial by a jury of the county where his crime was committed, if the criminal jurisdiction of the court before which he is tried embraces and is confined to crimes committed anywhere in the county, and a right of a trial by jury of the district where his crime was committed, whether such district be larger or smaller than a county, when the criminal jurisdiction of the court before which he is being tried embraces and is confined to crimes committed anywhere in such district. *State v. Kemp*, 34 Minn. 61, 62, 24 N. W. 349.

The "town or district" of a justice, within a statute providing that a chattel mortgage must be acknowledged before a justice of the peace of the town or district where the mortgagor resides, means the town or district by which he is elected. The "district" of a police justice is the village in which he was elected. *Ticknor v. McClelland*, 84 Ill. 471, 477.

## As county.

The term "district treasury," as used in *Rev. St. c. 53, § 36*, requiring all excess of commissions and fees due town or district collectors to be paid into the town or district treasury, means the county treasury of counties not organized under township organizations, but does not include counties so organized, as section 140 provides that each county not under township organization shall be a collection district for the purpose of the act. *Ryan v. People*, 6 N. E. 37, 41, 117 Ill. 486.

## As defined portion of state.

*Rev. St. 1898, § 8*, declares that counties on the shores of Green Bay shall have jurisd-

diction in common of all offenses committed on that part of the bay lying within the limits of the state. Const. art. 1, § 7, provided that in all prosecutions by indictment or information the case shall have a speedy trial by a jury of the "county or district" wherein the offense shall have been committed, which county or district shall have previously been ascertained by law. It was held that where one was informed against for taking fish with nets in the waters bordering on Door county, and the offense was committed 40 miles from Brown county and 5 miles at least from the nearest point of any other county than Door, the circuit court of Brown county had jurisdiction. The word "district" in the Constitution not being used synonymously with "county." *State v. McDonald*, 85 N. W. 502, 506, 109 Wis. 506.

In Laws 1899, c. 370, § 10, giving the civil service commission power to prescribe rules for the classification of the offices, places, and employments in the classified service, and section 17, providing that where the labor service of any department or institution extends to separate localities the commission must provide separate registration lists for each district or locality, "district" means some political subdivision of the state created and existing by legislative act at the time the registration lists are furnished. For a district or locality thus created, and not otherwise, the commission may provide separate registration lists; but it cannot of its own volition, independent of the statute, first create a district and then furnish the list. *People v. Shea*, 76 N. Y. Supp. 679, 681, 73 App. Div. 232.

Webster defines the word "district" as a defined portion of the state, and it is so used in the definition of a "town" as a "district of certain limits." *Chicago & N. W. Ry. Co. v. Town of Oconto*, 6 N. W. 607, 608, 50 Wis. 189, 36 Am. Rep. 840.

In the act of Congress of 1872 providing for the collection of direct taxes, and speaking of an entry of a commanding general into an insurrectionary state or district, the word "district" means simply a part or portion of the state, and not large divisions, such as counties. *Keely v. Sanders*, 99 U. S. 441, 448, 25 L. Ed. 327.

In Act Cong. 1862, § 6, directing tax commissioners to enter upon their duties whenever the commanding general of the forces of the United States, entering into any insurrectionary state or district, shall have established the military authority throughout any parish or district of the same, the word "district" means, not necessarily any civil division in the state occupied, but is synonymous with "region," "section of country," or "locality" occupied. The same word is used in describing the whole territory into which the commanding general entered, and the

subjugation of parts of which will authorize the tax. Within the nomenclature of the law, there is necessarily an insurrectionary district, the whole of which need not be occupied in order to justify the tax. Within this law, on the occupation of the entire city of Memphis, having a distinct municipal organization, it becomes a taxing district. It is not a parish or a county; but both the title and the reason of the law show that distinct political divisions and tax districts are contemplated by it. *Sharpleigh v. Surdam*, 21 Fed. Cas. 1173, 1174; *Keely v. Sanders*, 99 U. S. 441, 448, 25 L. Ed. 327.

#### As judicial district.

The word "district," as used in Minn. Const. art. 1, § 6, providing that in all criminal cases the accused shall enjoy the right to a trial by a jury in the county or district wherein the crime shall have been committed, means the territory within the jurisdiction of the court, which may be in area greater or smaller than a county. *State v. Kemp*, 34 Minn. 61, 24 N. W. 349, 351. It means trial district, and not the senatorial or judicial district. *State v. Miller*, 15 Minn. 344, 347 (Gil. 277, 279).

Under a bill of rights which provided that in all criminal prosecutions the accused shall be allowed a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, it was held that the word "district," like the word "county," as used in such section, was used in a restrictive sense, and intended to designate the precise portion of territory or division of the state over which the court, at any particular sitting, may exercise power in criminal matters. *State v. Knapp*, 19 Pac. 728, 729, 40 Kan. 148; *Olive v. State*, 7 N. W. 444, 446, 11 Neb. 1 (approved and followed in *State v. Crinklaw*, 59 N. W. 370, 371, 40 Neb. 759); *McCauley v. Fulton*, 44 Cal. 355, 360.

In Wash. Code, § 47, providing that local actions shall be tried in the county or district wherein the subject of action is situated, the word "district" refers only to a case where two or more counties are joined together for jurisdictional purposes, one of them not having the privilege of sessions of courts within its limits. *McLeod v. Ellis*, 26 Pac. 76, 78, 2 Wash. St. 117.

Act May 19, 1874, § 17, relating to contested elections of senators, provides that, in case there shall be no law judge of the district in which any contest shall arise qualified to act, a judge, learned in the law, residing nearest the courthouse of the county in which by the provisions of the act the trial in any such case is required to be had, shall proceed to the trial, etc. Held, that the word "district" as used in such statute meant judicial district, and not the senatorial

district in which the state was divided. *Cumberland County v. Trickett*, 107 Pa. 118.

In Bill of Rights, § 10, which guaranties the right of an accused person to have a trial by an impartial jury of the county or district in which the offense is alleged to have been committed, "district" should not be construed to limit the right to a change of venue to such counties as are in the same judicial district in which the indictment is found, the word not being used in the sense of "judicial district," but in the sense of "vicinity," and hence an order may be had that an accused shall be tried in any adjoining county. *State v. McCarty*, 89 N. E. 1041, 1042, 52 Ohio St. 363, 27 L. R. A. 537.

Comp. St. c. 10, § 1, providing that all "district officers" shall, before entering on their respective duties, take and subscribe a certain oath, which shall be indorsed on their bonds, refers solely to judicial district officers, and does not include school district officers. *Frans v. Young*, 46 N. W. 528, 529, 30 Neb. 360, 27 Am. St. Rep. 412; *Laird v. Leap*, 60 N. W. 1043, 1044, 42 Neb. 834.

#### As place or locality.

"District," as used in Rev. St. § 5134, requiring national banking associations, in their certificates, to name the place where their operations of discount and deposit are carried on, designating the state, territory, or district, means simply the place—the locality—in which the business is carried on. *Silver Bow County Com'rs v. Davis*, 12 Pac. 688, 690, 6 Mont. 806.

#### As port.

In the revenue laws, "district" and "port" are often used as of the same import in cases where the limits of the port and the district are the same. *Ayer v. Thacher* (U. S.) 2 Fed. Cas. 269, 270.

#### As school district.

In Revenue Act, § 110, providing that the county clerk shall distribute the value of railroad track, certified to him by the auditor, to the county, and to the several towns, districts, villages, and cities in his county entitled to a proportionate value of such railroad track, the term "districts" means school districts, and has no reference to road districts. *Ohio & M. R. Co. v. People*, 10 N. E. 545, 548, 119 Ill. 207.

#### As territory.

Within the article of the Constitution providing that all the judges shall be elected by the electors of the districts over which they are to preside, "district" may be construed to mean territory, so that, in the case of an election for a president judge of a district, the voters of the entire territory over which he is to preside might vote at such

election. *Commonwealth v. Dumbauld*, 97 Pa. 293, 304.

In Pol. Code, § 1837, relating to the levying of a tax for the purpose of building schoolhouses, and providing that if the electors of a district vote therefor the trustees are to certify this fact to the board of supervisors, and the supervisors, when levying the county taxes, must levy a tax sufficient to raise the amount voted on all the taxable property in the "district" voting such tax, the word "district" is synonymous with "corporations voting the tax," and is not an equivalent of "territory within the district." *Hughes v. Ewing*, 28 Pac. 1067, 1068, 93 Cal. 414.

#### DISTRICT ATTORNEY.

As district officer, see "District Officer."

The district attorney is the duly constituted prosecuting officer of the commonwealth. He represents the public, and the duty of prosecuting all offenders is laid upon him. Special counsel employed by private prosecutors are allowed to assist in certain cases, but they merely take part by his courtesy. The burden of the case is always in contemplation upon him. The boards of health of cities of the third class have no authority to employ private counsel to prosecute indictments for nuisance. *Smith v. City of Scranton* (Pa.) 3 C. P. Rep. 82, 84.

The Constitution calls the prosecuting attorney the district attorney. The law prescribing his duties says that he shall be a public prosecutor, so that the terms "district attorney" and "prosecuting attorney" are one and the same thing, and the fact that an indictment is signed "Prosecuting Attorney," and not "District Attorney," is immaterial. *State v. Salge*, 2 Nev. 321, 324.

The district attorney is a quasi judicial officer. He represents the commonwealth. *Commonwealth v. Bubnia*, 47 Atl. 748, 750, 197 Pa. 542.

#### DISTRICT JUDGE.

Code Civ. Proc. § 252, providing that injunction may be granted in an action at the time of commencing it, or at any time afterwards, before judgment, by the Supreme Court, or any judge thereof, the district court, or any judge thereof, is not comprehensive enough to authorize any district judge to grant temporary injunctions throughout the state, no matter whether the judge of the court in which the action is brought be absent from his district or not; but the words clearly refer alone to the particular court in which the action is brought, and to the judge having for the time being jurisdiction within that district. *Ellis v. Karl*, 7 Neb. 381, 386.

**DISTRICT MEETINGS.**

Under Pub. Laws May 29, 1884, c. 447, § 1, providing that any town may at a "town meeting" abolish all the school districts therein, a town divided into voting districts cannot legally vote in district meetings on the question of abolishing its school districts, as the words "district meetings," in the act, are not equivalent to "town meetings." *Comstock v. School Committee*, 17 R. L. 827, 828, 24 Atl. 145, 146.

**DISTRICT OF ALASKA.**

The phrase "District of Alaska," as used in 15 Stat. 241, extending the laws of the United States relating to customs, commerce, and navigation over the territory ceded to the United States by Russia, and as used in the executive order made pursuant to such act, includes that portion of the sea along its coasts, which lies inside of a line drawn from the promontory of Point Hope to Cape Prince of Wales. *The Louisa Simpson* (U. S.), 15 Fed. Cas. 958, 958.

**DISTRICT OF COLUMBIA.**

As state, see "State."

**DISTRICT OFFICER.**

A county tax collector is not a "district" officer within the meaning of Const. § 234, providing that all district officers shall reside within their respective districts. *Commonwealth v. Blackwell*, 80 S. W. 642, 643, 97 Ky. 314.

A "district attorney" is not a county or precinct, but a district, officer. *Merwin v. Boulder County Com'rs*, 67 Pac. 285, 287, 29 Colo. 169.

**DISTRICT SEWERS.**

"District sewers," as defined in a city charter establishing a sewer system, are those constructed or acquired, under authority of ordinance, within the limits of an established sewer district, and paid for by special assessments. *Prior v. Buehler & Cooney Const. Co.*, 71 S. W. 205, 170 Mo. 439.

**DISTRICT TELEGRAPH BUSINESS.**

A "district telegraph business" consists in securing the attendance of messenger boys to carry telegraph messages, run miscellaneous errands, carry packages, distribute posters, invoices, invitations, etc. The business also includes night-watchman signals, fire and burglar alarms, and police calls. *City of Toledo v. Western Union Tel. Co.* (U. S.) 107 Fed. 10, 14, 46 C. C. A. 111, 52 L. R. A. 730.

**DISTURB.**

The word "disturbed" means agitated, aroused from a state of repose, molested, interrupted, hindered, perplexed, disquieted, or turned aside, or diverted from the object for which they are assembled. *Richardson v. State*, 5 Tex. App. 470, 472.

Act April 11, 1873, § 2, providing that, if any two or more persons shall confederate for the purpose of "intimidating, alarming, or disturbing" any person or persons, they shall on conviction be fined, implied the use of physical force and menace, and involved a breach of the peace; and hence an allegation of a threat to prosecute for selling whisky without a license was not an intimidation, alarming, or disturbing within the statute. *Embry v. Commonwealth*, 79 Ky. 439, 441.

"Disturb" primarily means to throw into disorder or confusion, to derange, to interrupt the settled state of; so that, under an allegation that by reason of defendant's neglect and careless conduct plaintiff was greatly disturbed in body and mind, proof that plaintiff was injured physically does not constitute a variance. *Watkins v. Kaolin Mfg. Co.*, 42 S. E. 983, 984, 131 N. C. 536, 60 L. R. A. 617.

A school is as much "interrupted or disturbed" by preventing the assembly as by breaking it up after school is assembled, within the meaning of Pub. St. c. 241, § 7, providing a punishment for persons who willfully interrupt or disturb any public or private school. *Douglass v. Barber*, 28 Atl. 805, 18 R. L. 459.

**DISTURBANCE.**

"Disturbance" is defined as any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation, in whole or in part. *State v. Stuth*, 39 Pac. 665, 666, 11 Wash. 423 (citing 2 Bish. Cr. Law, § 309).

A valid contract cannot be made on Sunday if it relates to the business of one's secular calling and is not an act of necessity or mercy, because two or more must necessarily be engaged in making such contract, and, however willing and desirous they both and all might be to consummate it on that day, yet in doing it they would each necessarily "disturb the other or others," in the sense in which that term is used in Rev. St. c. 118, § 1, Comp. Laws, 271, providing that the work, labor, or business of a person's secular calling shall not be done to the "disturbance of others" on the Lord's Day. The word "disturbance" is not to be understood in the sense that a person cannot be disturbed by business, unless it annoys him or interferes in some way with his devotion, or his medi-

tation or his rest, against his wish. *Smith v. Foster*, 41 N. H. 215, 218.

A statute prohibiting any work on Sunday, to "the disturbance of others," includes all secular work, business, or labor, the spirit of the act being to advance the interests of religion, to turn a man's thoughts from worldly concerns, and to direct them to the duties of piety and religion. But the execution of a will on Sunday is not an act, secular in its character, tending to the disturbance of others. *George v. George*, 47 N. H. 27, 33.

An act prohibiting any person from doing any work on the Lord's Day, to the "disturbance" of others, applies to anything which throws into confusion things settled, which interrupts the movements, pursuits, or thoughts of another; so if it distracts his attention, and calls his mind off from one train of thought and diverts it to another, it may be said to "disturb" him. The only safe meaning to be given to the word is a comprehensive one, going upon the ground that the main purpose of the law was to release an individual from a penalty who had been guilty of no act that actually did or that tended to disturb the minds of others from those religious observances which the act unquestionably intended to respect. If a person should desire to buy a horse, he would have no right to go to the owner on the Sabbath and make his proposition for the sale, because that would tend to disturb the quiet of the owner on the day which the statute intended should be respected; and where a contract for the sale of a horse was made on Sunday, and a note executed, and the wife of one of the parties and a witness were the only persons present, it was a disturbance within the law. *Varney v. French*, 19 N. H. 233, 238.

#### Of others.

Rev. St. c. 118, § 1, provided that no person should do any work, business, or labor of his secular calling, to the "disturbance of others," on the Lord's Day. Held, that any business tends to the "disturbance of others," and is consequently prohibited, which withdraws the attention from the appropriate duties of the Sabbath, and turns it to other things. *Varney v. French*, 19 N. H. 233, 235.

In this state, under the construction of our statute prohibiting unnecessary labor on Sunday, the execution and delivery of a promissory note upon Sunday has been declared "business of a person's secular calling, and generally an act to the disturbance of others, and, as such, is prohibited under a penalty." *State Capital Bank v. Thompson*, 42 N. H. 869, 370.

#### Of religious worship.

Of religious worship, see "Disturbing Religious Worship."

#### Of a right.

"A 'disturbance' of a right cannot necessarily of itself be held to mean a refusal of permission to exercise such right. A refusal, unaccompanied with threats, express or implied, is a bare negation; it has nothing active in its nature, nor can it fairly be implied that the person who refused had it in contemplation to do any unlawful act. He may doubt the right of him who asked permission, and intend to take his remedy at law in case that person persisted in the exercise of the right, and such an intention could be no legal disturbance. A bare refusal does not amount to a disturbance." *Downing v. Baldwin* (Pa.) 1 Serg. & R. 298, 303.

#### DISTURBING THE PEACE.

See "Seriously Disturb or Injure The Public Peace."

An ordinance of St. Charles, providing that every person who shall willfully "disturb the peace \* \* \* by loud or unusual noise, by blowing horns \* \* \* shall be deemed guilty of misdemeanor," means the disturbance of some person or persons; the mere making of noise without disturbing any one is insufficient. *City of St. Charles v. Meyer*, 58 Mo. 86, 89.

Where defendant has been convicted of "unlawfully and willfully using loud and vociferous language in a manner calculated to disturb the inhabitants of the said public place," an appeal should be dismissed which is based on recognizances stating that appellant has been convicted of "disturbing the peace," since there is no such offense, *eo nomine*, as disturbing the peace. *Yokum v. State* (Tex.) 21 S. W. 191.

#### DISTURBING RELIGIOUS WORSHIP.

A statute making it an offense to "disturb religious worship" meant to derange its quiet and order. *Lancaster v. State*, 53 Ala. 398, 399, 25 Am. Rep. 625.

The cracking and eating of nuts during religious services, thereby disturbing members of the congregation, may constitute a "disturbing religious worship" within Pen. Code, art. 284 (Acts 1874, p. 43). *Hunt v. State*, 3 Tex. App. 116, 30 Am. Rep. 128.

The announcement, to a congregation assembled for public worship, by a third person, that defendant was engaged in a fight near the church, which had the effect of stopping the service temporarily, such fight occurring at such a distance that the congregation, while in the church, could not hear it, is not "disturbing public worship" within the North Carolina statute. *State v. Kirby*, 12 S. E. 1045, 108 N. C. 772.

Rev. Code, § 8612, providing that "any person who willfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, must on conviction be fined," etc., requires not only that there shall be an actual interruption or disturbance as described in the Code, but that such interruption or disturbance shall be "willfully" made by the person or persons accused. The offense may be committed without necessarily stopping or hindering the progress of a worshipping assembly in effecting the objects and purposes for which such assembly was met together. *Brown v. State*, 46 Ala. 175, 183.

Where one having a paper title to land on which a church stands asserts a claim to the building, and locks up the same to exclude the entrance of the congregation claiming adversely to him, he is not guilty of a "disturbance of religious worship" under a statute punishing such offense. *Davis v. State* (Miss.) 16 South. 377.

A "disturbance" of a religious congregation, within the meaning of a statute prohibiting such act, is shown by the fact that defendant entered a church with a large stick in his hand, and afterward went outside and used profane language in a tone of voice loud enough to be heard over the church, which disturbed certain persons, though not shown to have disturbed the entire congregation. *McElroy v. State*, 25 Tex. 507, 509.

A congregation of persons which had just been lawfully assembled under a bush arbor for divine worship could, in legal contemplation, be "disturbed" by such acts as are specified in Pen. Code, § 418, although the persons composing the congregation may have been dismissed from the arbor, but remained assembled around it for the purpose of attending to their animals and preparing and eating their own dinners. *Minter v. State*, 30 S. E. 989, 991, 104 Ga. 743.

## DITCH.

The words "ditch" and "drain" have no technical or exact meaning. They both mean a hollow space in the ground, natural or artificial, where water is collected or passes off. *Wetmore v. Fiske*, 5 Atl. 375, 378, 15 R. I. 354 (citing *Goldthwait v. Inhabitants of East Bridgewater*, 71 Mass. [5 Gray] 61, 64).

### As building.

See "Building (In Lien Laws)."

### As drain.

See "Drain."

### As fence.

See "Fence."

### As water course.

See "Water Course."

### Sewer distinguished.

The distinction between "ditches" and "sewers" is that ditches are drains which are or may be open, and so arranged as to take surface water, while sewers are closed or covered waterways. *State Board of Health v. Jersey City*, 35 Atl. 835, 838, 55 N. J. Eq. 116.

## DITTO.

"Ditto" marks are to be read as a repetition of what appears on the line above them, and are as much a part of the English language as are punctuation marks, such as the comma, semicolon, colon, and period, etc. They are often given an important, and sometimes a controlling, part in the construction of general writings, and in the interpretation of legal documents and statutes and constitutions. Being regarded as a part of the language, the court will, of course, take judicial notice of their meaning. *Hughes v. Powers*, 42 S. W. 1, 2, 99 Tenn. 480.

"Ditto" marks are generally understood to mean "the same as above." A statute requiring the index to a judgment record to contain the names of the plaintiff and defendant is satisfied, where the same party has been defendant in several actions, by the writing of his name once as defendant in the action first indexed, and the using of ditto marks in place of his name in the titles to the other actions. *New England Loan & Trust Co. v. Avery* (Tex.) 41 S. W. 673, 675.

Where articles of association were subscribed as follows:

Subscribers' Names.	Place of Residence.	No. of Shares Taken.
N. R. Lindsay.....	Howard County, Ind.	10
Mathew W. Miller..	" " " "	5

—The double commas are by common usage equivalent to the repetition of the words "Howard County, Indiana." *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51, 59.

The use of a double comma following the name of the subscriber to articles of association, under the name of the specified locality, sufficiently designates such subscriber's residence. *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457, 460.

## DIV.

"Div.," as used in a notice to the "Chicago W. Div. R. R. Co.," will be understood as an abbreviation of the word "division," where sent to the Chicago West Division

Railway Company. West Chicago St. R. Co. v. People, 40 N. E. 599, 600, 155 Ill. 299.

## DIVE.

The term "dive," as in popular use, designates a place of infamous resort. *Gartenstein & Sindel's License*, 15 Pa. Co. Ct. R., 612, 614.

## DIVERS.

"Divers" is a term which may be used in an indictment charging the stealing of various articles of one kind for the purpose of describing the property, and when the word "divers" is so used it is sufficient, without stating any specific number of the articles stolen. *Commonwealth v. Butta*, 124 Mass. 449, 452.

The phrase "divers days and times," in an indictment charging the commission of an offense on the day now last past, and on divers days and times before and since that day, may be rejected as surplusage if the offense be but a single offense. *United States v. La Coste* (U. S.) 26 Fed. Cas. 826, 829.

"Divers times," as used in Rev. Laws, § 3859, providing the form of information for selling intoxicating liquors contrary to law, providing that it shall read that a certain person on a certain day, at a certain place, did at divers times furnish or give away liquor, notifies the defendant that he may be called upon to meet more than one offense committed in one of the ways named. *State v. Hodgson*, 28 Atl. 1089, 1094, 66 Vt. 134.

"Divers persons," as used in an allegation in a slander suit that the words had been spoken in the presence and hearing of divers good and worthy persons, means in the presence of one or more persons. *Harris v. Zanone*, 28 Pac. 845, 847, 93 Cal. 59.

### As all.

In a submission to arbitration of sundry controversies touching the division fence between the farms of the parties, and touching "divers other matters," such words are operative, and equivalent to a general submission of all questions of controversy between the parties. They are used as forming an independent part of the submission, and it is impossible not to perceive that the parties intended by them to embrace different and more general matter than that which had already been specified. *Munro v. Alaire* (N. Y.) 2 Caines, 320, 326.

## DIVERSION.

### Of attention.

"Diversion of attention," when used in reference to the law of negligence, has been

adopted to express conditions under which the watchfulness of one traveling on a sidewalk might be relaxed consistently with ordinary care, and hence is obviously inapplicable to the duty of vigilance resting on one about to cross a railway track, which is not, like a city sidewalk, an assurance of probable safety, but, on the contrary, a proclamation of peril. *Guhl v. Whitcomb*, 85 N. W. 142, 144, 109 Wis. 69, 83 Am. St. Rep. 889.

### Of a note.

"Diversion" means the turning aside or altering the natural course of a thing. Thus the "diversion" of an accommodation note is any use other than that intended, and a note is "diverted" when not returned on the execution of a renewal note. *Ives v. Jacobs*, 1 N. Y. Supp. 330, 331, 21 Abb. N. C. 151.

### Of water.

"Diversion," as applied to a water course, means a turning aside or altering the natural course of the stream. The term is chiefly used in law to mean the unauthorized changing of the course of a stream to the prejudice of a lower proprietor. *Merritt v. Parker*, 1 N. J. Law (Coxe) 460, 463; *Parker v. Griswold*, 17 Conn. 288, 299, 42 Am. Dec. 739.

## DIVIDE.

See "Lawfully Divided."

Divided or otherwise, see "Otherwise."

The words "divided among them," in a will in which testator devises certain real estate between his wife and children, to be divided among them according to law, is simply declaratory, not of the quantity of the estate conveyed, but how the devisees shall hold it, to wit, in severalty, the partition to be made in the mode prescribed by law. *Pruden v. Paxton*, 79 N. C. 446, 448, 28 Am. Rep. 333.

Where some of the legacies of a will were specific and some general, a direction that the executors should divide the land, negroes, etc., "to be given off in the order herein named," was not sufficient to change the specific to general legacies. The word "divide" was not used to indicate the intention that the legacies were to be paid in specie out of the money and property, but to designate the duty to appropriate the assets of the estate to the accomplishment of the testator's purpose. *Gilmer's Legatees v. Gilmer's Exrs*, 42 Ala. 9, 16.

### As applying to realty.

The term "divided equally," in a direction in a will that testator's estate is to be divided equally, is alike applicable to real and personal property, and may very appro-

privately be used in reference to both. *Penfield v. Tower*, 46 N. W. 413, 417, 1 N. D. 216.

The general expression "divide and pay" as used in a will giving a life estate to a certain person, and directing the executor, from and after the death of the life tenant, to divide and pay over the corpus of the trust estate to certain others, *per se* includes real and personal estate. Land as well as personalty may be the subject of division in kind. *Seeds v. Burk*, 87 Atl. 511, 513, 181 Pa. 281.

#### As creating tenancy in common.

The words "divided between," in a will directing that certain real estate be divided between certain beneficiaries, operates to create an estate in common in the beneficiaries. *Walker v. Dewing*, 25 Mass. (8 Pick.) 520, 521.

The words "divided equally between them," in a will devising property to certain beneficiaries, to be divided between them, import the granting of an estate in common, and not a joint estate. *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257; *Weir v. Tate*, 39 N. C. 264, 276; *Griswold v. Johnson*, 5 Conn. 363, 366; *Emerson v. Cutler*, 31 Mass. (14 Pick.) 108, 114.

#### As change boundary.

"Divide" means to make something into smaller parts, and not to enlarge, and hence the provisions of the Constitution of New York giving the Legislature power to divide counties and to erect new counties does not authorize it to change the boundary lines of counties. In *re McGinness' Estate*, 35 N. Y. Supp. 820, 823, 13 Misc. Rep. 714.

#### As devise.

Where a testator devises property to his wife and children, and afterward executes a codicil directing his executor to have all his property divided between the wife and children, the word "divide" will not be construed as being equivalent to "devise," and will only authorize a change in the division of that portion of the estate devised by the will to the wife and children. *Boyd v. Boyd* (U. S.) 2 Fed. 138, 145.

#### As divide equally.

"Divide," as used in a will directing the residue of the personal estate to be divided for personal charitable purposes, does not necessarily imply equality of division. *Mills v. Farmer*, 1 Mer. 54, 102.

#### As distribute.

The word "divided," in a will, held to mean "distributed." *Duffield v. Morris* (Pa.) 8 Watts & S. 348, 349.

#### As implying joint interest.

Where two parties are engaged in running an ice wagon, one of whom runs the business and divides with the other any portion of the returns of the business, "divide" will not be held to convey the idea that both were jointly interested, but is entirely consistent with the idea of payment for service. *McCormack v. Nassau Electric R. Co.*, 44 N. Y. Supp. 684, 686, 16 App. Div. 24.

#### DIVIDE (noun).

A "divide," when used with reference to the flow of water, is an elevation of land or other obstruction by which the natural flow of water is arrested and the water caused to flow in different directions. *Anderson v. Henderson*, 16 N. E. 232, 235, 124 Ill. 164.

#### DIVIDED REPUTATION.

When the courts use the term "divided reputation" with reference to the fact that there is a divided reputation in a community as to the question whether or not persons are married, it is not meant that an individual can have such a thing as two opposite general reputations at the same time. A condition of that sort is an impossibility. A reputation cannot be general if it is not general, and no reputation of a marriage but a general reputation is competent evidence to establish marriage. *Jackson v. Jackson*, 83 Atl. 317, 320, 82 Md. 17, 34 L. R. A. 773.

#### DIVIDING LINE.

A "dividing line," asserted as having been agreed on and recognized by the adjoining owners, must have been acquiesced in by them with knowledge of the facts of its situation and marking; but it need not appear that they knew of the terms, or even existence, of the distribution which first divided their land. *Rathbun v. Geer*, 30 Atl. 60, 61, 64 Conn. 421.

#### DIVIDEND.

See "Preferred Dividend"; "Stock Dividend."

"Dividend," both in common and legal parlance, is "a portion of the principal or profits divided among the several owners of a thing." *Bouv. Law Dict.* Webster defines it as "a part or a share." In speaking of it in connection with moneyed corporations, we always understand it to be the share or profit going to each holder of stock. *Commonwealth v. Erie & P. R. Co.* (Pa.) 10 Phila. 465, 466.

"Dividend," when applied to incorporated companies, means that amount which is



set aside and designated, by the managers of the company, from its property to be divided among its members. *State v. Comptroller of State of New Jersey*, 23 Atl. 122, 54 N. J. Law (25 Vroom) 135.

The word "dividends," *ex vi termini*, imports a distribution of the funds of a corporation among its members, pursuant to a vote of the directors or managers. *Williston v. Michigan*, S. & N. L. R. Co., 95 Mass. (13 Allen) 400, 404.

A duebill payable from the first "dividends" declared by a certain company is payable out of the maker's share of the assets of such company on its dissolution without declaring a dividend. "There may be dividends out of profits, and there may be dividends out of insolvent estates. The one is as much a dividend as the other." *Cozad v. McKee*, 18 Atl. 618, 130 Pa. 406.

Act June 1, 1889, § 21, provides that if the dividends made or declared by a corporation during any year amount to more than 6 per cent. on the par value of the stock, the corporation shall be taxed, etc. Held, that where a certain corporation saved a certain amount of money during the tax year from rents and the sale of real estate, and divided the sum amongst the stockholders, the money so divided constituted a "dividend" within the meaning of the term as above used. *Commonwealth v. Land & Imp. Co.*, 26 Atl. 1034, 156 Pa. 455.

A "dividend," as applied to mutual life insurance companies, is "a distribution of existing overpayments, resulting mainly from savings on the annual cost of insurance and expenses of management, and in part from savings on the future cost of insurance; that is, the net gain from lapsed policies." *Fuller v. Metropolitan Life Ins. Co.*, 41 Atl. 4-11, 70 Conn. 647.

#### As capital.

A "dividend" is not capital, but the product of capital; and it is this product which the law taxes by a provision imposing a tax on the capital stock of companies at the rate of one-half mill for every one per cent. dividend made or declared by the company. *Commonwealth v. Pittsburg, Ft. W. & O. R. Co.*, 74 Pa. (24 P. F. Smith) 83, 90.

#### Distributive shares synonymous.

"Dividends" is a word of very general and indefinite meaning. It has not in law any particular and technical signification. As used in Const. art. 9, § 6, appropriating to the university all the property accruing to the state from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, it is synonymous with "distributive shares," and used as a convertible term meaning the same thing, to wit, "divi-

dends or distributive shares of estates of deceased persons." *Trustees of University v. North Carolina R. Co.*, 76 N. C. 103, 105, 22 Am. Rep. 671.

#### As division from any source.

A "dividend" is a sum of money distributed pro rata among the stockholders of a corporation or company, without reference to the source from which it was taken or paid. *Osgood v. Laytin* (N. Y.) 5 Abb. Prac. (N. S.) 1, 9. The term was so used in an act providing for the incorporation of insurance companies, section 20, as amended in 1857 (4 Edm. Rev. St. p. 210), providing that no "dividend" shall ever be made by any company incorporated under this act when its capital stock is impaired, or when the making of such dividend will have the effect of impairing its capital stock. *Osgood v. Laytin* (N. Y.) 37 How. Prac. 63, 65, \*42 N. Y. (3 Keyes) 521, 523.

#### As division of profits.

The term "dividend" ordinarily means the profits of a corporation apportioned among shareholders. *Fitzgerald v. Fitzgerald & Mallory Const. Co.*, 59 N. W. 838, 855, 41 Neb. 374; *Taft v. Hartford, P. & F. R. Co.*, 8 R. I. 810, 333, 5 Am. Rep. 575; *City of Allegheny v. Pittsburgh, A. & M. Pass. R. Co.*, 39 Wkly. Notes Cas. 366, 368, 36 Atl. 161, 179 Pa. 414.

A "dividend" is defined as a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders on demand or at a fixed time. *De Koven v. Alsop*, 68 N. E. 930, 931, 205 Ill. 309, 63 L. R. A. 587; *Parks v. Automatic Bank Punch Co.*, 14 N. Y. St. Rep. 710, 711.

"Dividends" mean proportionate shares of the profits earned by the capital stock of a concern. When we speak of a "dividend-paying stock," we characterize the whole capital stock, and express its quality. *Struthers v. Clark*, 30 Pa. (6 Casey) 210, 213.

"Dividend," as used in reference to corporate stocks, has a technical but well-understood meaning, and indicates corporate funds, derived from the business and earnings of the corporation, appropriated by a corporate act to the use of and to be divided among the stockholders. *Hyatt v. Allen*, 56 N. Y. 553, 556, 15 Am. Rep. 449.

Testator devised a sum in trust for his daughters, and directed the trustees to invest it in stocks, and to pay the dividends as they should be received to the daughters from time to time. Held, that the word "dividends" as used in the will meant all distributions to corporators of the profits of the corporation, whether such distributions were large or small, or whether made at long or short intervals, and without any re-

gard to the manner or place of their declaration or payment. *Clarkson v. Clarkson* (N. Y.) 18 Barb. 646, 657.

"Dividends," as used in Act Cong. 1864, as amended in 1866, imposing a tax on all dividends thereafter declared due, wherever and whenever the same should be payable to depositors as part of the earnings, income, or gain of any savings institution, should be construed to include the division of profits among the several contributors, according to the manner of their contributions, arising from the interest received for the loans of the depositors, all of which were placed in a common fund, instead of being paid to the depositor after deducting a charge to cover expenses. *Cary v. San Francisco Savings Union*, 89 U. S. (22 Wall.) 38, 41, 22 L. Ed. 779.

Within the meaning of the charter, providing that stockholders of a railroad company shall be entitled to 6 per cent. dividends from earnings, and shall never be entitled to greater dividends, "dividends" is used in its ordinary sense, as a description of divided profits and gains arising from the use and management of the capital. As said in *Rorer, R. R.* 188: "Dividends are of the earnings or product of the road, and not of, nor can be of, corporate capital." On a proper occasion there may be a dividend of capital, but in the charter above there is no agreement that on partition the whole of it that is divided shall go to one class of its owners. *Jones v. Concord & M. R. R.*, 38 Atl. 120, 125, 67 N. H. 119.

A "dividend" is a fund which a corporation sets apart from its profits to be divided among its members. A "dividend" is a corporate profit set aside, declared, and ordered by the proper corporate authorities to be paid to the stockholders on demand or at a fixed time. A dividend becomes the property of the shareholder, and the shareholder acquires his legal right thereto, only when it is regularly declared. *State v. Bank of Commerce*, 31 S. W. 993, 998, 95 Tenn. (11 Pickle) 221.

The term "dividend," as used in the statute providing that no tax shall ever be laid on said railroad which will reduce the dividends below 8 per cent., has reference to dividends on the capital stock held and owned by the shareholders, and, in its technical as well as in its ordinary acceptation, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders; and hence the provision of such statute is not void for indefiniteness. *Mobile & O. R. Co. v. Tennessee*, 14 Sup. Ct. 968, 971, 153 U. S. 486, 38 L. Ed. 793.

"A 'dividend' to the stockholders of a corporation, when spoken of in reference to

an existing organization engaged in the transaction of business, and not of one being closed up and dissolved, is always, so far as we are aware, understood as a fund which the corporation sets apart from its profits to be divided among its members. A 'dividend' among preferred stockholders inclusively is understood to imply that the sum divided has been realized as profits, though the earnings did not yield a dividend to the stockholders in general." *Lockhart v. Van Alstyne*, 31 Mich. 76, 79, 18 Am. Rep. 156.

Act April 18, 1884, providing incorporated companies are liable to a franchise tax at a percentage calculated, first, upon gross receipts, and, second, upon "dividends earned or declared" during the specified year, refers to those profits of the company which have been divided, or those which ought to have been divided. *State v. Comptroller of State of New Jersey*, 23 Atl. 122, 123, 54 N. J. Law (25 Vroom) 135.

#### As income or interest.

"Dividend," as used with reference to corporate stock, is synonymous with "income" and "interest," and hence, where dividends were bequeathed to a tenant for life, the bequest must be construed to vest in such tenant the income, and the income only, of the shares included in the bequest owned by the testator at the time of his death, and that the capital of the shares bequeathed should go to the remaindermen as legatees in remainder. *Gibbons v. Mahon*, 10 Sup. Ct. 1067, 1062, 136 U. S. 549, 34 L. Ed. 525.

The "dividends" of a copartnership of which a decedent was a member, and which continued after his death, do not constitute a part of the corpus of his estate, any more than interest money constitutes a portion of the principal invested, but go as income to the life tenant of his estate. It has been held that the words "dividends" and "income," used in a will bequeathing stock, mean the same thing. *Helge v. Litig*, 63 Md. 301, 305, 52 Am. Rep. 510.

"Dividends," as used in Act March 25, 1870, authorizing manufacturing corporations to issue and dispose of preferred stock, and to guaranty the holders of such stock semi-annual dividends not exceeding a certain amount, should be construed to mean "interest." *Burt v. Rattle*, 31 Ohio St. 116, 128.

#### As payable in money.

The term "dividend" is usually used to denominate the profits in a corporation or other form of commercial partnership which may be reasonably set apart, and is in fact set apart, by the management as the separate part of the shareholders. The word "dividends," if unqualified, signifies dividends

payable in money. *Spooner v. Phillips*, 24 Atl. 524, 525, 62 Conn. 62, 16 L. R. A. 461.

"The word 'dividend,' if unqualified," said the Supreme Court of Errors of Connecticut, "signifies dividends payable in money." The words "dividends and income," in a will devising property in trust, the dividends and income thereof to be paid to his daughter, with remainder over after her death, do not include the increase in the value of the corpus caused by the investment of the funds and stocks, and their sale and investment in other stocks at a profit. *Smith v. Hooper*, 51 Atl. 844, 846, 95 Md. 16.

It is a matter of no difference whether a dividend is declared in stock, or paid in cash and thereafter converted into stock by the shareholders. In either event it is a distribution of the surplus profits of the corporation. *Rose v. Barclay*, 43 Atl. 385, 386, 191 Pa. 594, 45 L. R. A. 392.

#### Profits distinguished.

As defined by Webster, a "dividend" is "the share of a sum divided that falls to each individual; a distributive sum, share, or percentage applied to the profits as apportioned among stockholders." It differs from "profits" in being taken by a competent authority out of the joint property of the partnership or company and transferred to the separate property of the individual partners or stockholders. No safely conducted business, corporate or other, distributes all its earned profits. There must be a fund reserved for contingencies, for repair or renewal of deteriorated material, etc., and the amount, absolute or proportionate, to be held for such purpose, must be determined by the authority which conducts the business. The power to control this matter is necessarily implied in all authority to make dividends, and in the present case it is expressly vested in the directors, who are to declare such dividends as "shall appear advisable" to them, not exceeding net profits, so that the words "dividends declared," as used in a charter of a street railway company requiring it to pay to a city a tax on the dividends declared, which by another provision were to be such as should appear advisable to the directors, not exceeding the net earnings, a lease of the property of a company to a new corporation for a nominal rental, and the exchange by the stockholders of all its stock for stock in the new corporation, have a substantial and settled meaning; and it is upon such dividends only, and not on par or market value of stock, or on profits earned, that the tax is laid. *City of Allegheny v. Pittsburgh, A. & M. P. Ry. Co.*, 36 Atl. 161, 179 Pa. 414.

#### DIVIDEND (In Bankruptcy).

Sums to be paid as "dividends," on which referees and trustees are allowed com-

missions by Bankr. Act July 1, 1898, c. 541, §§ 40a, 48a, 30 Stat. 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3439], are what remains after payment of taxes and prior claims in full, section 65a (30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), providing that dividends shall be paid on all allowed claims except such as have priority or are secured. In re *Mammoth Pine Lumber Co.* (U. S.) 116 Fed. 731, 735.

The term "dividends," as used in section 65 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448]), which provides that dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured, means the aliquot portion of the bankrupt estate which was to be divided proportionally among the creditors after the payment of such claims as were entitled to priority by the act, and which were to be paid in full. In re *Goldville Mfg. Co.* (U. S.) 123 Fed. 579, 587.

The word "dividend," as used in Bankr. Act July 1, 1898, c. 541, § 65a, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3448], does not include payments made by a trustee from funds collected by him on claims entitled to priority under section 64b (30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]); therefore such trustee is not entitled to commission. In re *Sabine* (U. S.) 1 Am. Bankr. R. 322, 328.

#### Payments to secured creditors.

"Dividends," as used in the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), allowing the referee and trustee certain commissions on dividends paid by the state, sums paid to mortgagees from the proceeds of the mortgaged property on its sale by order of the court of bankruptcy are not dividends. In re *Utt*, 105 Fed. 754, 758, 45 C. C. A. 32.

The word "dividends," as used in a bankruptcy act providing that the referee shall receive a commission on dividends paid, does not include partial payments made on claims of secured creditors. A "dividend," within the meaning of the law, is declared and paid on unsecured claims only. In re *Ft. Wayne Electric Corp.* (U. S.) 94 Fed. 109, 110.

Both in common and legal parlance the term "dividend" implies a portion of a fund divided among several others. *Bouvier* defines it primarily as a portion of the principal or profit divided among several owners of a thing. *Black* defines it as a fund to be divided. In bankruptcy or insolvency practice a "dividend" is a proportional payment to the creditors out of the insolvent estate. These definitions carry with them the idea of the division of a fund owned by several parties, and the "dividend" is the aliquot

portion of the estate of the common owners. So that under Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], providing that referees and trustees in bankruptcy shall be entitled to commission on sums received as "dividends," they are not entitled to commissions on disbursements made in payment to creditors who are entitled to priority of payment and to full satisfaction before distribution to general creditors begins. In re Fielding (U. S.) 96 Fed. 800, 801.

The word "dividend" is a business term applied to the division among stockholders of a fund arising from the profits, or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate. In either case it is the fund that is divided and parceled out among those who are entitled to a part of the fund so allotted to a stockholder as his dividend. A "dividend," in bankruptcy, is a parcel of the fund arising from the assets of an estate rightfully allotted to a creditor entitled to a share of the fund, whether in the same proportion with other creditors or in a different proportion, and thus includes payments on secured claims. In re Barber (U. S.) 97 Fed. 547, 550.

Bankr. Act July 1, 1898, c. 541, §§ 40, 48a, 30 Stat. 556, 557 [U. S. Comp. St. 1901, pp. 3436, 3439], prior to its amendment, provided that referees should be entitled, as compensation, to a fee of \$10, and to 1 per cent. commissions on sums to be paid "as dividends and commissions," or one-half of 1 per cent. on the amount to be paid to creditors on confirmation of a compensation. Section 48a declared that trustees should be entitled to receive a fee of \$5, and such commissions on sums to be paid as dividends and commissions as should be allowed by the courts, etc. Held, that the word "dividends" included only such sums as were paid to creditors who had provable and allowed claims, and did not include sums paid by the trustee to satisfy fixed liens on real estate sold by him, though the property was sold free of all incumbrances, and the trustee paid such liens from the proceeds of the sale. In re Hinckel Brewing Co. (U. S.) 124 Fed. 702, 703.

#### DIVIDEND IN SCRIP.

"Dividends in scrip," as used in Internal Revenue Act June 30, 1864, declaring that any railroad company which may have declared any dividends in scrip or money due and payable to its stockholders as part of the earnings, dividends, income, or gains of such company, carried to the account of any fund or used for the construction, should be subject to a tax on the amount of such dividends or profits, should be construed to include certificates, issued to stockholders of

the company, declaring on their face that such stockholder was entitled to 80 per cent. of the amount of the capital stock held by him, payable, ratably with the other certificates issued at the option of the company, out of their future earnings, which were issued as evidence to the stockholders that an equal amount of the earnings of the company beyond the current expenses had been expended for the objects stated in the preamble of the certificates, and to show that the respective stockholders were entitled to reimbursement of such expenditure at some convenient future period. *Bailey v. New York Cent. & H. R. R. Co.*, 89 U. S. (22 Wall.) 604, 629, 22 L. Ed. 840.

#### DIVINE LAW.

"Divine laws," as distinguished from human laws, are those whose authorship is ascribed to God, and are of two kinds—natural laws and positive laws, or revealed laws. *Borden v. State*, 11 Ark. (6 Eng.) 519, 527, 44 Am. Dec. 217.

"Revealed" or "divine" laws are those laws which are revealed from God, and are to be found only in the Holy Scriptures, and on comparison are found to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. *Mayer v. Frobe*, 22 S. E. 58, 61, 40 W. Va 246.

#### DIVINE SERVICE.

Where an agreement was made between two churches using the same building that its use was to be restricted to divine service, and, by a common understanding between both congregations, no other meetings were to be held in it, and at the time of the agreement no other meetings were held in the church except preaching services, the term "divine service" is to be restricted to that meaning in the agreement, and would not include a Sunday school. In re Gass' Appeal, 73 Pa. (23 P. F. Smith) 39, 46, 18 Am. Rep. 726.

Where a canon of the church provided that notice of the election of vestrymen shall be given during divine service on the Sunday previous to the election, "divine service" will be understood to mean the regular divine service commencing at 11 a. m., where the custom is to commence at that time, and not to include a service beginning at 9 a. m., no other or different time having been assigned or fixed for such services on that day. *Dah' v. Palache*, 9 Pac. 94, 97, 68 Cal. 248.

#### DIVISIBLE CONTRACT.

A "divisible contract" is one in its nature and purposes susceptible of division and

apportionment, having two or more parts in respect to matters and things contemplated and embraced by it; not necessarily dependent upon each other, nor intended by the parties to be so. *Horseman v. Horseman*, 72 Pac. 698, 702, 43 Or. 83; *Potter v. Potter*, 72 Pac. 702, 704, 43 Or. 149.

## DIVISION.

### See "Political Division."

"Division" is the separation of an entire body into parts. *Inhabitants of Starks v. Inhabitants of New Sharon*, 39 Me. 368, 372.

The words "division" and "schism," as used in Rev. St. c. 14, § 3, which provides that, in case a division or schism shall take place in a religious society, the trustees shall permit each party to use the church and apportionances for divine worship a part of the time, import no more than a separation of the society into two parts, without any change of faith or ulterior relations. *McKinney v. Griggs*, 68 Ky. (5 Bush) 401, 414, 96 Am. Dec. 360.

The term "division," as used in an act of Parliament directing that a moiety of the penalty prescribed therein should be paid to the treasurer of the county, riding, or division where the offense is committed, does not mean a division not known in the law, but capriciously adopted in particular counties. There are legal divisions which satisfy and directly apply to each of these words. "County" applies to every county in the kingdom except two, "riding" to Yorkshire, and "division" to Lincolnshire, where there are three divisions and three separate commissions of the peace, three quarter sessions, and three distinct rates. The word "division," as used in the act, does not mean one of these three divisions. *Evans v. Stevens*, 4 Term R. 459, 462.

### Of inheritance.

A "division of inheritance" is the distribution of the property inherited among the heirs, giving to each the portion he is entitled to according to the will of the deceased or in the manner prescribed by law. *Comp. Laws N. M. 1897*, § 2027.

### Of mankind.

Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face, are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies at the foundation of the

classification which scientists have adopted. Blumenbach, in 1781, divided mankind into five principal types—the Caucasian, or white; Mongolian, or yellow; Ethiopian, or black; American, or red; and Malay, or brown. Cuvier simplified this classification into Caucasian, Mongol, and Negro, or white, yellow, and black races. Other writers make a still larger number of distinct races. It is said that Prof. Huxley's division of mankind is the most satisfactory. He distinguishes four principal types, and he points out the marked physical characteristics of each. These types are the Australioid (chocolate brown), Negroid (brown black), Mongoloid (yellow), and Xanthochroic (fair whites). To these he adds a fifth variety, the Melanchroic (dark whites). The "fair whites" are the type of the prevalent inhabitants of Northern Europe, and the "dark whites" of Southern Europe. All these physical differences do not exist in the case of each individual, and "innumerable varieties of mankind run into one another by insensible degrees"; but taking the race or type as a whole, their peculiarities are sufficiently distinct to form the basis of well-recognized classification. *Enc. Brit. tit. "Anthropology."* So it was held that a native of Japan was not entitled to naturalization as being included in the term "white persons." *In re Saito* (U. S.) 62 Fed. 126, 127.

### Of national guard.

The word "division," as used in the section relating to the national guard, in connection with the naval militia, shall have the same meaning and effect as "company" when used in connection with the infantry. *Pol. Code Cal. 1903*, § 1912.

### Of a town.

"Division" means the separation of an entire body into parts, and does not include the idea of preservation of any previous organization, form, or shape; and, with relation to the division of any town, it does not mean that to be a "division" of a town there shall necessarily be produced two or more towns composed of the same territory which formed the original town. If one part of a town were incorporated into a plantation and the other part were left without it, there would be a "division." It would not be necessary, to constitute a "division," that the two or more parts should have any political organization, if their respective parts were otherwise designated. It is not incorrect to speak of a town as "divided," when it has been separated into two parts, because one of them was left without organization and the other was united to another town; and hence, where a portion of a town was set off therefrom and annexed to and made a part of another town, and the incorporation of the residue of the first town was repealed.

there was a "division" of the first town, which gave paupers who had a settlement in the portion of the first town so set off and annexed to another a settlement in the town to which it was annexed. *Inhabitants of Livermore v. Inhabitants of Phillips*, 35 Me. 184, 188.

The vacation of a town and attachment of all its territory to several other organized towns is not a "division" of the town, within the meaning of Rev. St. § 671. *State v. Wood County Sup'rs*, 21 N. W. 55, 56, 61 Wis. 278.

#### DIVISION FENCE.

"Division or partition fence," as used in Code 1873, § 1498, declaring that when land which has lain uninclosed is inclosed the owner shall pay for one-half of each division or partition fence between his lands and the adjoining lands, etc., means a fence used as a partition between farms, whether on the exact boundary line or not, the purpose of the act not being to fix boundaries, but to provide an obligation for payment for division fences. *Card v. Dale*, 25 N. W. 774, 67 Iowa, 552.

#### DIVISION WALL.

The term "party wall" is usually applied to such walls as are built partly on the land of another for the common benefit of both in supporting timbers used in construction of contiguous buildings, and a division wall may become a party wall by agreement, either actual or presumed; and although such wall may have been built exclusively upon the land of one, if it has been used and enjoyed in common by the owners of both houses for a period of 20 years, the law will presume, in the absence of evidence showing that such use and enjoyment were permissive, that the wall is a party wall. In such cases the law presumes an agreement between the adjacent owners that the wall shall be held and enjoyed as the common property of both. *Barry v. Edlavitch*, 85 Atl. 170, 171, 84 Md. 95, 83 L. R. A. 294.

#### DIVORCE.

The purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceased to bind either. *Atherton v. Atherton*, 21 Sup. Ct. 544, 547, 181 U. S. 155, 45 L. Ed. 794.

A decree that the plaintiff be "divorced" from the defendant imports a dissolution, in the largest sense, of the marriage relation

between the parties. It means a divorce from the bonds of matrimony, and not merely from bed and board. The term is not answered by a divorce in part or to a limited extent only, but calls for a complete severance of the tie by which the parties were united. *Miller v. Miller*, 33 Cal. 353, 355.

Divorce is a remedy provided for an innocent party, and hence, if both parties have a right to a divorce, neither has. *Alexander v. Alexander*, 140 Ind. 555, 559, 88 N. E. 855.

In America, a "divorce" is commonly taken to mean an absolute severing of the bonds of matrimony, and not merely a separation from bed and board. No ecclesiastical court ever took cognizance of such cases. Parliament alone in England could grant absolute divorces. In most of the states of the Union divorce is classed among suits at law, and tried by jury, and in others it is considered a proceeding in chancery. And generally it has not been assumed by the courts except upon statutory authority, or for causes arising prior to marriage when there was no statute. *Cast v. Cast*, 1 Utah, 112, 124, 125.

#### Decree of nullity.

A divorce is a vacation of the marriage contract for a sufficient cause, and is conclusive evidence that the marital rights have once existed. A decree of nullity of a marriage simply discloses that a valid marriage contract never existed, and differs from a divorce, which is the vacation of the marriage contract for sufficient cause. *Town of Reading v. Town of Ludlow*, 43 Vt. 628, 632, 633.

The term "divorce" cannot, strictly speaking, be applied to a decree declaring an attempted marriage, which was absolutely void, to be null and void, as the word "divorce" implies a dissolution of, and does by its terms dissolve, a valid existing contract. *Rooney v. Rooney*, 34 Atl. 682, 686, 54 N. J. Eq. 231.

While the term "divorce" is not properly applicable to a decree of nullity, yet such a decree is often called a "divorce." 1 Bish. Mar. & Div. (Ed. 1881) § 166. In 2 Bish. Mar. & Div. (Ed. 1891) it is said: "Not infrequently the judicial declaration of nullity is called a 'divorce.' It is properly so where the marriage it declares void is only voidable. For example, it is common and correct language to speak of impotency as a cause for divorce, and Blackstone writes that 'divorce a vinculo matrimonii must be for some canonical cause of impediment.' But the expression 'sentence' or 'decree of nullity' equally well indicates the legal avoidance of voidable marriage, and it seems more significant and less liable to be misunderstood than the other, and somewhat better in accord with modern usage." *Henneger v. Lomas*, 44 N. E. 462, 465, 145 Ind. 287, 32 L. R. A. 848.

**As judicial act.**

A divorce is not a legislative, but is a judicial, act, and hence Rev. St. U. S. § 85, providing that the legislative power of every territory shall extend to all original subjects of legislation not inconsistent with the Constitution and laws of the United States, does not authorize an act of Legislature granting a private divorce. *In re Higbee*, 5 Pac. 693, 694, 4 Utah, 19.

Our Legislature is clothed with the simple power to enact laws and do some other things expressly authorized by the Constitution. Beyond this the Legislature has no power at all. To grant a divorce is not to enact a law; an expression of the will of the lawmaking power that the marriage relation is dissolved is no law. It is a decree, an order, a judgment, and not a law. A law is a rule, something permanent, uniform, and universal. A divorce begins with the parties and ends with the parties. It is a single act, and begins and expires with the performance of a single function. *Bingham v. Miller*, 17 Ohio, 445, 448, 49 Am. Dec. 471.

**As prospective in effect.**

A divorce, under the statute, for a cause arising after the marriage, puts an end to the marital relation, but does not relate back to the act of marriage and render it null. It recognizes the marriage as valid, and recognizes that rights arise out of it. It is prospective only in its effect. *Doyle v. Rolwing*, 65 S. W. 815, 816, 165 Mo. 231, 55 L. R. A. 332, 88 Am. St. Rep. 416.

**DIVORCE A MENSA ET THORO.**

A "divorce a mensa et thoro" does not dissolve the marriage relations between the parties; it grants a mere separation for the time, leaving all the other marital rights and obligations still subsisting between the parties as husband and wife. The husband is still bound for the support and maintenance of the wife; and the ecclesiastical courts, in decreeing such separation, and as incident thereto, decree to the wife alimony, or an allowance out of the husband's estate for her support and maintenance during the separation. Such a decree of separation may be terminated by a reconciliation of the parties. They may, in their own mutual discretion, reunite at pleasure; indeed, it is the policy of the common law that they should do so; and to that end the door is ever left open, while the parties are held firmly by the dissoluble matrimonial tie, as an inducement from necessity to a reconciliation. *Miller v. Clark*, 23 Ind. 370, 372.

A "divorce a mensa et thoro" is a mere separation of a married woman from the bed and board of her husband by a decree of a competent court—a qualified divorce. The

term is used by courts, in discussing the subject, as convertible with "separation" or "limited divorce." *Rudolph v. Rudolph*, 12 N. Y. Supp. 81, 82, 19 Civ. Proc. R. 424.

A "divorce a mensa et thoro" is a qualified or partial divorce, by which the parties, while separated and forbidden to cohabit, remain married. The term presupposes a pre-existing valid marriage, and such a divorce is founded on some cause subsequent to the marriage. *Zule v. Zule*, 1 N. J. Eq. (Sart.) 96, 99.

**DIVORCE A VINCULO.**

A "divorce a vinculo" is a final winding up of the relation existing between man and wife. It is an absolute breaking of all marital ties. The chain which has bound the parties together is broken. *De Roche v. De Roche* (N. D.) 94 N. W. 767, 770.

In England "divorces a vinculo" were granted only for causes sufficient in ecclesiastical law to avoid the marriage ab initio. *Aiken v. Suttle*, 72 Tenn. (4 Lea) 103, 110. The parties were left, so far as their estates dependent on or arising out of the marriage were concerned, as though no marriage had occurred. *Doyle v. Rolwing*, 65 S. W. 815, 816, 165 Mo. 231, 55 L. R. A. 332, 88 Am. St. Rep. 416.

**DIVORCE CASE.**

Alimony as part of divorce proceedings, see "Alimony."

An action for a dissolution of the bonds of matrimony existing between parties is a "divorce case," within Rev. St. art. 996, prescribing that the judgment of the courts of civil appeals shall be conclusive on the law and facts in all divorce cases, and that no writ of error shall be allowed thereto from the Supreme Court, though it involves rights of property. The determination of the rights of property held in the name of either or both husband and wife is incidental to the dissolution of the bonds of matrimony existing between them. *Kellett v. Kellett*, 59 S. W. 809, 810, 94 Tex. 206.

"Divorce proceedings" are in the nature of session proceedings, and not subject to the ordinary rules of pleading and practice. Usually there are no pleadings except the libel, which is not required to conform to the common-law rules in regard to declarations. *Hemenway v. Hemenway*, 27 Atl. 609, 65 Vt. 623.

**As an action or criminal proceeding.**

See "Suit"; "Action"; "Criminal Proceeding"; "Civil Action—Case—Suit—Etc."

**Nullity suit distinguished.**

A "divorce suit" is a suit for the purpose of dissolving the marriage which the parties thereto had legal capacity to contract. The term cannot be accurately employed to designate a bill to annul a void marriage. *Pyott v. Pyott*, 61 N. E. 88, 91, 191 Ill. 280.

**DIXIE LAND.**

The term "Dixie Land" means "the slave or rebellious states," and evidence that a vessel was to make a voyage to "Dixie Land" is confirmatory of evidence that a voyage to states in rebellion and under blockade was intended. *United States v. The William Arthur* (U. S.) 28 Fed. Cas. 624, 626.

**DO.**

See, also, "Done."

A proviso for re-entry if the lessee should do, or cause to be done, anything in violation of his covenants, did not include an omission to repair. *Abdy v. Stevens*, 3 Barn. & Adol. 299, 303.

A notice that a claimant intends to claim, and "does claim, a lien" for building material, simply gives notice of a present claim, which is quite distinct from a notice that the claimant has begun to enforce the claim. *Goff v. Hosmer*, 37 Atl. 533, 534, 20 R. I. 91.

**DO GRANT.**

The words "do grant" in a deed indicate the vesting of a present fee-simple estate, the words being in the present tense, and importing, in grammar as well as daily language, present actual transfer. *Lauck v. Logan*, 31 S. E. 986, 988, 45 W. Va. 251.

The words "doth hereby grant," as used in Act April 14, 1872, providing that the state doth hereby grant certain lands under tide water to a certain city, import a grant in present, and confer an immediate estate. *Easton & A. R. Co. v. Central R. Co.*, 19 Atl. 722, 725, 52 N. J. Law (23 Vroom) 267 (citing *Hannibal & St. J. R. Co. v. Smith*, 76 U. S. [9 Wall.] 95, 19 L. Ed. 599; *Schulenberg v. Harriman*, 88 U. S. [21 Wall.] 44, 62, 22 L. Ed. 551; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 741, 23 L. Ed. 634; *Glasgow v. Hortix*, 66 U. S. [1 Black] 595, 17 L. Ed. 110).

**DO WHAT HE COULD.**

Where an attorney was employed "to do what he could" to obtain a pardon for one confined in prison, it meant that the attorney should take such legal and proper steps as the law allows an attorney to perform, and it could not be construed to mean, or give

rise to any assumption, that it was intended to employ the attorney to do any illegal act. *Bremsen v. Engler*, 49 N. Y. Super. Ct. (17 Jones & S.) 172, 176.

**DO WITH.**

A will giving all of testator's property to his wife during her life, and to "do with" as she sees proper before her death, only confers power to deal with the property in such manner as she might choose consistently with her life estate therein, and, perhaps, without liability for waste committed. These words used in connection with a conveyance of a leasehold estate would never be understood as conferring a power to sell property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 327, 23 L. Ed. 927.

**DOCK.**

See "Adjustable Dock"; "Dry Dock"; "Graving Dock."

Floating dock as building, see "Building."

A "dock" is a place for vessels, whether excavated from the land or surrounded by wharves. *Bingham v. Doane*, 9 Ohio (9 Ham.) 165, 167.

"Dock" is defined by philologists, according to the American use of the term, to be the space between two wharves. *City of Boston v. Lecraw*, 58 U. S. (17 How.) 426, 434, 15 L. Ed. 118.

**DOCKAGE.**

"Dockage is the pecuniary compensation for the use of a dock while the vessel is undergoing repairs. It is in the nature of rent, and the owner of a dry dock has the right to demand from those who seek its use whatever he considers a fair compensation, uncontrolled by the custom of other docks in other places." *Ives v. The Buckeye State* (U. S.) 13 Fed. Cas. 184, 185.

In Pol. Code, §§ 24, 25, the term "dockage" is used to designate the charge against vessels for the privilege of mooring to the wharves or in the slips. Such charge is not contrary to an act charging wharfage, which is a charge against merchandise for the use of wharves. *People v. Roberts*, 28 Pac. 686, 691, 92 Cal. 659.

**DOCK BERTH.**

It cannot be said as a matter of law that "having a dock berth" means anything other than having a place for loading and



would be included in the term "evidence," as used in the statute, if it had been introduced in evidence. *Doctor Jack v. Washington Territory*, 3 Pac. 832, 836, 2 Wash. T. 101.

"Document," as used in the bankruptcy act, shall include any book, deed, or instrument of writing. U. S. Comp. St. 1901, p. 8419.

#### **Indorsement on note.**

An indorsement on a promissory note is not an "instrument, document, or paper" which needs to be stamped under the statutes of the United States; nor is a waiver in writing, by an indorser, of demand of payment and notice of dishonor of a document, to be stamped. *Pugh v. McCormick*, 81 U. S. (14 Wall.) 861, 20 L. Ed. 789.

#### **Memorandum book.**

Memorandum books containing entries of one's experience and observation at different times, and being valuable to him for reference, are not "documents," within an exception of a bill of lading providing that, if the shipper shall fail to give notice of the character and value of the documents, the owner of the ship shall not be liable therefor. *The St. Cuthbert* (U. S.) 97 Fed. 840, 842.

#### **Record book of corporation.**

The term "document," as used in Pub. St. c. 214, § 45, which provides for the production in court, or for the inspection by one of the parties, of any document in the possession or control of the opposite party, would include the record book of a corporation. *Arnold v. Pawtuxet Valley Water Co.*, 26 Atl. 55, 56, 18 R. I. 189, 19 L. R. A. 602.

The word "document," in general laws providing for the production of a document in the possession of the adverse party, doubtless includes the stock ledger or transfer book of a corporation. *Clark v. Rhode Island Locomotive Works*, 53 Atl. 47, 48, 24 R. I. 307.

#### **Template.**

A template is not a "document," so as to authorize its production by a subpoena duces tecum. *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* (U. S.) 48 Fed. 181, 193.

#### **DOCUMENTARY EVIDENCE.**

Legal evidence is not confined to the human voice or oral testimony, but includes every tangible object capable of making a truthful statement, such evidence being roughly classified as "documentary evidence." In oral evidence the witness is the man who speaks; in documentary evidence

the witness is the thing that speaks. In either case the witness must be competent—that is, must be deemed competent to make a truthful statement—and in either case the competency of the witness must be proved before the evidence is admitted, the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony; and the further difference that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency. *Curtis v. Bradley*, 31 Atl. 591, 594, 65 Conn. 99, 28 L. R. A. 143, 48 Am. St. Rep. 177.

#### **DOG.**

The word "dog," as used in the chapter relating to dogs, shall be held and construed to mean all animals of the canine species, both male and female. Rev. St. Mo. 1899, § 6977.

#### **As beast or beast of burden.**

See "Beast"; "Beast of Burden."

#### **As a domestic animal.**

In the case of *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423, it was held that dogs were not recognized in law as belonging to the class denominated "domestic animals," and, consequently, that a demurrer to an indictment for killing a dog, founded upon a statute making criminal the killing or wounding of domestic animals, ought to have been sustained. In a dissenting opinion by Appleton, C. J., in that case, he eulogized the dog in the following language: "He is a domestic animal. From the time of the Pyramids to the present day, from the frozen pole to the torrid zone, wherever man has been, there has been his dog. Cuvier has asserted that the dog was, perhaps, necessary for the establishment of civil society, and that a little reflection will convince us that barbarous nations owe much of their civilization above the brute to the possession of the dog. He is the friend and companion of his master, accompanying him in his walks; his servant, aiding him in his hunting; the playmate of his children; an inmate of his house, protecting it against all assailants." And later on the Chief Justice quoted approvingly the following poetic tribute to dogs:

They are honest creatures,  
And ne'er betray their masters, never fawn  
On any they love not.

—On the other hand, in *Wilson v. Wilmington & M. R. Co.* (S. C.) 10 Rich. Law, 52, Munro, J., alluded to the dog as an animal whose nature is carnivorous, and who is prompted by instinct and appetite to roam

at large in the forest in the pursuit of game, or upon a sheep-killing expedition; and finally stigmatized him as a "yelping cur," whose presence upon a railroad track should not arrest in its progress a train of cars freighted with products or passengers. *Patton v. State*, 19 S. E. 734, 93 Ga. 111, 24 L. R. A. 732.

A dog is a "domestic animal," within a law authorizing the imposition of a tax on domestic animals. *Wilcox v. State*, 28 S. E. 981, 101 Ga. 563, 39 L. R. A. 709. See, also, *Hurley v. State*, 17 S. W. 455, 457, 80 Tex. App. 333, 28 Am. St. Rep. 916.

**As dumb animal.**

See "Dumb Animal."

**As property.**

See "Chattel"; "Personal Goods"; "Personal Property"; "Property."

**DOG FIGHT.**

As a game, see "Game."

**DOG MATCH.**

As a game, see "Game."

**DOGGER.**

A "dogger" is a man employed in a sawmill, who stands opposite the log as it is being sawed up, and kicks off with his foot, and onto the rollers, slabs from the logs as they are cut. *Rucks v. Minden Lumber Co.*, 33 South. 926, 927, 109 La. 933.

**DOING BUSINESS.**

See "Place of Doing Business."

See, also, "Carry on Business"; "Transacting Business."

Doing a cold-storage business, see "Cold-Storage Business."

Engage in business, see "Engage."

To "do business" is to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, mechanic arts, or profession. *George R. Barse Live Stock Co. v. Range Valley Cattle Co.*, 50 Pac. 630, 632, 16 Utah, 59.

Laws 1880, c. 542, imposes a tax on corporations organized under the laws of other states and "doing business in this state." Held, that the words "doing business in this state" should be construed to mean the doing of any substantial part of the business for which the corporation was organized within the state of New York; and hence, where a foreign silver mining corporation had an office in New York, where its president, secretary, and treasurer were located,

and the directors held their annual meetings there, its dividends were declared and paid there, and its product was sent to New York for sale, and the proceeds were received at its New York offices, some of which were deposited in New York banks and some loaned in the city of New York, some used for the purposes of the company in that city, and the balance transferred out of the state, there was a very substantial portion of the company's "business done" in New York within the statute, so as to subject it to taxation therein. *People v. Horn Silver Min. Co.*, 11 N. E. 155, 158, 105 N. Y. 76.

The expression "doing business," as used in Laws Tenn. 1877, c. 81, and Laws 1891, cc. 97, 122, regulating foreign corporations "doing business" in the state, is to be interpreted with regard to something more than the mere linguistic signification of the words used to the ordinary ear, and it has acquired in legal terminology a much narrower meaning than that usually given to it. A corporation is to be considered as "doing business" in the state only where it becomes in a sense domesticated therein, subject to be sued in the courts of the state, and responsible to its citizens, as are domestic corporations. *Caesar v. Capell* (U. S.) 83 Fed. 408, 422.

One who acted for a foreign corporation in the purchase of certain wire while visiting the city of St. Louis, where the seller resided, was visited by the seller relative to a controversy that had arisen from the sale of the wire, and during negotiations the one who had acted for the purchaser asked the seller to give him a quotation on a certain number of tons of wire, but no quotation was given him and no purchase made. Held, that the purchaser of the wire was not on such state of facts "doing business" within the meaning of such phrase in the statute. *St. Louis Wire Mill Co. v. Consolidated Barb Wire Co.* (U. S.) 82 Fed. 802, 803.

"Doing a business of \$25,000 per year," within the meaning of section 9 of the general revenue act of June 10, 1881, fixing a license on dealers of dressed meats doing a business of \$25,000 or more per annum, means the dealers whose annual gross sales amount to the sum stated. *Johnson v. Armour*, 12 South. 842, 843, 31 Fla. 413.

A foreign corporation is not "doing business" within the state, within Laws 1892, p. 1806, c. 687, § 15, requiring it in such instances to obtain a certificate from the Secretary of State, by making a contract within the state, no sales being made or other business done there. *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*, 84 N. Y. Supp. 38, 39, 41 Misc. Rep. 242.

**Accepting premiums and paying losses.**

A statute imposing a tax on insurance companies "doing business" in this state does

not require such an insurance company to be writing insurance nor to be doing business in this state, but it is sufficient if the company is still accepting yearly premiums on outstanding policies, and is still paying losses which may accrue thereon, though it has discontinued writing policies in the state. *Smyth v. International Life Assur. Co. (N. Y.)* 35 How. Prac. 126, 129; *Price v. St. Louis Mut. Life Ins. Co.*, 3 Mo. App. 262, 268.

Under Acts 1897, c. 2, § 7, providing that foreign insurance companies "doing business" in that state shall pay a privilege tax, the receiving of renewal premiums, on policies already in force, by mail directly from policy holders, under provisions in the policies that the premiums were payable in New York, is not included. *State v. Connecticut Mut. Life Ins. Co.*, 61 S. W. 75, 77, 106 Tenn. 282.

Under a city ordinance imposing a license tax on insurance companies incorporated in another or foreign state, and doing business in such state by an agent, it is held that insurance companies taking arrears through insurance agents or insurance brokers are not "doing business" within the state, within the meaning of the ordinance, so as to be liable for the tax. *City of New Orleans v. Aetna Fire Ins. Co.*, 33 La. Ann. 10-12.

The words "doing business," as used in Rev. St. 1899, c. 89, art. 3, providing for annual statements by corporations doing business under the act which related to assessment insurance companies, refers to issuing policies, and not to paying them. A man "does business" when he contracts obligations, and he "ceases to do business" when he discharges them. *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 23 Sup. Ct. 106, 111, 187 U. S. 197, 47 L. Ed. 189.

#### **Acquiring land by foreign contract.**

A contract, made out of the state, by which title to land in the state is acquired, is not "doing business" within the state, within the laws relating to foreign corporations. *Goldsberry v. Carter*, 41 S. E. 858, 859, 100 Va. 438.

#### **As any act in its regular business.**

"Doing business," as used in Const. art. 14, § 4, prohibiting foreign corporations from "doing business" in the state without having at least one known place of business, means the doing of some of the works, or the exercise of some of the functions, for which the corporation was created. *Beard v. Union & American Pub. Co.*, 71 Ala. 60, 62.

Act Pa. 1868, §§ 7, 8, providing that every railroad company doing business in the state shall be liable to be taxed, etc., means transacting any business in the state, without regard to the amount of business

done or the length of road on which it is done, so that where a railroad 450 miles long had 13 miles of its road located in the state where it was incorporated, and 42 miles only in the state of Pennsylvania, where it was not incorporated, it was nevertheless "doing business" within the latter state within the meaning of the act. *Erie Ry. Co. v. Pennsylvania*, 88 U. S. (21 Wall.) 492, 497, 22 L. Ed. 595.

Rev. St. c. 82, § 26, provides that foreign corporations doing business in the state shall have the same powers and be subject to the same liabilities as domestic corporations. Held, that the phrase "doing business" did not embrace a case where the president of a foreign corporation, while temporarily sojourning in the state on his own business, made a casual offer to receive a proposition relating to the business of his company. *Galveston City R. Co. v. Hook*, 40 Ill. App. 547, 556.

#### **Appointing agents.**

A person who is engaged by a foreign corporation in appointing agents to do its business is not himself "doing business" within the state, within an act providing that such an agent shall, before entering on his business, file evidence of authority with the clerk of the counties in which it is proposed to do business. *D. S. Morgan & Co. v. White*, 101 Ind. 413.

#### **Bidding for state supplies.**

A foreign corporation offering to bid for state supplies is "doing business" within the state, within a statute forbidding the same without compliance with its requirements. *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.*, 1 Pa. Dist. R. 576.

#### **Bringing or maintaining action.**

The institution and prosecution of suits is not "doing business" within the meaning of a statute prescribing the conditions on which foreign corporations may do business in the state. *St. Louis, A. & T. Ry. Co. v. Fire Ass'n of Philadelphia*, 18 S. W. 43, 46, 55 Ark. 163; *Charter Oak Life Ins. Co. v. Sawyer*, 44 Wis. 387; *Christian v. American Freehold Land & Mortgage Co.*, 7 South. 427, 89 Ala. 198; *Cook v. Rome Brick Co.*, 12 South. 918, 919, 98 Ala. 409; *George A. Barse Live Stock Co. v. Range Valley Cattle Co.*, 50 Pac. 630, 632, 16 Utah, 59.

The act of maintaining an action is not "doing business." It is rather an act for the purpose of enforcing rights springing from just business transactions. *Utley v. Clark-Gardner Lode Min. Co.*, 4 Colo. 366, 373.

A foreign corporation which does no business in Illinois, except to bring suit there to enforce a call made on its stock

in the country of its organization, is not "doing business" in that state, the term "doing business" having reference to the business for which the corporation was organized, and not to the form of its by-laws, with reference to its relations to its own members, or a resort to the courts of this state to recover a contract liability. *Mandel v. Swan Land & Cattle Co.*, 40 N. E. 462, 465, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124.

Failure of a foreign corporation to comply with Comp St. div. 5, § 442, providing that all foreign corporations, before doing any business within the territory, shall file with the Secretary thereof, and the recorder of the county wherein they intended to transact business, a copy of the charter and a statement, does not preclude it from suing to recover taxes paid under protest and alleged to have been illegal, the right to sue not constituting "doing business." *Powder River Cattle Co. v. Custer County Com'rs*, 22 Pac. 383, 385, 9 Mont. 145.

#### Consigning goods to factors.

A mere consignment of goods by a foreign corporation to the factors in the state is not "doing business in the state," within Laws 1892, c. 687, § 15, requiring every foreign corporation to obtain a certificate of authority before it can sue on any contract made in the state. *Bertha Zinc & Mineral Co. v. Clute*, 27 N. Y. Supp. 342, 346, 7 Misc. Rep. 123.

A foreign corporation that consigns its goods to a commission merchant in the state, who sells them for the corporation, and not for himself, the corporation not parting with the possession, is "doing business" within the state. *In re Nonantum Worsted Co.*, 15 Pa. Co. Ct. R. 125.

#### Continuance implied.

Plaintiff wrote to defendant as follows: "We are 'doing business' with B. & Co., and require a guaranty, and they refer us to you;" and defendant replied: "I hereby engage to guaranty the sum of two hundred pounds for iron received for B. & Co." Held, that the words "doing business" meant doing and continuing to do business—that is, continuing to supply goods—and the guaranty was a continuing one. *Colbourn v. Dawson*, 10 C. B. 765, 774.

#### Dealing in reference to foreign property.

"Doing business in the state," within the meaning of a statute forbidding a foreign corporation from doing business in the state without complying with certain statutory provisions, does not include the acts of a foreign corporation in Tennessee, dealing with citizens of other states, in reference to property not situated in Tennessee. *Hart*

*v. Livermore Foundry & Machine Co.*, 17 South. 769, 775, 72 Miss. 809.

#### Disposing of devised land.

"Doing business in the state," within the meaning of Rev. St. 1891, c. 32, § 28, which declares that foreign corporations doing business in the state shall be subject to all the liabilities, restrictions, and duties that are or may be imposed on corporations of like character organized under the general laws of the state, applies to the acts of a foreign corporation in receiving a devise of land in Illinois with power to sell and lease the same, and in asserting title to such land, making a contract for its sale, and bringing a suit to enforce such contract. *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Bauerle*, 33 N. E. 166, 170, 143 Ill. 459.

#### As doing present business.

In Const. art. 14, § 4, providing that no foreign corporation shall do any business in the state without one known place of business and an authorized agent therein, and that such corporation may be sued in any county where it does business, the phrase "does business" is equivalent in meaning to, and expressive of the same thought as, the words "doing business," and refers exclusively to the present time, not authorizing a suit against a corporation because it has in some time past transacted business in the county where the suit is brought, if it has ceased to do so at the time of bringing the action. *Sullivan v. Sullivan Timber Co.*, 15 South. 941, 943, 108 Ala. 371, 25 L. R. A. 543.

#### Entering into partnership.

A foreign corporation, by becoming a special partner in and contributing to the capital of a limited partnership in New York, which is engaged in importing, and has the sole sale in the United States of, the manufactures of the corporation made in the foreign country, is "doing business" in the state within Laws 1880, c. 542, declaring it in such case taxable on the amount of its capital stock employed within the state, which is the amount of its contribution to the capital of the partnership. *People v. Roberts*, 46 N. E. 161, 152 N. Y. 59, 36 L. R. A. 756.

#### Filling order given outside state.

A foreign corporation which ships goods into the state on an order given it out of the state is not "doing business" within the state, within Laws 1892, c. 687, § 15, forbidding foreign corporations to do business within the state without a certificate. *Novelty Mfg. Co. v. Connell*, 34 N. Y. Supp. 717, 718, 88 Hun. 254.

"Doing business in the state," within the meaning of a statute requiring a foreign

corporation to file a copy of its articles of incorporation with the Secretary of State before doing business in the state, does not apply to the act of a foreign corporation in selling goods in another state, to be transferred and delivered to a person doing business in Texas, since the transaction is an act of interstate commerce, as the statute, if applicable to the case, would be in conflict with the commerce clause of the federal Constitution. *Lyons-Thomas Hardware Co. v. Reeding Hardware Co. (Tex.)* 21 S. W. 300.

#### **Filing unsolicited order.**

The law of 1889 requiring foreign corporations to file their articles of incorporation and obtain a permit before "doing business" in the state does not apply to a corporation doing business in another state which ships goods on an unsolicited order to a resident of the state, and such corporation may maintain an action to recover for such goods. *H. Zuberbier Co. v. Harris (Tex.)* 35 S. W. 408.

#### **As going into operation.**

"Doing business," as used in Act June 7, 1879 (P. L. p. 112), enacting that no corporation doing business in the state shall go into operation without first making certain reports, is used synonymously with "going into operation." *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 132.

#### **Issuing policy on foreign contract.**

"Doing business," within the meaning of a statute requiring agents of foreign corporations to file a certain certificate before doing business in the state, was held not to apply to a transaction in which an agent of an Illinois insurance company obtained an application for insurance on certain property in Indiana, and submitted a note and sum of money in payment of the premium to the company at the home office in Illinois, where they were examined and accepted by the proper officer. *Lamb v. Bowser (U. S.)* 14 Fed. Cas. 980, 981.

"Doing business" in a state, within the meaning of the statutes fixing certain regulations as to the right of foreign insurance companies doing business in a state, was intended to describe the conditions under which such companies could effect insurance through agencies established in the state, and was not intended to restrain or control the business of such corporations transacting business outside the state; and therefore a contract of insurance made out of the state on property situated therein is valid, though the insurance company has not complied with the statute. *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law (3 Vroom) 33, 34.

#### **Keeping office in state.**

A foreign corporation leasing an office in the state, in which samples for its agents were kept, incidental to the business of taking orders and making sales in the state, having an average bank balance of \$4,000 in a bank in the state, was not "doing business" in the state within Laws 1880, c. 542, imposing a franchise tax on foreign corporations so engaged. *People v. Roberts*, 50 N. Y. Supp. 355, 27 App. Div. 455.

A nonresident who maintains an office in New York, and keeps there for sale goods manufactured for him in the state of his residence, is not taxable on the amount of such goods under Laws 1855, c. 37, providing that all persons "doing business in the state" and nonresidents thereof shall be taxed on their business as though they were residents, no other business being done except to sell the goods and remit the proceeds to the state in which they were manufactured. *People v. Barker*, 39 N. Y. Supp. 151, 152, 5 App. Div. 246.

The phrase "doing business," found in Laws 1855, p. 470, relative to foreign corporations doing business in the state, does not include a foreign railroad corporation having the road and traffic without the state, but having an office therein, which sells tickets over its lines. *Doty v. Michigan Cent. R. Co. (N. Y.)* 8 Abb. Prac. 427, 428.

#### **Lending money.**

"Doing business in the state," within the meaning of Const. art. 236, in reference to foreign corporations doing business within the state, does not include the act of a foreign corporation loaning money to a resident of Louisiana through brokers domiciled in another state. *Scottish American Mortg. Co. v. Ogden*, 21 South. 116, 118, 49 La. Ann. 8; *American Freehold Land Mortg. Co. v. Pierce*, 21 South. 972, 49 La. Ann. 390.

Under Acts 1891, requiring foreign corporations to register their charters as a condition of doing business within the state, a building and loan association, resident of a foreign state, not having agents or local boards within the state, which made loans to a resident directly from and payable at its home office, is not "doing business in the state" within the statute. *Neal v. New Orleans Loan, Building & Savings Ass'n*, 46 S. W. 755, 100 Tenn. 607.

A foreign corporation, having no agent or place of business within the state, which loaned money on applications sent to it by loan brokers who were agents of the borrowers, was not doing a business of loaning money in the state. *Norton v. Union Bank & Trust Co. (Tenn.)* 46 S. W. 544.

A foreign corporation is not "doing business" in a state, where it makes an agree-

ment for a loan in another state, and the mortgage securities on land in the state are delivered and the money paid in such other state. *Scruggs v. Scottish Mortg. Co.*, 16 S. W. 563, 54 Ark. 563.

"Doing business in the state," within the meaning of Const. art. 14, § 4, which provides that no foreign corporation shall do any business in this state without having at least one known place of business or an authorized agent or agents therein, is shown by the single act of making a loan in Alabama, and taking notes and mortgages to secure it on land owned by a foreign corporation. *State v. Bristol Sav. Bank*, 18 South. 533, 534, 108 Ala. 3, 54 Am. St. Rep. 141.

"Doing business in the state," within the meaning of the constitutional and statutory provision requiring foreign corporations doing business in the state to have a known place of business and an authorized agent in the state, includes the loan of money in the state secured by notes and mortgage. *Ginn v. New England Mortg. Sec. Co.*, 8 South. 388, 92 Ala. 135.

#### Receiving payment on stock loans.

The receiving by a foreign building and loan association of payment on stock loans made before the enactment of Rev. St. 1897, § 4464 et seq. (*Horner's Rev. St. 1897*, § 3420 et seq.; *Acts 1893*, p. 274), regulating such business, is "doing business" within the prohibition of such act against doing business without compliance with its terms. *Equitable Loan & Investment Ass'n v. Peed* (Ind.) 52 N. E. 201, 202.

#### Settling accounts.

A settlement of accounts with a foreign corporation for goods sold in its place of business in New Jersey, even if made in Pennsylvania, is not "doing business" in Pennsylvania. *New Jersey Steel Tube Co. v. Riehl*, 9 Pa. Super. Ct. 220, 225.

#### Single act or transaction.

The doing of a single act of business in another state does not constitute a "doing of business" within the meaning of foreign corporation laws. *Cooper Mfg. Co. v. Ferguson*, 5 Sup. Ct. 739, 113 U. S. 727, 28 L. Ed. 1137; *Gilchrist v. Helena, H. S. & S. R. Co.* (U. S.) 47 Fed. 593, 594; *Leasure v. Union Mut. Life Ins. Co.*, 91 Pa. 491, 493; *Blakeslee Mfg. Co. v. Hilton*, 18 Pa. Co. Ct. R. 553, 556; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 148; *National Knitting Co. v. Bronner*, 45 N. Y. Supp. 714, 715, 20 Misc. Rep. 125.

A contract between citizens of one state and a corporation of another state for the erection of a single plant is not a "doing business" in the state where the plant is to

be erected, within the statute requiring foreign corporations to register before doing business therein. *Davis & Rankin Bldg. Co. v. Gaigle* (Tenn.) 53 S. W. 240.

The taking of a single mortgage by a foreign corporation to secure a past-due debt, with no intention of transacting other business of the kind in the state, is not "doing business" within the prohibition of the Constitution against foreign corporations doing business in the state except in compliance with the provisions therein contained. *Florsheim Bros. Dry Goods Co. v. Lester*, 29 S. W. 34, 35, 60 Ark. 120, 27 L. R. A. 505, 46 Am. St. Rep. 162.

"Doing business" means a transaction of business during some continuous period, neither a single nor several transactions being conclusive so as to show a doing of business. There must be a doing of some of the work, or an exercise of some of the functions, for which the corporation was created. *Beard v. Union & American Pub. Co.*, 71 Ala. 60. Where a manufacturing corporation made shipments of its goods into a certain county, subject to approval, and, if it happened that the goods were rejected, a broker was notified to sell them for the corporation, his authority being always limited to that single transaction, such operations did not constitute a "doing of business" within the statute. *International Cotton Seed Oil Co. v. Wheelock*, 27 South. 517, 518, 124 Ala. 367.

"Doing business," as used in Pennsylvania laws imposing a tax on foreign corporations doing business in the state, means the employment by the corporation of some of their capital in the state, or, at least, the establishing of a place of business therein. The mere fact that a foreign corporation entered into a contract with some of their stockholders who resided in Pennsylvania to buy certain articles would not constitute a "doing business" within the meaning of the act. *Kilgore v. Smith*, 15 Atl. 698, 699, 122 Pa. 48.

Gen. St. § 260, which prohibits foreign corporations from "doing business" within the state until they have filed a certificate with the Secretary of State, etc., is not satisfied by proof of a single purchase of machinery in the state, by a foreign corporation, to be used in the state of its domicile. *Colorado Iron-Works v. Sierra Grande Min. Co.*, 25 Pac. 325, 326, 15 Colo. 499, 22 Am. St. Rep. 433.

In Const. art. 14, § 4, providing that no foreign corporation shall do any business in the state without having at least one known place of business and an authorized agent therein, "'do any business' is a more comprehensive phrase than 'carrying on' or 'engaging in' business generally, which involves

the idea of a continuance or repetition of like acts. The doing of a single act of business, if it be in the exercise of a corporate function, is as much prohibited as the doing of a hundred of such acts, and is just as much opposed to the policy of the Constitution." *Farrior v. New England Mortgage Security Co.*, 7 South. 200, 88 Ala. 275.

#### **Soliciting newspaper subscriptions.**

Const. art. 14, § 4, prohibits foreign corporations from doing business in the state without having at least one known place of business and an authorized agent or agents therein. Held, that the term "doing business," as used in such section, means a doing of some of the works or an exercise of some of the functions for which a corporation was created, and that soliciting or receiving subscribers for a newspaper published in another state by a corporation did not constitute a "doing business" within the state, as the term is so defined. *Beard v. Union & American Pub. Co.*, 71 Ala. 60, 62.

#### **Soliciting stock subscriptions.**

"Doing business," within the meaning of Act June 17, 1852, requiring agents of foreign corporations to file a power of attorney, etc., in the county where they propose doing business, has no application to the soliciting of subscriptions to the capital stock of a foreign corporation. *Payson v. Withers* (U. S.) 19 Fed. Cas. 29, 30.

#### **Supplying means to another.**

For one person to supply the means to another to do business with or on is not the "doing of" that business by the former. *United States v. American Bell Tel. Co.* (U. S.) 29 Fed. 17, 18.

#### **Taking orders or making sales by agents.**

Taking orders or making sales by sample by agents coming into the state from another for that purpose is not "doing business" within the state within the meaning of the foreign corporation laws. *Blakeslee Mfg. Co. v. Hilton*, 5 Pa. Super. Ct. 184, 191; *Murphy Varnish Co. v. Connell*, 32 N. Y. Supp. 492, 493, 10 Misc. Rep. 553; *Crocker v. Muller*, 83 N. Y. Supp. 189, 190, 40 Misc. Rep. 685; *Vaughn Mach. Co. v. Lighthouse*, 71 N. Y. Supp. 799, 801, 64 App. Div. 138; *Waller v. Rothfield*, 73 N. Y. Supp. 141, 142, 36 Misc. Rep. 177; *Jones v. Keeler*, 81 N. Y. Supp. 648, 649, 40 Misc. Rep. 221; *Ware v. Hamilton Brown Shoe Co.*, 9 South. 136, 137, 92 Ala. 145; *Coit v. Sutton*, 60 N. W. 690, 691, 102 Mich. 324, 25 L. R. A. 819; *M. I. Wilcox Cordage & Supply Co. v. Mosher*, 72 N. W. 117, 114 Mich. 64; *Pierce Steam Heating Co. v. A. Siegel Gas Fixture Co.*, 60 Mo. App. 148, 155; *Mershon & Co. v. Pottsville Lumber Co.*, 40 Atl. 1019, 1020, 187 Pa. 12, 67 Am.

St. Rep. 560; *Toledo Commercial Co. v. Glen Mfg. Co.*, 45 N. E. 197, 198, 55 Ohio St. 217; *Davis & Rankin Bldg. & Mfg. Co. v. Dix* (U. S.) 64 Fed. 406, 412, 413; *Boardman v. S. S. McClure Co.* (U. S.) 123 Fed. 614.

The procuring in New York of orders for goods by the traveling agent of a foreign corporation, which orders are to be transmitted to the home office of the corporation for approval, after which the goods are to be shipped from such office to the buyer in New York, does not constitute "doing business" in this state within Laws 1892, c. 687, requiring foreign corporations to obtain a certificate of authority to do business in New York. *Tallapoosa Lumber Co. v. Holbert*, 39 N. Y. Supp. 432, 434, 5 App. Div. 559.

A foreign manufacturing corporation which merely places its products in the hands of local merchants to be sold on commission is engaged in interstate commerce, and hence may sue for a wrongful conversion of such products without having filed its articles with the Secretary of State, as required of foreign corporations doing business within the state. *Allen v. Tyson-Jones Buggy Co.*, 40 S. W. 393-395, 91 Tex. 22.

"Doing business," as employed in Acts Tenn. 1887, c. 226, p. 386, relative to foreign corporations doing business in the state, means any transaction with persons or any transaction concerning any property situated in the state, through any agency whatever acting for it within the state. *Romaine v. Union Ins. Co.* (U. S.) 55 Fed. 751, 754.

## **DOINGS.**

In Rev. St. § 1156, as amended by Laws 1870, c. 172, providing that a corporation may commence business as soon as the articles are filed in the office of the recorder of deeds, and their doings shall be valid if the publication in a newspaper is made, and the copy filed in the office of the Secretary of State, within three months from such filing in the recorder's office, "doings" relates, not to the acts of organization, but to other subsequent acts. *First Nat. Bank v. Davies*, 43 Iowa, 424, 429.

## **DOLLAR.**

See "Gold Dollars."  
Dollar mark, see "Signs."

Where a seaman shipped in New Brunswick on board an American vessel for a specified voyage at an agreed rate of twenty-five dollars per month, such voyage to terminate in the United States, the words "twenty-five dollars per month" should not be construed to mean that the seaman was entitled to an amount in the currency of the United

States equal to the value of the contract price in this country if paid in the currency of New Brunswick, but to entitle him only to the amount named in the contract in United States money. *Trecartin v. The Rochambeau* (U. S.) 24 Fed. Cas. 164, 165.

Where, in stating the amount in a note, the word "dollars" only is used, the court will intend current money of New Jersey to be meant. *Beardsley v. Southmayd*, 14 N. J. Law (2 J. S. Green) 534, 543.

"Dollar," as used in an indictment charging defendant with having passed a counterfeit dollar, does not import a coin coined by the mint of the United States, the Mexican dollar having been legalized by St. 1834, c. 71. *Commonwealth v. Stearns*, 51 Mass. (10 Metc.) 258, 257.

The word "dollars" imparts to the common understanding the meaning of a thing of value, and, when the charge is that defendant stole "sixty dollars" in United States currency, it means by common understanding that that amount of money in coin, bank notes, or notes issued by the government of the United States was stolen by him. *Leonard v. State*, 115 Ala. 80, 82, 22 South. 564.

#### Bank notes.

"Money" is a generic term, and covers everything used by common consent as a representation of property, and passing currently from hand to hand as money, whether it be coin or paper. Bank paper is money when passed and received as such. The word "dollars" does not of necessity mean coin, for in common parlance there are paper dollars as well as silver dollars, and the word in that sense applies as well to the one as to the other. United States bank paper is payable in dollars, was lent and received as so many dollars, and an indictment charging it as "dollars" is supported by the proof that it was United States bank paper for that amount. *Graham v. State*, 24 Tenn. (3 Humph.) 40, 41.

In Act Dec. 22, 1840, providing that the salary of the president of a certain bank should be seven hundred dollars, and the cashier's one thousand eight hundred dollars, "dollars" legally means gold or silver, and for services rendered as such officers of the bank the officers acquired the right to demand and receive in payment gold or silver, and could not lawfully be compelled to accept the depreciated paper of the banks of the state. *State Bank v. Crease*, 6 Ark. (1 Eng.) 292, 295.

"Dollars," as used in a decree requiring an executor to account for a certain sum in dollars, means the constitutional currency of the country, and will not be held to apply to depreciated issue of worthless banks.

*Bailey v. Dillworth*, 18 Miss. (10 Smedes & M.) 404, 410, 48 Am. Dec. 760.

In an indictment charging defendant with usuriously receiving and reserving four dollars for the loan and forbearance of twenty dollars, etc., the word "dollars" does not include United States bank notes; hence proof of the receipt and reservation of bank notes would not sustain the indictment. *McAuly v. State*, 15 Tenn. (7 Yerg.) 526, 528.

The word "dollars" has a definite signification fixed by law, and it is laid down that when words have a known legal meaning, such, for example, as measures of quantity fixed by statute, parol evidence that the parties intended to use them in a sense different from their legal meaning, though it were still the customary and popular meaning, is not admissible. A contract made in Richmond, before the war, for the payment of so many "dollars," would not have been deemed payable in bank notes, though bank notes were then the common and practically the exclusive currency, and a note made within the Confederate States must be deemed payable in specie, when that was the lawful money of the Confederate States at the time the note became payable. *Omohundro's Ex'r v. Crump* (Va.) 18 Grat. 703, 706.

#### Bullion.

A note promising payment in "dollars in gold and silver" is, according to any fair interpretation or the probable understanding of the parties, a note for the direct payment of money, and cannot imply an undertaking to pay bullion dollars in gold and silver, or old silver, etc. *Hart v. Flynn's Ex'r*, 38 Ky. (8 Dana) 190, 191.

#### Confederate money.

Where a contract made in a Confederate state during the Civil War was payable in "dollars," it was presumed in law to mean lawful money of the United States (*Miller v. Lacy*, 33 Tex. 351, 352; *Roane v. Green*, 24 Ark. 210, 214; *Wilcoxon v. Reynolds*, 46 Ala. 529, 532; *Hansbrough v. Utz*, 75 Va. 959, 962); but it could be shown by parol that the parties intended that it was to be discharged in Confederate money (*Riddle v. Hill's Adm'r*, 51 Ala. 224, 225; *Thorington v. Smith*, 75 U. S. [8 Wall.] 1, 12, 13, 19 L. Ed. 361; *Confederate Note Case*, 86 U. S. [19 Wall.] 548, 557, 22 L. Ed. 196; *Carmichael v. White*, 58 Tenn. [11 Heisk.] 262, 267).

At common law, in an obligation to pay "dollars," this word would be interpreted to mean gold dollars if the contract was made in this country, but if made in a foreign country it would mean a dollar of that country, and parol evidence would be admitted to show where the contract was made, and the value of the dollar of the country where the contract was made as compared with our gold



dollar. If the contract was made in the Confederate States, or where the military authorities of the Confederate government exercised control and Confederate notes constituted the currency, this fact might be shown, and the word "dollar," unexplained in the contract, would mean a Confederate note of one dollar. *Bierne v. Brown's Adm'r*, 10 W. Va. 748, 758.

Where a sale is made for "dollars," Confederate treasury notes are not within the term. *Hill v. Erwin*, 44 Ala. 661, 669.

The term "dollars," in a promissory note executed in New Orleans March 26, 1862, was construed, after the close of the Civil War, to mean dollars in the lawful money of the United States, and not Confederate dollars. *Cook v. Lillo*, 103 U. S. 792, 793, 26 L. Ed. 460.

"Dollars," as used in a promissory note executed in Georgia in 1859 and payable in 1860, in which the maker promises to pay a certain number of dollars, means dollars of the lawful money of the United States, and as it was not only executed, but came to maturity, before the civil strife began, no evidence will be permitted to give it a different signification. *Stroughton v. Hill* (U. S.), 23 Fed. Cas. 179, 180.

In the contract for the sale of land in South Carolina during the War of the Rebellion, where it was shown that the price was \$81.75 per acre, when the real value of the land in gold at that time would have been about \$26.70, the word "dollars" as so used should not be construed in its ordinary limited sense to mean dollars of the United States coinage, but was intended to represent Confederate currency, which was the basis of the contract. *Chalmers v. Jones*, 23 S. C. 463, 466.

Where land in Tennessee was sold in 1863, and a large part of the price had been paid in Confederate money, the word "dollars," as used in a note for a part of such price, should be construed to import Confederate money, and the holder after the war should not recover the face value of the note in Federal currency. *Alderson v. Clear*, 54 Tenn. (7 Heisk.) 667.

#### As coin of certain weight.

A contract to pay a certain number of "dollars" in gold or silver coin is an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight. *Bronson v. Rodes*, 74 U. S. (7 Wall.) 229, 250, 19 L. Ed. 141.

Taking the definition from the statute book, "dollar" is a silver coin weighing 412½ grains, or a gold coin weighing 25¼ grains,

of nine-tenths pure to one-tenth alloy of each metal. *Borie v. Trott* (Pa.) 5 Phila. 366, 404.

The government note payable in "dollars" intends coined dollars of the United States; a certain quantity in weight and fineness of gold or silver, authenticated as such by the stamp of the government. *Bank of New York v. New York County Sup'rs*, 74 U. S. (7 Wall.) 26, 80, 19 L. Ed. 60.

The term "dollar" has a known legal meaning, as much so as any other word or form of expression designating or having reference to a standard of measurement prescribed and established by law. It is a silver coin of a fixed weight and fineness, issued and made current by the authority of Congress, in the exercise of its constitutional power to that end. By the same authority other gold and silver coins are issued and made current, each as a legal equivalent of an ascertained number of dollars or fractions of a dollar. Undoubtedly the word "dollar" may be used in a contract in a sense other than this, its statute definition, and effect will be given to it accordingly if the intention to use it in such modified sense is so evidenced that the law can take cognizance of it. *Austin v. Kinsman* (S. C.) 13 Rich. Eq. 259, 262.

#### As coined dollar.

When from the judgment record it appears that the complaint was upon a contract which by law was payable in coin, the term "dollars," without the prefix of "coined," "gold," or "silver," in the subsequent parts of the record, means coined dollars. *Ransford v. Marvin* (N. Y.) 8 Abb. Prac. N. S. 432, 436.

#### As descriptive of value.

The term "dollar" is both the name of a coin and an expression of value. It may be that the phrase used is intelligible in common parlance, but, in an indictment charging the conversion of "nineteen thousand dollars" in money and in bank notes, without some description of their number or denomination, is insufficient. *State v. Stimson*, 24 N. J. Law (4 Zab.) 9, 27.

The term "dollar" is an expression of value as well as the name of a coin, and hence the word "dollar" is uncertain as a description, since it may be used to denote a number of cents or dimes, as well as a dollar proper, but is certain as an expression of value. *State v. Barr*, 38 Atl. 817, 61 N. J. Law, 181.

An information for robbery, describing the property as "twenty-five dollars in money," does not show that the property taken was of any value: "Twenty-five dollars in money" may, it is true, mean gold or silver coin of the United States or treasury notes,

or any other denomination known and used and which circulates as money, or it may mean only some paper such as state bank bills or Confederate money or bills purporting to be of the value of \$25. *State v. Segermond*, 19 Pac. 370, 372, 40 Kan. 107, 10 Am. St. Rep. 169.

In an indictment alleging a corrupt offer to give two dollars for the vote of a certain person, the word "dollars" will be understood to mean a specific sum of money, or money the value of which is fixed by the law of the United States, and sufficient without a further allegation, though "two dollars" was a value. *State v. Downs*, 47 N. E. 670, 671, 148 Ind. 324.

"Dollars" and "cents" have a well-recognized meaning as commonly used. The common definition is the unity of money by which values of commodities are measured. It is thus apparent that a defendant must have understood that he was charged with having in his possession, custody, and control money of the amount and value specified by the allegation in an indictment charging him with having in his possession and control a certain number of "dollars" and "cents." *People v. Lammerts*, 58 N. E. 22, 23, 164 N. Y. 137.

An indictment charging that the defendant stole "sixty dollars of the current gold coin" of the United States is equivalent to saying "sixty pieces of gold coin, called sixty dollars," there being in our money a piece of gold coin called a "dollar." *McKane v. State*, 11 Ind. 195.

#### As legal tender.

"Dollars," in a note payable in dollars, means legal money. *Hightower v. Maull*, 50 Ala. 495, 496.

A note payable in "dollars" can only be discharged by a payment or tender of legal tender funds. *Lang v. Waters' Adm'r*, 47 Ala. 624, 635.

The term "dollars," in a judgment for so many dollars, is to be understood as meaning dollars in legal money. *Ex parte Norton*, 44 Ala. 177, 189.

"Dollars," in a check, meant dollars in lawful money of the United States, and could not be explained by verbal agreement, custom, or any mercantile or other usage, to mean otherwise. *Howes v. Austin*, 35 Ill. 396, 398.

When a contract calls for the payment of a certain number of "dollars," without designating any particular kind of money, the presumption is that legal tender dollars are meant; but this presumption may be rebutted by showing that some other kind was intended. *Taylor v. Bland*, 60 Tex. 29, 30.

3 Wds. & P.—11

A contract for the payment of a certain sum of money in "silver or gold dollars" has no greater effect than if it had been to pay in the "lawful money of the country," and an offer of anything made legal tender money is a compliance with the contract. A paper dollar having been made equal to a gold dollar, it must be accepted as such in satisfaction of any contract for the payment of money, and no form or force of words can be used by contracting parties to give to a gold dollar a legal value as money above a paper dollar. A dollar is one hundred cents, no more, no less, whether it is silver, gold, or paper; and, when Congress declares that a paper dollar shall be current and pass for and represent and be of the value of one hundred cents, for all purposes of traffic and paying debts it becomes the equivalent of one hundred cents in any other substance or form. *Wilson v. Morgan*, 27 N. Y. Super Ct. (4 Rob.) 58, 68.

"Dollars," as used in a will containing a direction to invest twenty thousand dollars in some safe investment for the daughter of the testator, means the legal currency of the United States, and it does not mean dollars invested in bonds or stocks, either at the market or par value, or at the original cost to the testator. *Halsted v. Meeker's Ex'rs*, 18 N. J. Eq. (3 C. E. Green) 136, 139.

When it is provided that a payment shall be made in dollars, the meaning is manifest. The necessities of social and commercial intercourse, as well as the rules of evidence, require that ordinary words should be understood according to their common and ordinary acceptance; consequently, when an order or bill of exchange or any writing provides that payment shall be made in "dollars," it means lawful currency of the United States of America. *Hinnemann v. Rosenbank*, 39 N. Y. 98, 104.

In construing a contract made in one of the rebellious states in 1864, requiring the payment of a certain sum in dollars and cents, it was said on appeal that the trial court erred in refusing to give an instruction that the legal meaning of the terms "dollars" and "cents" is specie—that is, gold or silver—or whatever thing or article or paper the laws of the United States declared to be a legal tender, and that the word dollars in the note mean specie or legal tender notes of the United States. *Miller v. Lacy*, 33 Tex. 351, 353.

In the construction of statutes the word "money" or "dollars" shall be construed to mean lawful money of the United States. *Rev. Code Del. 1893, c. 5, § 1, subd. 15.*

An indictment charging the theft of "silver dollars in coin" will be presumed to mean United States silver dollars. *Kirk v. State*, 32 S. W. 1045, 35 Tex. Cr. R. 224.

**As specie currency.**

A promise to pay a specific sum in "dollars," or to pay so many dollars, is a contract to pay a particular kind of currency. It is a contract to pay a specie currency. *Hilb v. Peyton* (Va.) 22 Grat. 550, 561.

**As unit of value.**

"Dollar" is the money unit of the United States, of the value of one hundred cents. *State v. Downs*, 47 N. E. 670, 671, 148 Ind. 324; *United States v. Fuller*, 20 Pac. 175, 177, 4 N. M. 358.

Evidently the word "dollar," as employed in the federal Constitution, means the money recognized and established in the express power vested in Congress to coin money and regulate the value thereof and of foreign coin, the framers of the Constitution having borrowed and adopted the word as used by the Continental Congress. In the ordinance of the 6th of July, 1785, and the 8th of August, 1786, it was enacted that the money unit of the United States should be \$1, and that the money of account should be dollars and fractions of dollars as subsequently established in the ordinance establishing a mint. Per Clifford, J., dissenting in *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 623, 20 L. Ed. 287.

**DOLLS.—DOLS.**

"Dols." is in common use to express dollars, and its signification is well understood; and it is no objection to a verdict that the jury assessed the judgment at a fine of "ten dols." against each defendant. *Short v. State* (Tex.) 29 S. W. 1073.

"Dolls." is an abbreviation for "dollars," and, when used at the top of columns of figures in an assessment roll, is sufficient information that the figures appearing on the roll under the same were employed to indicate that they meant so many dollars. *Linck v. City of Litchfield*, 81 N. E. 123, 125, 126, 141 Ill. 469; *Salisbury v. Shirley*, 5 Pac. 104, 106, 66 Cal. 223.

**DOMAIN.**

See "National Domain"; "Public Domain."

Domain is "the ownership of land; immediate or absolute ownership; paramount or ultimate ownership; an estate or patrimony which one has in his own right; land of which one is absolute owner." *People v. Shearer*, 30 Cal. 645, 658 (quoting *Burrill*, Law Dict.).

**DOVE-SHAPED.**

By the claim of reissued patent No. 10,418, for improvements in ship's pumps, to a

bucket which is "dome-shaped," is meant a bucket having the form of an inverted cup or half globe. *Russell v. Hyde* (U. S.) 39 Fed. 614, 615.

**DOMESTIC.**

Of or pertaining to one's house or home, or one's household or family; relating to home life; as domestic concerns, life, duties, cares, happiness, worship, servants. Webster.

**DOMESTIC ANIMALS.****Dog.**

"Domestic animals," as used in Civ. Code, § 5883, authorizing the General Assembly to "impose a tax upon such domestic animals as from their nature and habits are destructive of other property," includes dogs, a dog being so classified by the fundamental law of the state. *Wilcox v. State*, 28 S. E. 981, 101 Ga. 563, 39 L. R. A. 709.

"Domestic animals," as used in Rev. St. c. 127, § 1, imposing a penalty for the killing or wounding of domestic animals, means animals that in their domestic state furnish some support to the family or add to the wealth of the community, and does not include dogs. *State v. Harriman*, 75 Me. 562, 564, 46 Am. Rep. 423.

"Domesticated animals," within the meaning of Pen. Code, art. 733, which provides that the term "personal property" shall include all domesticated animals, when of some specific value, includes dogs, and therefore a dog may be the subject of theft, under statutes defining theft as the fraudulent taking of corporeal personal property. *Hurley v. State*, 17 S. W. 455, 457, 30 Tex. App. 333, 28 Am. St. Rep. 916. See, also, *State v. Sumner*, 2 Ind. 377, 378.

The word "domestic," as employed in a statute for the incorporation of associations for the improvement of breeds of domestic animals, means "belonging to the house," and hence includes a dog. *People v. Campbell* (N. Y.) 4 Parker, Cr. R. 386, 393.

**Hog.**

See "Beast."

**Horse or mule.**

Judicial notice will be taken that the term "domestic animal" includes a mule, and therefore cruelly beating a mule is within the statute prohibiting the cruel beating of any domestic animal. *State v. Gould*, 26 W. Va. 258, 264.

"Domestic animals," as used in a statute authorizing payment of damages for injuries to domestic animals, includes horses. *Osborn v. Selectmen of Lenox*, 84 Mass. (2 Allen) 207, 209.

**DOMESTIC BUSINESS.**

See "Ordinary Domestic Business."

**DOMESTIC COMMERCE.**

"Domestic commerce" is commerce which is entirely within one state. *Louisville & N. R. Co. v. Railroad Commission of Tennessee* (U. S.) 19 Fed. 679, 701.

**DOMESTIC CORPORATION.**

A "domestic corporation" is a corporation created by or under the laws of the state, or located in the state and created by or under the laws of the United States, or by or pursuant to the laws in force in the colony of New York before the 19th day of April in the year 1775. Code Civ. Proc. N. Y. 1899, § 3343, subd. 18. See, also, *Plimpton v. Bigelow* (N. Y.) 12 Abb. N. C. 202, 221; *First Nat. Bank v. Doying* (N. Y.) 13 Daly, 509, 510; *In re Cushing's Estate*, 40 Misc. Rep. 505, 507, 82 N. Y. Supp. 795, 796; *Farmers' & Mechanics' Nat. Bank v. Rogers* (N. Y.) 1 N. Y. Supp. 757, 758.

The term "domestic corporation" includes not only corporations originally organized under the laws of the state, but also a corporation formed by the consolidation of a domestic and foreign corporation. *In re St. Paul & N. P. Ry. Co.*, 30 N. W. 432, 433, 36 Minn. 85.

In the chapter relating to insurance, "domestic" designates those companies incorporated or formed in the commonwealth. Rev. Laws Mass. 1902, p. 1120, c. 118, § 1. See, also, Ky. St. 1903, § 751; Civ. Code Ala. 1896, § 2575; Shannon's Code Tenn. 1896, § 3274; Rev. St. Me. 1883, p. 459, c. 49, § 86.

The word "domestic," as used in the title relating to insurance, telegraph, telephone, electric light, express companies, religious societies, and limited partnerships, when applied to a corporation, company, or copartnership, shall mean organized under the laws of this state, and the word "foreign," when so applied, shall mean not organized under the laws of this state. V. S. 1894, 4164.

**Municipal corporation.**

The municipal corporations of this state are not "domestic corporations" thereof, within the meaning of that term as used in section 1778 of the Code of Civil Procedure, providing that "in an action against a foreign or domestic corporation to recover damages for the non-payment of a promissory note, or other evidence of debt, for the absolute payment of money upon demand, or at a particular time, \* \* \* unless the defendant serves with a copy of his answer or demurrer, a copy of an order of a judge directing that the issues presented by the pleadings be tried, the plaintiff may take judgment as in case of

default." *Moran v. Long Island City* (N. Y.) 88 Hun, 122, 123.

**DOMESTIC COURTS.**

The term "domestic courts," within the meaning of statutes in reference to the proof by attested copy of domestic judgments, includes the judgments of the federal or district courts within the state. "So far as these courts derive their existence and jurisdiction from the Constitution and laws of the United States, they may be considered 'foreign' in a limited sense; but in the exercise of their jurisdiction in the administration of justice, they may properly be considered as 'domestic' courts." *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 417.

**DOMESTIC DISTILLED SPIRITS.**

"Domestic distilled spirits," as used in a statute relating to the inspection of liquors, meant those manufactured within the state. *Commonwealth v. Giltinan*, 64 Pa. (14 P. F. Smith) 100, 103.

**DOMESTIC FIXTURES.**

"Domestic fixtures" are all such articles as a tenant attaches to a dwelling house in order to render his occupation more comfortable or convenient, and may be separated from it without doing substantial injury, such as furnaces, stoves, cupboards, and shelves, bells, bell pulls, gas fixtures, etc.; or things merely ornamental, as painted wainscots, pier and chimney glasses, although attached to the walls with screws, marble chimney pieces, grates, beds nailed to the walls, window blinds and curtains. All these articles, whether useful or ornamental, are in a manner necessary to the tenant's domestic comfort; and, being easily severed from the house, are capable of being equally useful to him in any other house he may occupy, and therefore he may remove them. But things which he attaches in a more permanent manner, in order to complete it, such as hearthstones, doors and windows, closets, presses, locks and keys, he cannot take away, because such things are peculiarly adapted to the house in which they are fixed, and, if taken away, are injurious to the freehold. All substantial additions made to the house also become a part of the freehold, and are immovable, such as conservatories, greenhouses, hot-houses, pig sties, stables, wash houses, and other outhouses. Neither can the tenant remove shrubbery or flowers planted by him in the garden. *Wright v. Du Bignon*, 40 S. E. 747, 750, 114 Ga. 765, 57 L. R. A. 669 (citing *Taylor, Landl. & Ten.*).

**DOMESTIC JUDGMENT.**

The judgment of a state court will be considered by the federal court sitting within

the territorial limits of the state in which the same is rendered as a "domestic judgment." *Owens v. Gotzian* (U. S.) 18 Fed. Cas. 927, 928.

A judgment of the Circuit Court of the United States rendered in the Southern District of California is to be treated as a "domestic judgment" in Connecticut, and stands, in respect to its proof, and also to its essential nature, in any court of Connecticut, as if it had been rendered by another court of this state. *Barber v. International Co.*, 51 Atl. 857, 858, 74 Conn. 652, 92 Am. St. Rep. 246.

#### DOMESTIC MANUFACTURES.

"Domestic manufactures," as used by a state in its legislative acts, means, as a general thing, those within its jurisdiction, that being the first sense of the expression. *Commonwealth v. Giltinan*, 64 Pa. (14 P. F. Smith) 100, 103.

#### DOMESTIC MESSAGE.

Where the initial and terminal points are both in the same state, and the telegram is transmitted over the wires of the same company, and concerns only citizens of that state, the message is a "domestic" message, and its character in that respect is not altered by the circumstance that the line passes in part over territory of another state, nor is it affected by the fact that the company has established a railroad office in such other state. *Western Union Tel. Co. v. Reynolds*, 41 S. E. 856, 857, 100 Va. 459, 93 Am. St. Rep. 971.

#### DOMESTIC NAVIGATION.

Ships are engaged in "foreign navigation" when passing to or from a foreign country, and in "domestic navigation" when passing from place to place within the United States. *Rev. St. Okl.* 1903, § 4166; *Rev. Codes N. D.* 1899, § 3470; *Civ. Code S. D.* 1903, § 387.

#### DOMESTIC PURPOSES.

"Domestic purposes," as used in an ordinance fixing water rates for domestic purposes, include all uses of water which contribute to the health, comfort, and convenience of the family in the enjoyment of their dwelling as a home. *Crosby v. City Council of Montgomery*, 18 South. 723, 726, 108 Ala. 498.

The phrase "domestic purposes," as contained in the chapter relating to water rights and irrigation, shall be construed to include water for the household, and a sufficient amount for the use of domestic animals kept with and for the use of the household. *Civ. Code Idaho* 1901, § 2591.

The term "domestic purposes," as used in section 43, art. 2, c. 939, *Comp. St.* 1901, has

reference to the use of water for domestic purposes, permitted to the riparian proprietor by common law, which ordinarily involves but little interference with the water of a stream, or its flow, and does not contemplate diversion of large quantities of water in canals or pipe lines. *Crawford v. Hathaway County* (Neb.) 93 N. W. 781, 797, 60 L. R. A. 889.

#### DOMESTIC RATES.

The words "domestic rates," appearing in the provision of a contract between a waterworks company and the city, are used to signify rates allowed to be charged where water is furnished for domestic purposes. *Birmingham Waterworks Co. v. Truss*, 33 South. 657, 135 Ala. 530.

#### DOMESTIC REMEDY.

Quinine is not a "domestic remedy" within an act regulating the practice of pharmacy, and providing that it should not interfere with the sale of the usual domestic remedies by retail dealers. *Cook v. People*, 17 N. E. 849, 125 Ill. 278.

#### DOMESTIC SERVANTS—DOMESTICS.

"Domestics" are menial servants. *Ex parte Meason* (Pa.) 5 Bin. 167, 182.

A person hired for an hour to carry wood from the street to the back yard, and passing through a house in such labor, is not a "domestic servant," so as to be relieved on that account from the increased penalty imposed on stealing from a house. *Williams v. State*, 41 Tex. 649, 650.

The term "domestic servant," as used in that provision of the Code which enacts that an entry into a house for the purpose of committing a theft, unless the same is effected by actual breaking, is not burglary when the same is done by a domestic servant or other inhabitant of the house, means a servant who lives in the house, and does not extend to a servant whose employment is out of doors and not in the house, or to a lodger or visitor. *Wakefield v. State*, 41 Tex. 556, 558.

The words "domestic servant" in Act Cong. Feb. 26, 1885, c. 164, 23 Stat. 332, and the amendments thereto of February 23, 1887, c. 220, 24 Stat. 415 [U. S. Comp. St. 1901, p. 1290], prohibiting the immigration of aliens, under contract of labor, into this country, save domestic servants, do not include one whose labor will be devoted in part to the production of merchandise which competes with the products of others whose entire attention is given to manufacturing such products, as where part of the labor of the servant would be in the fitting of surplus dairy products for the market. *In re Cummings* (U. S.) 32 Fed. 75, 76.

The phrase "personal or domestic servant," as used in Act Cong. Feb. 23, 1885, c. 164, 23 Stat. 332 [U. S. Comp. St. 1901, p. 1290], prohibiting the immigration of aliens under contract for labor, and providing that the provisions of the act shall not apply to persons employed strictly as personal or domestic servants, embraces an under coachman, whose duties are partly to assist in keeping stables, horses, and carriages in good order, but principally to drive the horses when his employer or any of his family go out in carriages, or to accompany the younger members of the family when they go out on horseback, and who boards with his employer's coachman, and who sleeps in a room over the coachhouse. *In re Howard* (U. S.) 68 Fed. 263, 264.

#### **Boarder.**

"Domestics," as defined by Bouvier in his Law Dictionary, are those who reside in the house with the master they serve. The term does not extend to workmen and laborers employed out of doors. By Webster a "domestic" is "a servant or hired laborer residing with the family," and hence a boarder in a boarding house is not a domestic. *Ullman v. State*, 1 Tex. App. 220, 221, 28 Am. Rep. 406.

#### **Butcher.**

Within the meaning of the Texas statute which makes the act of taking property from his employer by a domestic servant a less offense than the same taking by another, a "domestic servant" is one who is employed as a house servant or outdoor worker, and who has general access to the premises. A butcher who was hired for one day to butcher and cut up beef is not a "domestic servant" within the meaning of the statute above referred to. *Richardson v. State*, 43 Tex. 456, 457.

#### **Farm hand.**

A "domestic servant" means a servant who resides in the house with the master he serves, but does not include a servant whose employment is outside, and not in the house. Thus, a farm hand who sleeps and eats outside of the master's house, though he performs chores inside the house when directed, is not a "domestic servant" within the legal meaning of the term. *Waterhouse v. State*, 2 S. W. 889, 21 Tex. App. 663.

#### **Gardener.**

In a will directing testator's executor to pay each of his domestic servants who should be with him or in his service at the time of his decease such sums of money as should be equivalent to two years of the annual amount of their respective wages, "domestic servant" cannot be construed to include a servant who has charge of the garden at the

mansion, but who lives in a cottage in the garden, and has an annual sum from his employer in addition to his yearly wages. *Vaughan v. Booth*, 13 Eng. Law & Eq. 351, 354.

#### **Hotel servant.**

Though servants or "domestics" have been declared to be those who receive wages and stay in the house of a person paying and employing them, such as valets, footmen, cooks, etc., the term would not include persons in such line of employment in a public hotel or tavern. *Cook v. Dodge*, 6 La. Ann. 276, 277.

#### **Laborer distinguished.**

See "Laborer."

#### **DOMESTIC SHIP.**

A ship in a port of the state to which it belongs is called a "domestic ship." Civ. Code Cal. 1903, § 963; Rev. St. Okl. 1903, § 4167; Rev. Codes N. D. 1899, § 3471; Civ. Code S. D. 1903, § 883.

#### **DOMESTIC USE.**

The expression "domestic use," as used in 18 & 19 Vict. c. 29, requiring a water company to furnish to occupiers of houses who should demand it a supply of water for domestic use, would include the use of water for a horse, and for washing a carriage of an occupier, who was assessed on his house and premises, including a coach house, stable, and yard. *Busby v. Chesterfield Waterworks & Gaslight Co.*, El., Bl. & El. 176, 182.

"Domestic uses," as used in Const. art. 16, § 6, giving a preference to those using water for domestic uses, means such uses as the riparian owner has at common law to take water for himself, his family, or his stock, and the like, but does not authorize a ditch company to divert water from a public stream for domestic purposes by means of a large canal, in violation of prior vested rights of others to the water for other purposes. *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 48 Pac. 532, 534, 23 Colo. 233.

#### **DOMESTIC WINE.**

The term "domestic wine" shall mean wine made from berries, grapes, and other fruits grown in the state. Pol. Code Ga. 1895, § 1523; Pen. Code Ga. 1895, § 449.

#### **DOMESTICATED ANIMALS.**

See "Domestic Animal."

## DOMICILE.

See "Commercial Domicile"; "De Facto Domicile"; "Elected Domicile"; "Natural Domicile."

"Domicile" is that place where a person has fixed his habitation, without any present intention of removing therefrom. Two things must concur to constitute a domicile: First, residence; second, the intention of making the place of residence the home of the party. There must be both the fact and intent. *Appeal of Carey*, 75 Pa. (25 P. F. Smith) 201, 205; *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 309, 10 Am. Rep. 698; *Neff's Lessee v. Neff* (Pa.) 1 Bin. 350, 351; *Hayes v. Hayes*, 74 Ill. 312, 316; *Bangs v. Inhabitants of Brewster*, 111 Mass. 382, 385; *Putnam v. Johnson*, 10 Mass. 488, 501; *Whitney v. Inhabitants of Sherborn*, 94 Mass. (12 Allen) 111, 114; *Hairston v. Hairston*, 27 Miss. (5 Cushman) 704, 717, 61 Am. Dec. 500; *City of Hartford v. Champion*, 20 Ala. 471, 473, 58 Conn. 268; *Long v. Ryan* (Va.) 30 Grat. 718, 719; *Dean v. Cannon*, 16 S. E. 444, 446, 37 W. Va. 123; *Cadwalader v. Howell*, 18 N. J. Law (3 Har.) 138, 144; *In re High* (Mich.) 2 Doug. 515, 523; *Hegeman v. Fox* (N. Y.) 31 Barb. 475, 476; *In re Thompson* (N. Y.) 1 Wend. 43, 45; *In re Robert's Will* (N. Y.) 8 Paige, 519, 524; *Brown v. Ashbough* (N. Y.) 40 How. Pracc. 260, 263; *In re Zerega's Will*, 20 N. Y. Supp. 417, 418; *Cincinnati, H. & D. R. Co. v. Ives*, 3 N. Y. Supp. 895; *Weitkamp v. Loehr* (N. Y.) 11 Civ. Proc. R. 36, 40; *Crawford v. Wilson* (N. Y.) 4 Barb. 504, 519; *State v. Moore*, 14 N. H. 451, 454; *Hart v. Lindsey*, 17 N. H. 235, 244, 43 Am. Dec. 597; *Overseers of Parker City v. Overseers of Du Bois Borough* (Pa.) 9 Atl. 457, 460; *Hardy v. De Leon*, 5 Tex. 211, 235; *McIntyre v. Chappell*, 4 Tex. 187, 197; *Ex parte Blumer*, 27 Tex. 734, 738; *Merrill's Heirs v. Morrissett*, 76 Ala. 433, 437; *Fullham v. Howe*, 20 Atl. 101, 103, 62 Vt. 386; *Sanders v. Getchell*, 76 Me. 165, 49 Am. Rep. 606; *Inhabitants of Wayne v. Inhabitants of Greene*, 21 Me. (8 Shep.) 357, 361; *Thomas v. Warner*, 34 Atl. 830, 831, 83 Md. 14; *Dormitzer v. German Savings & Loan Soc.*, 62 Pac. 862, 882, 23 Wash. 132; *In re Williams* (U. S.) 99 Fed. 544, 545; *Chambers v. Prince* (U. S.) 75 Fed. 176, 177; *White v. Brown* (U. S.) 29 Fed. Cas. 982, 992; *Jones v. Alsbrook*, 20 S. E. 170, 171, 115 N. C. 46; *Town of Albion v. Village of Maple Lake*, 74 N. W. 282, 283, 71 Minn. 503; *Munro v. Munro*, 7 Clark & F. 842, 877 (quoted in *White v. Tennant*, 31 W. Va. 790, 792, 8 S. E. 596, 597, 13 Am. St. Rep. 896). It is one's permanent, not pretended, home. It must be actual, not intended. It must be bona fide; not a residence taken merely for the purpose of obtaining a divorce, and to be given up afterwards. *Commonwealth v. Ainsworth*, 20 Pa. Co. Ct. R. 123, 125; *State v. Casinova's Adm'rs*, 1 Tex. 401, 407; *Ayer v. Weeks*, 18

Atl. 1108, 1109, 65 N. H. 248, 6 L. R. A. 716, 23 Am. St. Rep. 37. "Domicile" has also been defined as: "A residence at a particular place, accompanied with positive presumptive proof of continuing there for an unlimited time." *Desebats v. Berquier* (Pa.) 1 Bin. 336; *State ex rel. Beckett v. Collector of Bordentown*, 32 N. J. Law (3 Vroom) 192, 194; *State v. Smith*, 64 Mo. App. 313, 319. A place where a person has his home or principal home, or where he has his family and principal place of business; that residence from which there is no present intention of moving, or to which there is an intention to return. *In re Zerega's Will*, 20 N. Y. Supp. 417, 418 (quoting Cent. Dict.). The place where a person lives and has his home. *Mitchell v. United States*, 88 U. S. (21 Wall.) 350, 352, 22 L. Ed. 584; *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 306, 10 Am. Rep. 698; *Anderson v. Anderson's Estate*, 42 Vt. 350, 352; *Borland v. City of Boston*, 132 Mass. 89, 95, 42 Am. Rep. 424; *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 176; *Harvard College v. Gore*, 22 Mass. (5 Pick.) 370, 372; *Hart v. Lindsey*, 17 N. H. 235, 244, 43 Am. Dec. 597. The place where a man carries on his established business or professional occupation, and has a home and permanent residence. *Pearce v. State*, 33 Tenn. (1 Sneed) 63, 66, 60 Am. Dec. 135. The place where one permanently resides. *Tiller v. Abernathy*, 37 Mo. 196. The place where a man establishes his abode, makes the seat of his property, and exercises his civil and political rights. *Chase v. Miller*, 41 Pa. (5 Wright) 403, 420. The place where one has established and resides with his wife, children, and family, and the greater part of his movable property. *Holliman's Heirs v. Peebles*, 1 Tex. 673, 687. The actual or constructive presence of a person in a given place, coupled with the intention to remain there permanently. *Yale v. West Middle School Dist.*, 22 Atl. 295, 296, 59 Conn. 489, 13 L. R. A. 161; *In re Town of Hector*, 24 N. Y. Supp. 475, 481. "Where one has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *In re Dimock*, 32 N. Y. Supp. 927, 929, 11 Misc. Rep. 610 (quoting Story, Conf. Law [Ed. 1846] c. 3, p. 31); *Hart v. Lindsey*, 17 N. H. 235, 244, 43 Am. Dec. 597; *Gilman v. Gilman*, 52 Me. 165, 174, 83 Am. Dec. 502; *State v. De Cassino's Adm'rs*, 1 Tex. 101, 107.

The civil law defines "domicile" to be the place where the domestic hearth has been established, from which the resident does not depart except for a temporary purpose and animus revertendi. *Morgan v. Nunes*, 54 Miss. 308, 310.

A man's "domicile" is his house, where he establishes his household, and surrounds himself with the apparatus and comforts of

life. *Sanderson v. Ralston*, 20 La. Ann. 312, 314.

A person's home is that place or country in which he in fact resides with the intention of residence, or in which, having so resided, he continues actually to reside, though no longer retaining the intention of residence, or with regard to which, having so resided there, he retains the intention of residence, though he in fact no longer resides there. *Dacey*, Dom. p. 44. Thus a resident of New York had his domicile there though he had spent a large portion of his life in Europe and died there, he always declaring himself a citizen of New York. *Cruger v. Phelps*, 47 N. Y. Supp. 61, 68, 21 Misc. Rep. 252.

The "domicile" or residence of a person of full age, and laboring under no disability, is the place or county where the family of such person shall permanently reside. *Daniel v. Sullivan*, 46 Ga. 277, 278.

The "domicile" of a man is not merely the place in which he lives, but the place in which he is required to perform the obligations due him from the government in which he lives and from which he receives protection. *Town of North Yarmouth v. Town of West Gardiner*, 58 Me. 207, 211, 4 Am. Rep. 279.

The "domicile" of a married man is the place of his family's habitual dwelling, although he may be conducting business elsewhere. It is not to be denied that domicile may exist independent of "habitation," using that term as denoting actually abiding within a place; but contemplated habitation or rehabilitation is also an element in the legal idea of "domicile" when actual habitation does not exist. The dwelling in one place, which is thus consistent with continued domicile in another, is, under certain circumstances, equal to commercial domicile, the residence "negotiorum ratione" of the civil law. *Chaine v. Wilson* (N. Y.) 16 How. Prac. 552, 558.

A man may acquire a "domicile" if he be personally present in a place and elect that as his home, even if he never design to remain there always, but design at the end of some short time to remove and acquire another. In the case of *Sanders v. Getchell*, 76 Me. 158, 49 Am. Rep. 606, it was held that bodily residence in a place, coupled with an intention to make such a place a home, would establish a "domicile" or residence. *Brittenham v. Robinson*, 48 N. E. 616, 617, 18 Ind. App. 502.

A person's "domicile" depends on the place where he actually resides, not on the place where his moral or legal duties call him to reside. *Scranton Poor District v. Directors of Poor of Danville and Mahoning*, 106 Pa. 446, 451 (citing *Inhabitants of Hallo-*

*well v. Inhabitants of Saco*, 5 Me. [5 Greenl.] 144).

A man may have a "domicile" in a country to which he is an alien, and where he has no political relations, and of which he is not an inhabitant. *Harvard College v. Gore*, 22 Mass. (5 Pick.) 870, 372.

Though a merchant having a fixed residence and carrying on business at the place of his birth acquires a foreign commercial character by occasional visits to a foreign country, he acquires no "domicile" therein. *The Nereide*, 13 U. S. (9 Cranch) 388, 3 L. Ed. 769.

One who is residing in a place with the purpose of remaining there for an indefinite period of time, and without returning and keeping up any animus revertendi, or intention to return, to the former home which he has abandoned, will have his "domicile" in the place of his actual residence. Where the question is one of national domicile, this statement may not be correct, for such a condition of facts might not manifest an intention of expatriation. *Inhabitants of Wilbraham v. Inhabitants of Ludlow*, 99 Mass. 587, 592 (citing *Sleeper v. Paige*, 81 Mass. [15 Gray] 349; *Whitney v. Inhabitants of Sherborn*, 94 Mass. [12 Allen] 111).

"Domicile" is acquired by residence and the animus manendi—the intent to remain—and does not involve the idea that a change of domicile may not thereafter be made; but this in no wise affects the pre-existing legal status of the individual as to his domicile while it continues. *Newton v. Mahoning County Com'rs*, 100 U. S. 548, 562, 25 L. Ed. 710.

While no exact and full definition to cover all cases can be given of the word "domicile," it was said in *Lyman v. Fiske*, 34 Mass. (17 Pick.) 231, 234, 28 Am. Dec. 293, that: "In general terms, one may be designated as an 'inhabitant' of that place which constitutes the principal seat of his residence, of his business, pursuits, connections, attachments, political and municipal relations. It is manifest, therefore, that it embraces the fact of residence at a place with the intent to regard it and make it his home." *Phillips v. City of Boston*, 67 N. E. 250, 251, 183 Mass. 314. See, also, *Thorndike v. City of Boston*, 42 Mass. (1 Metc.) 242, 245, where it was said that "no exact definition can be given of 'domicile'; it depends upon no one fact or combination of circumstances, but from the whole taken together, which must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. It follows that his existing domicile continues until he acquires another, and, vice versa, by acquiring a new domicile he relinquishes his former one. Very slight



circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character which fixes it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place."

"The word 'domicile,' in the French law, according to Mr. Duponzeau, the learned translator of the French Commercial Code, has a general and a particular technical meaning. In the former sense it means the party's usual place of residence, but in the language of legal practice it signifies a specific place of abode, declared, assumed, or pointed out by the instrument or contract." *Woodworth v. Bank of America* (N. Y.) 19 Johns. 391, 417, 10 Am. Dec. 239.

"The term 'domicile' seems to possess quite as much elasticity as 'residence,' for though there can be but one principal domicile for cases of testacy or intestacy, yet there may be two or more domiciles for different purposes, such as a domicile of allegiance, a political, matrimonial, commercial, or forensic domicile." *Isham v. Gibbins* (N. Y.) 1 Bradf. Sur. 69, 83.

Every human being has a "fixed domicile." Originally, it is the place where his parents lived at the time of his birth, which continues until he has acquired another; for although there are supposed exceptional cases, as gypsies, vagrants, or those wandering vagabonds or outcasts who do not know where or when they were born, it is not so in fact, for the place of birth, when known, is the "domicile." *In re Bye* (N. Y.) 2 Daly, 525, 528.

#### **As affected by absence.**

Change of domicile, see "Change."

"Domicile" is the place where one permanently resides, and a person's "domicile" is the place in which he last resided until he forms a new one by an intention to reside elsewhere. The mere leaving of a place with the intention not to return will not take from that place its character of "domicile" until the person leaving forms the intention of residing elsewhere permanently. *Rockingham v. Springfield*, 9 Atl. 241, 243, 59 Vt. 521.

A person does not lose his domicile in one state by removing to another to reside temporarily, and with the intention of returning to his former residence at a definite future time. The place where a person lives is to be taken to be his domicile, unless facts are adduced to establish the contrary. *Col-*

*lins v. City of Ashland* (U. S.) 112 Fed. 176, 177.

Actual residence is not indispensable to retain a domicile after it is once acquired, but is retained by the mere intention not to change it and adopt another. *Hayes v. Hayes*, 74 Ill. 312, 316; *Hart v. Lindsey*, 17 N. H. 235, 244, 43 Am. Dec. 597.

Two things must concur to establish "domicile"—the fact of residence, and the intention of remaining. These two must exist, or must have existed, in combination. There must have been an actual residence. The character of residence is of no importance, and, if domicile has once existed, mere temporary absence will not destroy it, however long continued. *Munro v. Munro*, 7 Clark & F. 842, 877 (quoted in *White v. Tennant*, 31 W. Va. 790-792, 8 S. E. 596, 597, 13 Am. St. Rep. 896).

There can never be in the eye of the law more than one domicile of citizenship, and that continues, in the case of a citizen, until he himself renounces it absolutely and takes up another in its stead, and such a domicile is not lost by absence in or out of the state. *Warren v. Board of Registration*, 40 N. W. 553, 72 Mich. 398, 2 L. R. A. 203.

"Domicile," as the word implies, is a man's house, his home; and it may continue to be such for years without being actually inhabited by him. It is a place where he may reside in fact, or for many purposes may be deemed to reside. A person may have two domiciles at once; as, for example, if a foreigner coming to this country should establish two houses, one in New York and the other in New Orleans, and pass one-half of the year in each, he would for most purposes have two domiciles. *Holmes v. Oregon & C. Ry. Co.* (U. S.) 5 Fed. 523, 527.

#### **Citizenship distinguished.**

See "Citizenship."

#### **Dwelling place distinguished.**

See "Dwelling Place."

#### **Home distinguished.**

"Home" and "domicile" may and generally do mean the same thing, but a home may be relinquished and abandoned while the domicile of the party, upon which many civil rights and duties depend, may, in legal contemplation, remain. Thus the "home," within the meaning of a statute providing that a pauper shall be deemed to have a settlement in the town where he dwells and has his home, may be lost by his leaving the town where he has his home without intending to return, though he fails to establish a home in any other place, and this is so without regard whether he loses his "domicile" or not. *Inhabitants of Exeter v. In-*

habitants of Brighton, 15 Me. (3 Shep.) 58, 60. See, also, *King v. King*, 56 S. W. 534, 538, 155 Me. 406.

Judge Grier, in *White v. Brown* (U. S.) 29 Fed. Cas. 982, says it may be correctly said that no one word is more nearly synonymous with the word "domicile" than the word "home." In *re Zerega's Will*, 20 N. Y. Supp. 417, 418.

"Home" is not synonymous with "domicile," but has a more restricted meaning. *Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. (1 App.) 293; *Dean v. Cammon*, 16 S. E. 444, 446, 37 W. Va. 123.

**As house, precinct, ward, county, or state.**

To constitute a "residence," there must be an actual home in the sense of having no other home, whether he intends to reside there permanently, or for a definite or indefinite length of time. Residence, therefore, is a question depending upon fact and intention, and, if so, it may be applicable to a particular spot, or to a whole country. A person who wanders from country to country, with no intention of remaining fixedly anywhere, acquires no new residence. On the other hand, one who confines his wanderings to a particular country or locality, but declines to fix himself upon some particular spot, can very properly be said to be a "resident" of that country or locality. "Home," "domicile," or "residence" may therefore include a spot or a wide area. Each of these words may be applied either to a house, a precinct, a ward, a county, or a state. *Langhammer v. Munter*, 81 Atl. 800, 301, 80 Md. 518, 27 L. R. A. 330.

#### **Inhabitaney.**

See "Inhabitaney—Inhabitant."

#### **Intention as governing.**

"Domicile" includes residence with an intention to remain, but no length of residence without intention of remaining constitutes "domicile." *Andrews v. Mundy*, 14 S. E. 414, 417, 86 W. Va. 22; *Munroe v. Williams*, 16 S. E. 533, 535, 37 S. C. 81, 19 L. R. A. 685.

It has been said that every person has in law a "domicile," or home, and that the original domicile can only be lost by the acquisition of another. It is acquired by act and intention. The intention gives character and effect to the act, as where a new abode is taken up with the intention to abandon the old one. *Morgan v. Munes*, 54 Miss. 308, 310.

"The 'domicile' is the habitation fixed in any place with an intention of always staying there, while simple 'residence' is much more temporary in its character. No length

of residence without the intention of remaining constitutes 'domicile.'" A person's domicile may be one place, while his residence for the time being may be another. *City of New York v. Genet* (N. Y.) 4 Hun, 487, 489; *Bartlett v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 44, 47.

The true basis and foundation of domicile is the intention, the *quo animo*, of the residence of a person. The apparent or avowed intention of constant residence, not the manner of it, constitutes a "domicile." *Bradley v. Lowry* (S. C.) Speers, Eq. 25; *Hairston v. Hairston*, 27 Miss. (5 Cushm.) 704, 711, 61 Am. Dec. 500.

The "domicile" of a man is his home or place of abode. Where a person lives is *prima facie* his domicile, but there must be an intention of retaining such place as a domicile. Mere intention alone is not sufficient to create a domicile. *Venable v. Paulding*, 19 Minn. 488, 493 (Gil. 422, 425).

"The right of domicile is acquired by a residence, even of a few days, if it appears that the intention of removing to the place of residence was to make a permanent settlement, or for an indefinite time." *The Venus*, 12 U. S. (8 Cranch) 253, 279.

The term "domicile" has been defined in different language by courts and law-writers. A terse definition is as follows: "'Domicile' is a place where the person has fixed his habitation, without any present intention of removing therefrom." This definition, while it has met with the approval of some courts, is in our judgment too narrow, unless the intention to remove be limited to the time of fixing the residence. The mere fact of an intention to remove from the place where one is domiciled cannot, we think, operate against the *bona fides* of residence. The existence of a mere purpose to go elsewhere to live is not sufficient to defeat the legal residence in the place where a person is actually domiciled. *Graham v. Graham*, 81 N. W. 44, 45, 9 N. D. 88.

To acquire a domicile, there must be a residence in a place, and an intention to make that place one's home. *Viles v. City of Waltham*, 32 N. E. 901, 902, 157 Mass. 542, 34 Am. St. Rep. 311.

Domicile is a question of intention, and it does not conclusively follow that the place where a person votes, and where, for business reasons, he rents a house in which he lives for 18 months prior to his death, is his legal domicile, if there is sufficient evidence to show that he never intended to abandon his original place of domicile. In *re Mintzer's Estate*, 13 Pa. Co. Ct. R. 465, 467.

A minor, whose parents reside at the domicile of his birth, in general retains that domicile. If, on coming of age, he go else-

where to reside, without an intention of removing thence to another fixed place, the place to which he thus goes becomes his domicile. *Hart v. Lindsey*, 17 N. H. 235, 244, 43 Am. Dec. 597.

#### **Reside synonymous.**

"Residing on the lands," as used in the Indian treaty of 1819, art. 8, granting to each and every head of an Indian family residing on the lands that which now or may be hereafter surrendered to the United States, etc., should be construed to mean a residence of a permanent, and not of a temporary nature for a special purpose. In other words, it is the being domiciled on the ceded lands, or having his domicile there. *Morgan v. Fowler*, 10 Tenn. (2 Yerg.) 450, 455.

Ordinarily the word "resides" may be construed as having a residence in a place and to be there settled as a home, and in our laws relating to taxation, voting, and settlement of paupers it has the same meaning as "domicile." *Phillips v. City of Boston*, 67 N. E. 250, 251, 183 Mass. 314; *Houghton v. Ault* (N. Y.) 16 How. Prac. 77, 85, 86.

"Resides at his home," as used in a statement that where the family is broken up, by separation or the death of some of the members, the right of homestead continues in the former head of the family, "provided that he still resides at his old home," is to be taken in its legal and not literal sense, not requiring an actual occupancy, but only such occupancy as a homesteader may successfully show in answer to a charge of homestead abandonment. Thus, although not in the actual occupancy, yet if his absence therefrom is only temporary, for business or pleasure, necessity or convenience, it is still an occupancy. *Euper v. Alkire*, 37 Ark. 283; *Flask v. Tindall*, 39 Ark. 571; *Marr v. Lewis*, 31 Ark. 203, 25 Am. Rep. 553; *Brown v. Watson*, 41 Ark. 309; *Gray v. Patterson*, 46 S. W. 730, 731, 65 Ark. 373, 67 Am. St. Rep. 937.

In the several provincial statutes of 1692, 1701, and 1767, in reference to settlements for the purpose of the poor laws, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," and "coming to reside and dwell," are frequently and variously used, and we think they are used indiscriminately to mean the same thing, namely, to designate the place of a person's domicile. This is defined in Const. c. 1, § 1, for another purpose, to be "the place where one dwelleth or hath his home." *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 176.

"Resided," as used in Priv. St., uniting the old town of Woodridge and the new town of Bethany, and providing that all persons belonging to the old town and those absent

therefrom should be deemed and taken to be inhabitants of such one of such towns as they last "resided" in, means domicile only, in contradistinction to such a residence as would by general law be necessary to confer a settlement. *Town of Waterbury v. Town of Bethany*, 18 Conn. 424, 429.

#### **Residence distinguished.**

"Domicile," in its popular sense, means one's fixed and settled abode or actual home, as distinguished from 'residence for a temporary purpose,' whether it be for health or pleasure, or some particular business." *Shaeffer v. Gilbert*, 20 Atl. 434, 435, 73 Md. 66; *Town of Salem v. Town of Lyme*, 29 Conn. 74, 79; *Town of Fairfield v. Town of Easton*, 49 Atl. 200, 201, 73 Conn. 735; *Welkemp v. Loehr*, 53 N. Y. Super. Ct. (21 Jones & S.) 79, 82; *Bradley v. Lowry* (S. C.) *Spears*, Eq. 1, 5, 39 Am. Dec. 142. A person who lives in town during the winter merely for the purpose of giving his children an education, and has his fixed permanent home in the county, cannot be said to be "domiciled" in the town, within the meaning of a law requiring a person to be domiciled in a place in order that his children may go to school there without paying tuition. *Gardner v. Board of Education*, 38 N. W. 433, 435, 5 Dak. 259.

The legal definition of the cognate terms "residence" and "domicile" vary with the circumstances of the case, and the mental constitution of judges and authors. "Residence" generally imports a personal presence, whereas, one may have a "domicile" in a place from which he is absent most of the time. But "residence" implies more than a temporary sojourn in a place. The Chinese Tax Cases (U. S.) 14 Fed. 338, 344.

"Residence," in the popular meaning of that word, is not synonymous with "inhabitaney" or "domicile." *Thayer v. City of Boston*, 124 Mass. 132, 147, 26 Am. Rep. 650; *Briggs v. Inhabitants of Rochester*, 82 Mass. (16 Gray) 337, 340.

The word "residence" has technically a more restricted meaning than "domicile." *Charlton County v. Moberly*, 59 Mo. 238, 242.

"Domicile" and "residence" are not convertible terms; domicile may be in one place, and the residence, for the time being, in another. *Alston v. Newcomer*, 42 Miss. 186, 192; *Briggs v. Inhabitants of Rochester*, 82 Mass. (16 Gray) 337, 340; *Frost v. Brisblin* (N. Y.) 19 Wend. 11, 12, 32 Am. Dec. 423; *Hart v. Kip*, 26 N. Y. Supp. 522, 524, 74 Hun. 412; *Brown v. Crane*, 13 South. 855, 69 Miss. 678; *Stickney v. Chapman*, 42 S. E. 68, 69, 115 Ga. 759; *Keller v. Carr*, 42 N. W. 292, 293, 40 Minn. 428; *Guler v. O'Daniel* (Pa.) 1 Bin. 349, 350, note, 1 Am. Lead. Cas. 733; *Love v. Cherry*, 24 Iowa, 204; *Cohen v. Daniels*, 25 Iowa, 88, 91; *Pacific Mut. Life Ins.*

Co. v. Tompkins (U. S.) 101 Fed. 539, 543, 41 C. C. A. 488; Collins v. City of Ashland (U. S.) 112 Fed. 175, 177; State v. Cunningham, 55 Atl. 654, 75 Vt. 332.

"Residence" and "domicile" may in some cases have the same meaning, but frequently they have other and inconsistent meanings, and import entirely different ideas. A "resident" of a place is one whose place of abode is there, and who has no present intention of removing therefrom. A married woman by operation of law may have a "domicile" in a place where she has never been, but it could not with any correctness of speech be said she was a "resident" of that place. A woman whose husband is a resident of one school district cannot be considered as a resident of another merely because of her former residence there, and her temporary presence in her father's family in the latter district. Dorsey v. Brigham, 52 N. E. 303, 307, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228.

There is a difference between "domicile" and "residence." "Residence" is used to indicate the place of abode, whether permanent or temporary. "Domicile" denotes a fixed permanent residence to which, when absent, one has the intention of returning. "Domicile" is composed of two elements, residence and intention, and both of these must concur. "Residence," without the requisite intention to remain, will not suffice to give one a domicile, nor will an intention to change one's domicile, unaccompanied by actual removal, constitute a "domicile." State v. Allen, 35 S. E. 990, 992, 48 W. Va. 154, 50 L. R. A. 284, 86 Am. St. Rep. 29.

"Residence" and "domicile" do not have the same meaning. The first is used to indicate the place of dwelling, whether permanent or temporary; the second to denote a fixed permanent residence to which, when absent, one has the intention of returning. The distinction is the same as is sometimes made between "actual residence" and "legal residence" or "inhabitaney." The actual residence is not always the legal residence or inhabitaney of a man. A foreign minister actually resides and is personally present at the port to which he is accredited, but his legal residence or inhabitaney and domicile are in his own country. Fitzgerald v. Arel, 16 N. W. 712, 713, 63 Iowa, 104, 50 Am. Rep. 733.

"Residence" is defined to be a place of abode; a dwelling; a habitation; the act of abiding or dwelling in a place for some continuance of time. "Residence" is often used to express different meanings according to the subject-matter, and is not synonymous with "domicile" or "legal residence," which means more than "residence." Cin-

cinnati, H. & D. R. Co. v. Ives, 3 N. Y. Supp. 895.

"Domicile" has a more extensive signification than the term "residence." In addition to a residence, it embraces within its meaning the intention of making that residence the home of the party. Foster v. Hall, 23 Tenn. (4 Humph.) 346, 348; Long v. Ryan (Va.) 30 Grat. 718, 719.

"Domicile" is residence combined with intention. It has been accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. A man can have but one domicile for one and the same purpose at any one time, though he may have numerous places of residence. His place of residence most generally is his place of domicile, but it obviously is not by any means necessarily so, for no length of residence without the intention of remaining will constitute domicile. Stout v. Leonard, 37 N. J. Law (8 Vroom) 492, 495.

A domicile is something more than a temporary residence, however long such stay may continue. The permanence which is to make it a residence does not depend solely upon past duration, but on the probability of a future continuance, growing out of the object of the sojourn in such place. The length of time necessary to establish a domicile cannot be determined by any fixed rule, but the nature of the business in which the party intends to be engaged may be looked at to determine the uncertainty or probability of the duration. Burrill v. Jewett, 25 N. Y. Super. Ct. (2 Rob.) 701, 702.

"Domicile" has a broader meaning than "residence"; it includes residence, but actual residence is not indispensable to retain a domicile after it is once acquired; it is retained by the mere intention not to change it. Krone v. Cooper, 43 Ark. 547, 549.

"Residence" is not synonymous with "domicile," for a man may have more than one place of residence, but he can have but one domicile. Savage v. Scott, 45 Iowa, 130, 133; Pacific Mut. Life Ins. Co. v. Tompkins (U. S.) 101 Fed. 539, 543; Corel v. Chicago, R. I. & P. Ry. Co. (U. S.) 123 Fed. 452, 454; State v. Cunningham, 55 Atl. 654, 75 Vt. 332; Witbeck v. Marshall-Wells Hardware Co., 68 Ill. App. 101, 110.

"Domicile" and "residence," though often used as synonymous, have in law two distinct meanings. The essential distinction between "residence" and "domicile" is this: the first involves the intent to leave when the purpose for which he has taken up his abode ceases; the other has no such intent—the abiding is *animo manendi*. One may seek a place for the purpose of pleasure, business, or health; if his intent be to remain, it becomes his domicile; if his intent be to leave as soon as his purpose is accomplished, it is his resi-

dence. Perhaps the most satisfactory definition is that one is a resident of a place from which his departure is indefinite as to time and definite as to purpose, and for this purpose he has made the place his temporary home. *Brisenden v. Chamberlain* (U. S.) 53 Fed. 307, 311.

The difference between a "residence" and a "domicile" may not be capable of easy definition, but every one can see at least this distinction: A person domiciled in one state may, for temporary reasons, such as health, reside for one or more years in some other place deemed more favorable. He does not, by so doing, forfeit his domicile in the first state, or in any proper sense become a non-resident of it, unless some intention manifested by some act of abandoning his residence in the first state is shown. *Walker's Estate v. Walker*, 1 Mo. App. 404, 413; *McFarlane v. Cornelius*, 73 Pac. 325, 329, 43 Or. 513.

"Domicile" is the habitation fixed in any place with an intention of always staying there. No length of residence without the intent of remaining constitutes "domicile," while "residence" means the actual dwelling place for some continuance of time. *Bartlett v. City of New York*, 7 N. Y. Super. Ct. (5 Sandf.) 44, 47 (citing *In re Thompson* [N. Y.] 1 Wend. 43, 45, and Webster).

"Domicile," as used in a statute providing that a writ of attachment may issue when the defendant is about to remove out of the state with intent to change his domicile, denotes an opposite condition, with reference to habitation, to the words "not a resident," but not differing in degree. One who is not a resident of the state is one who has a domicile elsewhere. One who has a domicile in the state cannot be a nonresident while temporarily absent from the state. "Domicile" is ordinarily a word of broader meaning than "residence." *Chariton County v. Moberly*, 59 Mo. 238, 242.

A distinction has been recognized in Tennessee between "residence" and "nonresidence," within the meaning of the attachment laws, and "domicile" or "citizenship." *Southern Ry. Co. v. McDonald* (Tenn.) 59 S. W. 370, 373.

There is a wide difference between "domicile" and mere "residence." Of course, they may be and usually are at the same place, and it is quite obvious that they may be at different places. A domicile is but the established, fixed, permanent, and may therefore be said to be the ordinary, dwelling place or place of residence of a party, as distinguished from his temporary and transient, though actual, place of residence. One is his legal residence as distinguished from his temporary place of abode, and one is his home as distinguished from the place or places to

which business or pleasure may temporarily call him. When a statute speaks of a residence which, if continued six years, will establish the settlement of a person, it must mean a permanent fixed residence, and not one which is temporary merely, since otherwise an absence from it of ever so short duration, and for an object wholly transient in its nature, would effectually interrupt it by the commencement of a residence in another place, it being wholly incompatible that two residences under such a statute should exist in the same person at the same time. *Town of Salem v. Town of Lyme*, 29 Conn. 74, 79.

There is a difference between a "residence" and a "domicile," which, however, may not be capable of easy definition; that is, it may be difficult to define both terms in such manner as to escape criticism. But every one can see at least this distinction: a person "domiciled" in one place may, for the sake of his health, "reside" one or more years in some place, the climate of which is supposed to be more favorable to his constitution. *McFarlane v. Cornelius*, 73 Pac. 325, 329, 43 Or. 513.

"Residence" and "domicile" are not treated as synonymous under the attachment laws of New York or Pennsylvania; so it is held that a person starting to leave the state, with the avowed intention of moving away, but not having actually passed the borders of the state, is still resident within the state, though intending to leave it, and is not subject to foreign attachment. *Eberly v. Rowland* (Pa.) 1 Pears. 312, 313.

In determining the question of residence for the purpose of an attachment, the distinction must always be kept in mind between it and domicile. The fact that a defendant never acquired a residence in another place, and had all the time during absence an intention to return and resume housekeeping with his family in this city, would be sufficient to constitute a "domicile" within this state. But the word "residence," as used in section 636 of the Code, means the abode or place where one actually lives, and not one's legal domicile. In other words, a reading of this section will show that it was intended to supply a method for the collection of debts by appropriating property of the debtor to be found within the state when proceedings against the debtor personally are impossible or liable to be made ineffectual, and thus it allows the use of the process in rem when process in personam could not be served. *Rosenzweig v. Wood*, 63 N. Y. Supp. 447, 449, 30 Misc. Rep. 297.

"Residence" and "domicile" are not synonymous terms as used in attachment laws, though the distinction is not always accurately drawn. It is the actual and not the legal residence which is meant in attachment stat-

utes. "Domicile" includes residence with an intention to remain, while no length of residence without intention of remaining constitutes domicile. In *Keller v. Carr*, 40 Minn. 428, 42 N. W. 292, it was ruled that a debtor may remain or reside out of the state so long and under such circumstances as to be a "nonresident" within the meaning of the statute relating to attachments, although, by reason of his intention to remain, his political domicile continues to be in the state; but a mere casual or temporary absence of a debtor from a state on business or pleasure will not render him a nonresident, even though he may not have a house of usual abode here at which a summons might be served against him. "Residence" was defined as an act, "domicile" as an act coupled with an intent. It was said that a man may have residence in one state or county and his domicile in another, and he may be a nonresident of the state of his domicile in the sense that his place of actual residence is not there. *Stickney v. Chapman*, 42 S. E. 68, 69, 115 Ga. 759.

In the contemplation of the attachment law there is or may be a marked distinction between "domicile" and "residence." The domicile of a citizen may be in one state and his residence in another; they generally, however, are at the same place. *Morgan v. Nunes*, 54 Miss. 308, 310.

In determining the question of residence for the purpose of an attachment, the distinction must always be kept in mind between it and domicile. The fact that a defendant never acquired a residence in another place, and had all the time during absence an intention to return, would be sufficient to constitute a domicile within this state. But the word "residence," as used in section 636 of the Code, means the abode or place where one actually lives, and not one's legal domicile. In other words, a reading of this section will show that it was intended to supply a method for the collection of debts by appropriating property of the debtor to be found within the state when proceedings against the debtor personally are impossible or liable to be made ineffectual, and thus it allows the use of the process in rem when process in personam could not be served. *Rosenzweig v. Wood*, 63 N. Y. Supp. 447, 449, 30 Misc. Rep. 297.

The writers upon the law of nations distinguish between a temporary residence in a foreign country for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel "domicile," which he defines to be "a habitation fixed in any place with an intention of always staying there." A "domicile," in the sense in which the term is used by him, requires not only actual residence in a foreign country, but an intention of always staying there. Actual residence without this intention amounts to

no more than simple "habitation." The *Venus*, 12 U. S. (8 Cranch) 253, 278, 290, 3 L. Ed. 562.

The word "domicile," in the statute requiring every inhabitant of the state to be sued in the county of his domicile, is used in the sense of "residence," but there may be a difference between a man's residence and his domicile. He may have his domicile in one place and still may have a residence in another, for, although a man for most purposes can be said to have but one domicile, he may have several residences. *Brown v. Boulden*, 18 Tex. 431, 433.

There is a marked distinction between "domicile" and "residence." The term "residence" simply indicates the place of abode, whether permanent or temporary; "domicile" denotes a fixed permanent residence to which, when absent, one has the intention of returning. A party may have different residences, but he can have but one domicile at the same time. *Corel v. Chicago, R. I. & P. Ry. Co.* (U. S.) 123 Fed. 452, 454.

The term "domicile," as used in the bankruptcy act, is a broader term than the term "residence," so that where it appears that the person was born and raised in a state, and lived and voted there, and paid taxes there, and that he has never voted in any other state, and is now a traveling salesman for a tobacco house in such state, he will be held to have his domicile there. *In re Grimes* (U. S.) 94 Fed. 800, 801.

#### Residence synonymous.

The terms "residence" and "domicile" have been held to be synonymous. *De Mell v. De Mell*, 120 N. Y. 483, 491, 24 N. E. 996, 17 Am. St. Rep. 652; *People v. Platt*, 117 N. Y. 159, 167, 22 N. E. 937; *In re Cleveland's Will*, 59 N. Y. Supp. 985, 987, 28 Misc. Rep. 369; *Crawford v. Wilson* (N. Y.) 4 Barb. 504, 520; *Ryall v. Kennedy*, 40 N. Y. Super. Ct. (8 Jones & S.) 347, 360; *Houghton v. Ault* (N. Y.) 16 How. Prac. 77, 85, 86; *In re Zerega's Will*, 20 N. Y. Supp. 417, 418; *People v. Platt*, 3 N. Y. Supp. 367, 369, 50 Hun. 454; *Isham v. Gibbons* (N. Y.) 1 Bradf. Sur. 69, 82; *Wallace v. Castle*, 68 N. Y. 370, 374; *Kennedy v. Ryall*, 67 N. Y. 379, 386; *Modern Woodmen of America v. Hester*, 71 Pac. 279, 281, 66 Kan. 129; *Carpenter v. Carpenter*, 2 Pac. 122, 126, 30 Kan. 712, 46 Am. Rep. 108; *Englehart-Davidson Mercantile Co. v. Burrell Sisters*, 66 Mo. App. 117, 123; *State ex rel. Blackburn v. Smith*, 64 Mo. App. 313, 319; *Wood v. Roeder*, 63 N. W. 853, 855, 45 Neb. 311; *Walker v. Stevens*, 72 N. W. 1038, 1039, 52 Neb. 653; *Berry v. Wilcox*, 62 N. W. 249, 250, 44 Neb. 82, 48 Am. St. Rep. 706; *State v. School Dist. of City of Superior*, 75 N. W. 855, 856, 55 Neb. 317; *Allgood v. Williams*, 8 South. 722, 92 Ala. 551; *Witbeck v. Marshall-Wells Hardware Co.*, 58 N. E. 929, 930, 188

Ill. 154; *Smith v. Smith*, 75 N. W. 783, 785, 7 N. D. 404; *Graham v. Graham*, 81 N. W. 44, 9 N. D. 88; *Ayer v. Weeks*, 18 Atl. 1108, 1109, 65 N. E. 248, 6 L. R. A. 716, 23 Am. St. Rep. 37; *Andrews v. Andrews*, 57 N. E. 333, 334, 176 Mass. 92; *Hipp v. State* (Tex.) 75 S. W. 28, 29, 62 L. R. A. 973; *Olivieri v. Atkinson*, 46 N. E. 422, 168 Mass. 28; *Stoughton v. City of Cambridge*, 43 N. E. 106, 165 Mass. 251; *McDaniel v. King*, 59 Mass. (5 Cush.) 469; *Kempster v. City of Milwaukee*, 72 N. W. 743, 744, 97 Wis. 843.

St. 1852, § 301, provides that any person who shall have his residence in the city of Boston on the 1st day of January shall, on the 1st day of May following, be taxed in that city, notwithstanding he may have removed therefrom before the 1st day of May. Held, that the words "any person who shall have his residence in Boston" meant only those whose domicile was in Boston on the 1st day of January, and does not include a person who habitually resides for 7 months of the year in his own house in another town where he has for 20 years been taxed for his personal property, and voted and exercised the rights of citizenship, although he spends 5 months of each year, including the winter months, in a house owned by him in Boston. *Lee v. City of Boston*, 68 Mass. (2 Gray) 484, 490.

A man's residence is the place of his domicile: If he is a single man, the place where he keeps his effects and to which he is accustomed to resort as his home; if a married man, the place where he keeps and supports his family. Occasional absence or employment at other places has been uniformly held not to suspend or interrupt his residence at the place of his usual domicile, so long as this remain visible and notorious. *Town of Bristol v. Town of Rutland*, 10 Vt. 574, 576.

"Residence," within the statute of limitation (Rev. St. 1846, c. 140, § 9), providing that the time of a party's residence without the state shall not be counted, etc., means the domicile or living without the state, as where a person goes to a place intending to remain and establish there his domicile or permanent residence, and does so remain. *Conrad v. Nall*, 24 Mich. 275, 277.

"The word 'residence' is in itself susceptible of different meanings. It may mean residence of a temporary or transient character, or it may mean one's fixed and settled home in the sense of having no other home or place of residence. Its meaning depends on the object and purpose with which it is used, and the subject-matter to which it refers. When used in a constitutional provision, as a qualification for the exercise of the right of suffrage, courts of high authority have held it synonymous with

'domicile.'" *Shaeffer v. Gilbert*, 20 Atl. 434, 435, 73 Md. 66.

"Residence," when used in statutes, is generally construed to mean "domicile." This is especially true with regard to the subjects of voting, eligibility to office, taxation, jurisdiction in divorce, probate administration, etc. The terms "legal residence" or "habitation" and "domicile" mean the same thing, and by "legal residence" is meant the place of a man's fixed habitation, where his political rights, such as the elective franchise, are to be exercised. *People v. Platt*, 3 N. Y. Supp. 367, 369, 50 Hun. 454.

"In *Wood v. Roeder*, 45 Neb. 311, 63 N. W. 853, it was decided that the word 'residence' is synonymous with the term 'domicile,' and the domicile of a person is the place where he has a fixed and permanent home, and to which, when absent, he has the intention of returning; and to effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, per se insufficient." *State v. School District of City of Superior*, 75 N. W. 855, 856, 55 Neb. 317.

"Residence," within the meaning of Const. art. 7, § 1, which requires a voter to reside in the state six months immediately preceding an election to be entitled to vote, means an actual settlement within the state adopted as a fixed habitation. "It is synonymous with 'home' or 'domicile,' and requires not only a personal presence for the requisite time, but a concurrence therewith of an intent to make the place of habitation the true home; and one who has made a home or domicile in some other state or territory where his family resides cannot, by a sojourn in the state, however long, after abandoning such former domicile, acquire a 'residence' in the constitutional sense." *Sharp v. McIntire*, 46 Pac. 115, 116, 23 Colo. 99.

"Residence," within the meaning of Const. art. 6, § 1, declaring that every male person born in the United States or naturalized, who is 21 years old or upward, and who has resided in the state 12 months preceding the election, and 90 days in the county in which he offers to vote, may be deemed an elector, is essentially synonymous with "domicile," denoting a permanent, as distinct from a temporary, dwelling place. There may be a residence for a specific purpose, as at summer or winter resorts, or to acquire an education, or some art or skill, in which the animus revertendi accompanies the whole period of absence, and this is consistent with the retention of the original and permanent home, with all its incident privi-

leges and rights. "Domicile" is a legal word, and differs in one respect, and perhaps in others, in that it is never lost until a new one is acquired, while a person may cease to "reside" in one place and have no fixed habitation elsewhere. *Hannon v. Grizard*, 89 N. C. 115, 120.

"Residence," as contemplated by the framers of our Constitution, for political or voting purposes means a place of fixed present domicile. An unmarried steamship clerk, employed as such for over three years, who resides on a steamer, and has no other place of residence during that time, acquires no voting domicile at the steamer's home port. *Howard v. Skinner*, 40 Atl. 379, 380, 87 Md. 553, 40 L. R. A. 753.

For the purpose of voting, of admission to public schools, and administration of estates, there is no substantial difference between the words "residence" and "domicile," though they are not always synonymous. For business purposes, and perhaps for purpose of taxation, a man may have more than one residence, but he can have but one domicile. *Grant v. Jones*, 89 Ohio St. 503, 515.

The word "domicile," when used in connection with subjects of domestic policy, as taxation, settlement, voting, and the attachment law, implies the same as "residence"; that is, the home or habitation fixed in any place, without a present intention of removing therefrom. Therefore a change of place for a temporary purpose, with an intention of returning, is not a change of domicile. *Stratton v. Brigham*, 35 Tenn. (2 Sneed) 420, 422.

In a technical and circumscribed meaning of the terms "domicile" and "residence," there may be some distinction; but in reference to administration of estates, where it appeared that a person was resident of one state for two years prior to her death, there will be held to be no distinction between "residence" and "domicile." *State v. Superior Court of King County*, 39 Pac. 818, 819, 11 Wash. 111.

The word "residence," as used in the statute conferring jurisdiction in divorce, does not mean a mere temporary abiding place, much less a place selected by the party for the purpose of securing a divorce. In *Hinds v. Hinds*, 1 Iowa, 86, Justice Wright says that "residence" means a legal residence; not an actual residing alone, but such a residence as that, when a man leaves it temporarily or on business, he has an intention of returning to it, and which, when he has returned, becomes and is, *de facto* and *de jure*, his domicile, his residence. *Whitcomb v. Whitcomb*, 46 Iowa, 437, 443.

"Residence out of the state," in order to take a case out of the statute of limitations,

must be something more than a mere place of abode; it must be the domicile of the party, which can only be in one place; and it must have the incidents which may vary under different circumstances, but which determine the place of his home which the debtor had adopted with an intention of remaining, and to which, when he is absent, he intends to return. *Campbell v. White*, 22 Mich. 178, 193.

The word "residence," as used in the New York Code relating to provisional remedies, means legal residence, and "legal residence" means the place of a man's fixed habitation, where his political rights are to be exercised, and where he is liable to taxation. *Houghton v. Ault* (N. Y.) 16 How. Prac. 77, 80.

Under Revision, p. 315, § 1, giving the court of chancery jurisdiction of divorce proceedings for desertion, where the complainant or defendant shall have been a resident of the state for the term of three years at the time of filing the bill or complaint, etc., the "residence" required means fixed domicile, or permanent home, and that shall have been continuous. Evidence that the complainant had been at a hotel in the state, sometimes two weeks at a time, and that he came there several times during the year, does not constitute "residence" within the statutory meaning of the word. *McShane v. McShane*, 45 N. J. Eq. (18 Stew.) 341, 342, 19 Atl. 465.

"Residence" and "domicile" are not absolutely synonymous terms, but the residence of a man who has a family which he maintains, and which has an established home, is *prima facie* with that family; or, wherever he locates that family in anything like a fixed residence, it is presumptively his chosen place of residence. Wherever he may go, for business or pleasure, he resides at home, and home is where the family dwells. *Keith v. Stetter*, 25 Kan. 100, 108.

The statutory terms "resident" or "residence," as used in the divorce statutes, contemplate an actual residence, with substantially the same attributes as are intended when the term "domicile" is used. They do not mean the place where the defendant in fact resides for the time being; they mean a residence of a permanent and fixed character—a domicile. The terms "resident" and "residence" in these statutes are equivalent in meaning to that of "citizen" and "domicile." *Hamill v. Talbott*, 81 Mo. App. 210, 215.

The terms "residence" and "domicile" have been held to be synonymous. To effect a change of domicile for the purpose of succession, there must be not only a change of residence, but an intention to abandon the former domicile and acquire another as



the sole domicile. Residence alone has no effect per se, except as a ground from which to infer intention. Length of residence will not alone effect the change, intention alone will not do it, but the two must be concurrent. In *re Cleveland's Will*, 59 N. Y. Supp. 985, 987, 28 Misc. Rep. 369.

The term "domicile," used in reference to the pauper laws on the gaining of settlements by paupers, should be construed as strictly synonymous with the terms "residence," "dwelling place," or "home," though in its ordinary sense it has not the same restricted meaning as those terms have in the statutes relating to settlements. Inhabitants of *Warren v. Inhabitants of Thomaston*, 43 Me. 403, 418, 69 Am. Dec. 69.

"Domicile" is synonymous with "residence" as the latter is used in statutes with regard to the subjects of voting, eligibility to office, taxation, etc. A change of municipal domicile is a question of act and intention. On the one hand, mere absence from the former place of abode does not destroy domicile there, nor does presence at the place for a temporary purpose fix domicile there. The terms "legal residence," "habitation," and "domicile" mean the same thing, and by "legal residence" is meant the place of a man's fixed habitation, where his political rights, such as the elective franchise, are exercised. *People v. Pratt*, 3 N. Y. Supp. 367, 369, 50 Hun, 454.

In a technical and circumscribed meaning of the terms "domicile" and "residence," there may be some distinction; but in reference to administrations of estates, where it appeared that a person was resident of one state for two years prior to her death, there will be held to be no distinction between "residence" and "domicile." *State v. Superior Court of King County*, 39 Pac. 818, 819, 11 Wash. 111.

"Domicile" is that place where a man has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning. Citing *Stratton v. Brigham*, 34 Tenn. (2 Sneed) 420, 421, where it is said there is no doubt a distinction between "residence" and "domicile." Domicile is the habitation fixed in any place, with an intention of always staying there. In this sense, he who stops even for a long time in a place for the management of his affairs has only a habitation there, but no domicile. Thus, the envoy of a foreign prince has not his domicile at the court where he resides. This is national domicile in the sense of the public law by which the national character of the person and the right of succession to movable property are determined. But when used in connection with subjects of domestic policy, as taxation, settlement, voting, and the attachment law, the word "domicile" has a

more confined and restricted meaning, and implies the same as "residence"; that is, the home or habitation fixed in any place, without a present intention of removing therefrom. *Hascall v. Hafford*, 65 S. W. 423, 424, 107 Tenn. 355, 89 Am. St. Rep. 952.

The term "residence," as used in Laws 1883, c. 358, § 54, which requires that the persons appointed as commissioners of quarantine should be citizens who shall reside in the metropolitan police district, is equivalent to the word "domicile." *People v. Platt*, 3 N. Y. Supp. 367, 371, 50 Hun, 454.

A man's "domicile" is prima facie the place of his residence, but this may be rebutted by showing that such residence is either constrained or transitory. *Graveley v. Graveley*, 25 S. C. 1, 17, 60 Am. Rep. 478.

#### Resident distinguished.

A "resident" is a person coming into a place with intention to establish his domicile or permanent residence, and who in consequence actually remains there. Time is not so essential as the intent, executed by making or beginning an actual establishment, though it be abandoned in a longer or shorter period. Citing *Stratton v. Brigham*, 34 Tenn. (2 Sneed) 420, 421, where it is said there is no doubt a distinction between "residence" and "domicile." Domicile is the habitation fixed in any place with an intention of always staying there. In this sense, he who stops even for a long time in a place for the management of his affairs has only a habitation there, but no domicile. Thus, the envoy of a foreign prince has not his domicile at the court where he resides. This is national domicile in the sense of the public law by which the national character of the person and the right of succession to movable property are determined. But when used in connection with subjects of domestic policy, as taxation, settlement, voting, and the attachment law, the word "domicile" has a more confined and restricted meaning, and implies the same as "residence"; that is, the home or habitation fixed in any place without a present intention of removing therefrom. *Hascall v. Hafford*, 65 S. W. 423, 424, 107 Tenn. 355, 89 Am. St. Rep. 952.

The word "resident," as used in Rev. St. 1889, § 7999, making it the duty of the enumerator to go about the school district and get from the parents or guardians the names of each and every child of school age therein residing, is not synonymous with the word "domicile," but includes only those who are absolutely within the district, so as to entitle them to be counted and enumerated. *State v. Smith*, 64 Mo. App. 313, 319.

The fact that a person's family may continue to reside within the state, and that his

home or domicile may be there, is not enough to make such person a resident of the state, so as to prevent judgment issuing against him as a nonresident debtor, for a person may have his home or domicile in the state, and be at the same time a resident of another. The domicile is the habitation fixed in any place with an intention of always staying there, while simple residence is much more temporary in its character. The question is, where is the person's actual residence, not his domicile? No length of residence, unless accompanied with a design of remaining beyond the limits of the state, constitutes non-residence. When a person left the state with that intention, he became a nonresident within the meaning of the attachment laws. *City of New York v. Genet* (N. Y.) 4 Hun, 487, 489.

The words "inhabitant" and "resident," in a divorce statute relative to the residency and inhabitancy of the plaintiff, do not naturally or necessarily imply that the party, in order to be a resident or inhabitant, must have any established domicile in the state. A person may reside in and be a resident of a place or state for years without acquiring a domicile. *Wallace v. Wallace*, 50 Atl. 788, 792, 62 N. J. Eq. 509.

#### **Of unemancipated minor.**

The domicile of an unemancipated minor is, if his father be living, the domicile of the latter. In *re Cannon's Estate*, 15 Pa. Co. Ct. R. 312, 314.

#### **DOMICILE BY OPERATION OF LAW.**

"Domicile" is correctly defined as being either one of origin, of choice, or by operation of law. Every person must be assigned to one of these. So that the place of residence of the father of a legitimate child, or, if illegitimate, of its mother, at its birth, is its domicile of origin. As an infant is incapable of changing its domicile by choice, it follows that wherever may be the domicile of its father, if it is legitimate, or otherwise of its mother, controls. But where the child has neither legal father nor living mother, and where neither is shown to have maintained a domicile at any place, then it must follow that the child's domicile must be fixed by operation of law. *Louisville & N. R. Co. v. Kimbrough* (Ky.) 74 S. W. 229.

#### **DOMICILE OF CORPORATION.**

The word "domicile," as used in Rev. St. art. 4378, providing that the public office of a railroad corporation shall be considered the domicile of such corporation, is manifestly intended to be understood in its general and popular sense. In this sense it denotes "residence," and should be treated as synonymous with such word. *Texas & P. R. Co. v. Edmison* (Tex.) 62 S. W. 635, 636.

"Domicile," at least for any given purpose, is single by its essence. A corporation does not differ from a natural person in this respect. If any person, natural or artificial, as a result of choice, or on technical grounds of birth or creation, has a domicile in one place, it cannot have elsewhere, because what the law means by "domicile" is the one technically pre-eminent headquarters, which as a result, either of fact or of fiction, every person is compelled to have in order that by aid of it certain rights and duties which have been attached to it by the law may be determined. It is settled that a corporation has its domicile in the jurisdiction of the state which created it, and, as a consequence, that it has not a domicile anywhere else. *Bergner & Engel Brew. Co. v. Dreyfus*, 51 N. E. 531, 532, 172 Mass. 154, 70 Am. St. Rep. 251.

The "domicile" of a corporation has been defined to be where the governing power of the corporation is exercised; where those meet in council who have a right to control its affairs and prescribe what policies of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. Thus, where the by-laws of a corporation providing that the semiannual meetings of its stockholders shall be held in T., and that its offices shall be at T. or any other city as the board of directors may establish, the domicile of the corporation was at T. *Grundy County v. Tennessee Coal, Iron & R. Co.*, 29 S. W. 116, 119, 94 Tenn. (10 Pickle) 295.

#### **DOMICILE OF ORIGIN.**

The "domicile of origin" is the domicile of a person's birth, used to distinguish the domicile of a person's birth from a domicile of choice, which he may acquire by selection after he becomes an independent person. *Price v. Price*, 27 Atl. 291, 293, 156 Pa. 617.

Where a person has either no fixed place of residence, or has two homes and the scale is almost evenly balanced between them, the legal presumption, as to his domicile, is in favor of what is called the "domicile of origin," by which is meant not the place where he may chance to have been born, but the home of his parents. *Prettyman v. Conway*, 32 Atl. 15, 17, 9 Houst. 221.

The "domicile of origin"—by which is meant the place of birth and immediate connections; the place in which, according to the Roman law, a man is born, or ought to be born—subsists during minority, and until the person has legally the will to change it by arriving of age. It is a domicile fixed by law, what the law calls a "necessary domicile," and, independently of the parties'

will, attends him through his minority. The Supreme Court of Pennsylvania (*School Directors of Borough of Westchester v. James* [Pa.] 2 Watts & S. 571, 37 Am. Dec. 525) states this matter with legal precision, as well as with force and beauty of sentiment: "No infant who has a parent, *sui juris*, can in the nature of things have a separate domicile. This springs from the status of marriage, which gives rise to the institution of families; the foundation of all domestic happiness and virtue which is to be found in the world. The education and bringing up of children makes it indispensable that they be brought up in the bosom and as a part of their parent's family, without which the father could not perform the duties he owes them, or receive from them the service that belongs to him. The parent's domicile, therefore, is consequently and unavoidably the domicile of the child." *White v. Brown* (U. S.) 29 Fed. Cas. 983, 992.

#### DOMICILE OF SUCCESSION.

The "domicile of succession," as distinguished from a commercial, political, or forensic domicile, is the actual residence of a man within some particular jurisdiction, of such character as shall, in accordance with well-established principles of the public law, give direction to the succession to his personal estates. *Smith v. Croom*, 7 Fla. 81, 82.

#### DOMICILIATION.

In Spain "domiciliation" is in most respects equivalent to naturalization. It may be done by being born in the kingdom, by being converted to the Holy Catholic faith there, by establishing a domicile, obtaining the right of residence in some settlement, marrying a native woman, and domiciliating himself in the kingdom, by attaching himself to the soil, and by purchasing and acquiring real property and possession. *Yates v. Iams*, 10 Tex. 168, 169.

#### DOMINANT ESTATE OR TENEMENT.

A dominant estate is the one enjoying the easement and to which it is attached. *Walker v. Clifford*, 29 South. 588, 591, 128 Ala. 67, 86 Am. St. Rep. 74.

A dominant estate is an estate dependent of necessity for enjoyment, on some use, in the nature of an easement, in another estate. *Dillman v. Hoffman*, 38 Wis. 559, 572.

The term "dominant estate" in the law of easements applies to the estate to the owner of which, by reason of such ownership, attaches the right of an easement in other property known as the "servient estate." *Stevens v. Dennett*, 51 N. H. 324, 330.

When one part of an estate is dependent of necessity for enjoyment on some use in the nature of an easement in another part, the former is the dominant, and the latter the servient, estate. *Galloway v. Bone-steel*, 26 N. W. 262, 65 Wis. 79, '56 Am. Rep. 616; *Benedict v. Barling*, 48 N. W. 670, 671, 79 Wis. 551.

The land to which an easement is attached is called the "dominant tenement." Civ. Code Cal. 1903, § 803; Civ. Code Mont. 1895, § 1252; Rev. Codes N. D. 1899, § 3353; Civ. Code S. D. 1903, § 269; Rev. St. Okl. 1903, § 4054.

#### DOMINIO.

A term used in the Spanish law, which does not necessarily imply ownership, but may mean simply the *dominio alto*, which is the right of eminent domain, which belongs to every sovereign state over private property, or the *dominio directo*, or the *dominio utile*. *Hart v. Burnett*, 15 Cal. 530, 553.

#### DOMINION.

"Dominion" is defined to be the rights in a thing from which arise the power of disposition and the right of claiming it. *Baker v. Westcott*, 11 S. W. 157, 159, 73 Tex. 129.

Dominion, when full, is defined to be the right in a corporeal thing from which arises the power of disposition and of claiming it from others. All dominion has two causes, proximate and remote. Remote is the title which vests a right to the thing, and gives cause of action against the vendor, who has not delivered the thing sold; and proximate is the obtaining possession by delivery of the thing sold, which, without anything else, being preceded by the title, vests the right in the thing, which is the dominion. The consequence is that the right to the thing gives a personal action, and the right in the thing gives the right against any possessor. It serves, then, for a general rule that the title never gives a right in the thing, or, what is the same, the dominion, unless delivery be joined with it. Consequently neither is title sufficient without delivery, nor delivery without title. *Coles v. Perry*, 7 Tex. 109, 136 (citing 1 *White's Recop.* 342-345).

#### DOMUS.

The word "domus" or "house," in a devise of such property, has been said not to be sufficient to pass the garden and curtilage surrounding the house, when the words "cum pertinentiis" are not used in the devise in connection with such words. *Bennet v. Bit-*

tie (Pa.) 4 Rawle, 388, 342 (citing 2 Ch. Cas. 27; Kiehlway, 27).

### DOMUS MANSIONALIS.

"Domus mansionalis," or mansion house, was said in 1 Hale's P. O. 558, 559, not only to include the dwelling houses, but also the outhouses that are parcel thereof, as barns, cow houses, dairy houses, etc.; but if the barn, etc., be no parcel of the messuage, or if it be far remote from the dwelling house, and not so near as to be reasonably esteemed parcel thereof, then the breaking of it is not burglary, for it is not domus mansionalis, nor any part thereof. *State v. Brooks*, 4 Conn. 446, 448.

The words "domus mansionalis" mean in law the mansion house or outset and in-set houses, parcel of a mansion house. *State v. Sutcliffe* (S. C.) 4 Strob. 372, 378.

### DONATE—DONATION.

Donation is defined by Bouvier to be the act by which the owner of a thing voluntarily transfers the title and possession of the same, without any consideration. *Georgia Penitentiary Co. v. Nelms*, 65 Ga. 499, 504, 38 Am. Rep. 798; *Indiana N. & S. Ry. Co. v. City of Attica*, 56 Ind. 476, 486; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198, 202.

Webster defines a donation to be "that which is given or bestowed; that which is transferred to another gratuitously, or without a valuable consideration; a gift; a grant." *Indiana N. & S. Ry. Co. v. City of Attica*, 56 Ind. 476, 486.

A constitutional requirement that any legislative act making a donation or gratuity must be passed by a two-thirds majority of each house does not include an act giving the labor of convicts to a corporation free of charge, on its giving satisfactory obligations to feed, clothe, and provide for the same. *Georgia Penitentiary Co. v. Nelms*, 65 Ga. 499, 504, 38 Am. Rep. 798.

To discharge an obligation which rests upon full value received is not a donation or gift. *Erskine v. Steele County* (U. S.) 87 Fed. 630, 635.

#### As agreement to pay.

The electors of a town meeting resolved to donate \$1,000 to the plaintiffs for the use of a bridge "over Rock river at a specified point in the town, providing defendants would, by a day named, erect a substantial bridge for the public at that point." Held that, though the word "donate" usually imports a gift, yet, in connection with the words following it in such resolution, it expressed

an agreement to pay the plaintiffs a consideration for constructing a bridge for the public use. *Goodhue v. Town of Beloit*, 21 Wis. 636, 642.

#### As appropriate.

"Donated," as used in Code 1851, tit. 14, c. 65, whereby the State University was established and land granted by Congress was "donated to said University," meant simply "appropriated." *Wearry v. State University*, 42 Iowa, 335, 338.

#### As gift to public cause or charity.

The word "donation" is more aptly used to describe that which is given to a public cause or charity than to indicate a bounty to an individual. *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 602, 23 Atl. 501, 505.

The word "donate" means to give generally for a specific object, to bestow freely, to grant, and in an act of Congress aiding railroads amounts to a grant. *State v. Sioux City & P. R. Co.*, 7 Neb. 357, 373.

#### As a grant.

A statute authorizing a city to make a donation to a railroad means an absolute gift or grant, without any condition or consideration. *Indiana N. & S. Ry. Co. v. City of Attica*, 56 Ind. 476, 486; *Wilkinson v. City of Peru*, 61 Ind. 1, 9.

A donation is a gift in gratuity, and not a grant of land founded on a consideration, and where the government, pursuant to Jay's treaty of 1794, granted title to persons who were entitled to the lands as British subjects prior to the treaty of 1783, such grant was not a donation. *Forsyth v. Reynolds*, 15 How. (U. S.) 358, 365.

#### Stock subscription distinguished.

A clear distinction between subscriptions to the capital stock of a railroad company or private corporation and donations or loans of credit to such a corporation is apparent from the reading of the constitutional provision providing that no city, town, township, or other municipality shall ever become a subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, but that the adoption of the article shall not be construed as affecting the right of such municipalities to make such subscriptions where the same have been authorized under existing laws by a vote of the people of such municipalities prior to such adoption. It is apparent that donations or loans of credit to such corporation are prohibited under all circumstances, but that a subscription may be made, if authorized prior to the adoption of the Constitution. *Town of Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 629, 23 L. Ed. 628.

**DONATIO CAUSA MORTIS.**

See "Gift Causa Mortis."

**DONATIO INTER VIVOS.**

See "Gift Inter Vivos."

**DONATIO MODALIS.**

The term "donatio modalis" is used to designate anything given to a person with the view that he first do something that shall benefit himself alone. *Fisk v. Flores*, 43 Tex. 340, 343 (citing 2 Colquhoun, Roman Civil Law, 109).

**DONATIO RELATA.**

A donatio relata is a donatio inter vivos which is given with reference to some service done. *Fisk v. Flores*, 43 Tex. 340, 343 (citing 2 Colquhoun, Roman Civil Law, 109).

**DONATIO REMUNERATORIA.**

A "donatio remuneratoria" is a donatio inter vivos given by way of reward for service done. *Fisk v. Flores*, 43 Tex. 340, 343 (quoting 2 Colquhoun, Roman Civil Law, 109).

**DONATIO SUB MODO.**

See "Donatio Modalis."

**DONATION (In Civil Law).**

A "donation" is defined by the civil law as a contract whereby a person gratuitously disposes himself of something by transferring it to another, to be his property who accepts it. It is a contract or agreement, and must be accepted by the donee; otherwise, it would be a mere offer. It must also be gratuitous, because otherwise it would be a sale or exchange. *Fisk v. Flores*, 43 Tex. 340, 343 (citing 3 Browne's Roman Law, 119).

Under the Spanish and Mexican law a more comprehensive meaning was attached to the term "donation" than the one usually given to it in our jurisprudence, as conditions were sometimes annexed which would be regarded at common law as changing the character of the transaction from one of gift to one of purchase. Under all systems donations are of three classes—pure, remuneratory, and conditional. They are pure when made without condition; in the exercise of a spirit of liberality, as charities. They are remuneratory when required by no legal obligation, but are made from a regard for services rendered. Such are pensions. Such was the character of the grants of land made in many instances to officers of the Revolution. They are conditional when accompanied with provisions intended to secure the

purposes for which they are made. These provisions may often impose the discharge of burdensome and expensive duties, without changing the character of the transactions. Grants of land for institutions of benevolence or instruction, or for hospitals, schools, asylums, and the like, are generally of this class. Conditions annexed to such grants, that the institutions shall be established, only operate as a requirement that the lands shall be appropriated to the purposes for which they are granted. The performance of the conditions does not constitute a consideration in the nature of a price, thereby converting the transactions into sales. This is so obviously true as to require no argument for its support. *Noe v. Card*, 14 Cal. 576, 610 (citing *Scott v. Ward*, 13 Cal. 458).

In France it is the unanimous sentiment (with the one dissent of Laurent) that what is done or given in satisfaction of a moral obligation is not a donation. *Succession of Miller v. Manhattan Life Ins. Co.*, 34 South. 723, 725, 110 La. 652.

**DONE.**

In holding that a provision in a contract that a boat was to be ready when corn was done was too indefinite to permit of a construction by either the court or the jury. The court say that the word "done" has no specific meaning, except in cookery. Bread is said to be done, and meat done, when they are sufficiently cooked for uses of food; but when is corn done? "Done" is not a word of art or trade, and requires no expert to tell us its meaning. *Silverthorn v. Fowle*, 49 N. C. 362, 363.

"Done," as used in Code Iowa, § 2134, which provides that, where a subcontractor on a railroad claims a lien for labor, he shall have 60 days from the last day of the month in which such labor was done within which to file his claim therefor, means "performed." It is sometimes used in the sense of "completed," but not in this case. *Sandval v. Ford*, 8 N. W. 324, 325, 55 Iowa, 461.

Code Ala. §§ 3223, 3226, providing that actions against the sureties of executors for any misfeasance or malfeasance of the executor must be brought within six years from the act "done" or omitted by the executor, was construed not to mean the time of the doing of the act by the executor which creates the liability, but the time that such liability is judicially ascertained. *Alexander v. Bryan*, 4 Sup. Ct. 107, 110, 110 U. S. 414, 28 L. Ed. 195.

**Done by agents, engines, or cars.**

Act July 1, 1874, as amended by Act July 1, 1879, providing that when a railroad company does not erect the fences required of it in the manner required, or when such fences

are not kept in good repair, such railroad company shall be liable for all damages done by agents, engines, or cars of such railroad to cattle, horses, or other stock, must be construed to mean that the injury to the stock must be caused by actual collision; that is, it must have been done by the agents, engines, or cars of the railroad. The words "damages done by agents, engines, or cars" involve the idea of actual collision, and do not cover a case of consequential damages; and hence a railroad company is not liable for an injury done to a horse frightened either by the approaching train, or the sound of the bell or whistle, or all of them combined, which in its flight was injured, either by jumping a cattle guard, or by coming in contact with a wire fence, or both; there being no actual collision or contact with the engine or cars of the train, or negligence or willful misconduct on the part of defendant's servants in charge of the train. *Schertz v. Indianapolis, B. & W. R. Co.*, 107 Ill. 577, 579.

## DONEY.

A "donee" is one who takes without valuable consideration. *Worthy v. Caddell*, 76 N. C. 82, 83.

One to whom is given a naked power is known in law as a "donee" and not a "trustee." The latter word implies an investiture of the legal title. A power to convey may be given without the investiture of title in the donee. *Dulin v. Moore*, 70 S. W. 742, 743, 96 Tex. 135.

Under a trust deed authorizing a board of managers of a charitable fund, on the death of the settlor, to direct its expenditure by trustees, or to cause the fund to be transferred to a corporation organized for like charitable purposes, the board have merely a power of appointment, and are not donees, within St. 1891, c. 425, § 1, imposing a tax to take effect on death of donor, and excepting gifts to charitable institutions therefrom. *Balch v. Shaw*, 54 N. E. 490, 174 Mass. 144.

## DOOR.

A "door" is defined to be a movable barrier of wood, metal, stone, or other material, consisting sometimes of one piece, but generally of several pieces together, and commonly placed on hinges, for closing a passage into a building, room, or other inclosure; and it was held that an injury to a casing was not an injury to the door. *State v. McBeth*, 31 Pac. 145, 49 Kan. 584 (citing 2 Cent. Dict. p. 733).

## DORMANT.

Bouvier defines "dormant" as sleeping, silent, not known, or not acting. *Elmira Iron*

& Steel Rolling Mill Co. v. Harris, 26 N. E. 541, 543, 124 N. Y. 280.

## DORMANT JUDGMENT.

A judgment not satisfied or barred by lapse of time, but temporarily inoperative so far as the right to issue execution is concerned, is usually called a "dormant judgment." *Draper v. Nixon*, 8 South. 489, 93 Ala. 436.

## DORMANT PARTNER.

A "dormant partner" is defined as one who is unknown as such to those doing business with the firm. *Shamburg v. Ruggles*, 83 Pa. 148, 150; *Rowland v. Estes*, 42 Atl. 528, 529, 180 Pa. 111.

A dormant or secret partner is one whose connection with the firm is really and professedly concealed from the world. Civ. Code Ga. 1895, § 2628.

A dormant partner is one who takes no part in the business and whose connection with the business is unknown. Both secrecy and inactivity are implied by the terms. *National Bank of Salem v. Thomas*, 47 N. Y. 15, 19; *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 26 N. E. 541, 543, 124 N. Y. 280; *Bouker Contracting Co. v. Scribner*, 65 N. Y. Supp. 444, 445, 52 App. Div. 505. But in order to be such it is not essential that a person should wholly abstain from any active participation in the business of the firm, or be universally unknown as bearing a connection with it. *North v. Bloss*, 30 N. Y. 374, 380.

A "dormant partner" is one whose name and transactions are unknown to the world, at least to such an extent that he cannot be regarded as an ostensible partner. It is a question of fact for the jury to determine, though the style of the partnership indicated to the world that more than one might be members of the copartnership. While evidence of general reputation may not be admissible to prove a partnership, still it may be competent on the issue as to whether a member of a firm is a dormant partner. *Metcalf v. Officer* (U. S.) 2 Fed. 640-642.

In *Pooley v. Driver*, 5 Ch. Div. 458, it is said "a dormant partner means a person who does not take an active part in the conduct of the business, and who may be, and even is, prohibited from taking such active part. Therefore, when the inquiry is whether a man is a dormant partner, it does not aid that inquiry by saying that there are provisions preventing his taking an active part in the conduct of the business, or a further provision which makes it optional for him to take an active part in the business or not. It only shows that he is not an active partner." *Johnson v. Rothschilds*, 41 S. W. 990, 998, 63 Ark. 518. The term does not include a partner who is not to give any services to

the business, except to consult with the other partners and use his influence to obtain business for the firm. *National Bank v. Thomas*, 47 N. Y. 15, 19; *Bouker Contracting Co. v. Scribner*, 65 N. Y. Supp. 444, 445, 52 App. Div. 505; *Elmira Iron & Steel Rolling Mill Co. v. Harris*, 26 N. E. 541, 543, 124 N. Y. 280.

"In order to make a partner a dormant partner, it is essential that he be unknown, or not generally known." *Rowland v. Estes*, 42 Atl. 528, 529, 190 Pa. 111.

"A 'dormant partner,' in the legal acceptance of the term, is one who participates in the profits of the trade, but conceals his name. A partner is considered dormant whose name is not mentioned in the firm, nor embraced under general terms as the name of one of the firm. 3 Kent, Comm. 81. A dormant partner differs from an actual, ostensible partner in that, his name being suppressed and concealed from the firm, his interest is consequently not apparent." *Speake v. Prewitt*, 6 Tex. 252, 258 (quoting 3 Tom. Law Dict. 71).

Every partner is construed dormant unless his name is mentioned in the firm, or embraced under general terms, as the name of one of the firm and company. Gow, in his *Treatise on Partnership* (pages 12, 18), says: "A dormant partner is likewise a participant in the profits of the trade; but, his name being suppressed and being concealed from the firm, his interest is consequently not apparent." *Mitchell v. Dall* (Md.) 2 Har. & G. 159, 171.

A dormant partner is one whose name is not mentioned in the title of the firm, nor embraced in some general term, as "Company," "Sons," "Brothers," etc., and whose connection as partner is professedly concealed from the world, whether actually so or not. *Jones v. Fegely* (Pa.) 4 Phila. 1.

## DORMITORY.

A dormitory is a room or rooms or a building used to sleep in; sleeping quarters; a lodging house. It does not include a dining hall. *Hillsdale College v. Rideout*, 46 N. W. 373, 375, 82 Mich. 94.

## DOS.

Lord Coke says: "Dos. The very name doth import freedom; for the law doth give her therewith many freedoms." *Deltz v. Beard* (Pa.) 2 Watts, 170, 172.

## DOTAGE.

Dotage is that feebleness of the mental faculties which proceeds from old age. It is a diminution in degree of that intellectual

power which was once possessed. It is the slow approach of death; that irrevocable cessation, without hurt or disease, of all the functions which once belonged to the living animal. The external functions gradually cease; the senses waste away by degrees, and the mind is imperceptibly visited by decay. The inert and dull senses transmit the passing occurrences so imperfectly to the sensorium that they leave none but a transitory impression there. Hence long-past transactions are often remembered with much more exactness than those which have taken place recently. In the second childhood, as in the first, all the present makes but a faint and fleeting impression on the mind; hence the judgment in both cases is weak and the conduct unsteady and frivolous. *Owing's Case* (Md.) 1 Bland, 370, 389, 17 Am. Dec. 311.

## DOTAL PROPERTY.

Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Civ. Code La. 1900, art. 2335; *Fleitas v. Richardson*, 13 Sup. Ct. 495, 498, 147 U. S. 550, 37 L. Ed. 276.

## NOTE.

"Dote," as used in the Spanish law, is that which the wife gives the husband on account of marriage, and is a sort of donation, made with a view to his maintenance and to the support of the marriage. *Cutter v. Waddingham*, 22 Mo. 206, 254.

"Dote," as used in the Spanish law, means dowry when applied to the patrimony of the wife; but, when applied to towns, it means a gift or endowment. *Hart v. Burnett*, 15 Cal. 530, 566.

To "dote" is to be delirious, silly, or insane. *Gates v. Meredith*, 7 Ind. 440, 441.

## DOUBLE.

Laws 1869, p. 180, § 10, prohibiting the bank chartered by such act from investing its funds in bonds or mortgages, excepting on real estate worth at least "double the sum invested above all incumbrances," means "double the investment and double the incumbrances." The word "above" signifies excess, and the word "double" signifies the excess. *Williams v. McDonald*, 7 Atl. 866, 868, 42 N. J. Eq. (15 Stew.) 392.

## DOUBLE ADULTERY.

Double adultery is adultery committed by persons both of whom are married. *Hunter v. United States* (Wis.) 1 Pin. 91, 92, 39 Am. Dec. 277.

**DOUBLE BALLOT.**

"Double ballot," as the term is used in Gen. St. § 238, declaring that no double ballot for the same office shall be counted, meant a case where more than one ballot for the same office was found in any envelope deposited, both of which ballots should be for the same person, in which case they should be considered a double ballot, and one only be counted. *State v. Walsh*, 25 Atl. 1, 8, 62 Conn. 260, 17 L. R. A. 364.

**DOUBLE BENEFIT.**

A railroad relief association provided for the relief of insured employes, and declared that no person should be entitled to benefits therefrom until the person legally entitled to recover damages on account of the accident shall release the railroad company in order that double benefits might not be recovered. Held, that the word "double benefits," as there used, was not limited to a cause where the same person was both the beneficiary of the relief association and the person legally entitled to recover, but that it meant that no recovery could be had by any person against a relief association when the person legally entitled to damages made a claim against the road. *Fuller v. Baltimore & O. E. R. Ass'n*, 10 Atl. 237, 239, 67 Md. 433.

**DOUBLE COSTS.**

Where a statute authorizes double costs, they are to be calculated thus: First, the common costs, and then half the common costs. *Van Aulen v. Decker*, 2 N. J. Law (2 Penning.) 108, 111; *Gilbert v. Kennedy*, 22 Mich. 5, 19.

Double costs are the costs taxed and then multiplied by two. This is not admitted to be the English method of computation, which is to add to single costs one-half of their amount (2 Tidd, Pr. 982); but this mode of calculation has never been followed in this state. *Moran v. City of Huxon*, 84 N. J. Law (5 Vroom) 530, 531.

Where double or treble costs are allowed, the additional costs so allowed do not go to the officers or jurors, but to the party, to compensate him for the injustice and undue vexation which he has been put to. *Van Aulen v. Decker*, 2 N. J. Law (2 Penning.) 108, 111.

**DOUBLE DAMAGES.**

Where a statute gives double or treble damages to the party injured, the jury should find the single damages, and the court in its judgment should assess the double or treble damages, and the general verdict in such a case will be deemed for single damages, un-

less the contrary appears. *Cross v. United States* (U. S.) 6 Fed. Cas. 892, 893.

*Gantt's Dig.* § 1376, made it a misdemeanor for any person to be a party to any sale intended to injure or defraud creditors, and providing that on conviction persons guilty of the offense should be fined in any sum not less than \$500. Section 1378 declared that any person violating the previous section, in addition to the fine, should pay to any person injured or defrauded "double damages sustained by him," to be recovered in a proper action. Held, that the term "double damages sustained by him" meant double the amount which the law, as applicable to the circumstances, would consider he had sustained. The Legislature intended to give an independent civil action, which did not exist at common law, since there the persons defrauded could not have sustained any damage. *Daniel v. Vaccaro*, 41 Ark. 316, 329.

**DOUBLE DEADWOODS.**

A car with double deadwoods has a horizontal timber at the end, with projecting blocks bolted to each end of the timber, and the drawbar for coupling extends but little beyond the faces of these blocks. In coupling, the blocks come together and receive the blow of the cars. The coupling pin is dropped between the blocks from above. Distinguished from the cars with double deadwoods is that known as the single deadwood, which dispenses with the projecting blocks, and leaves the drawbar to receive the concussion when the cars are coupled. *Michigan Central R. Co. v. Smithson*, 7 N. W. 791, 45 Mich. 212.

**DOUBLE HOUSE.**

A double house is two under one roof, each complete in itself, with closed partition between, and with independent means of ingress in front and rear. *Webb v. Carney* (N. J.) 32 Atl. 705.

**DOUBLE INSURANCE.**

A double insurance is where the same man is to receive two sums, instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same ship or goods. *Thurston v. Koch*, 4 U. S. (4 Dall.) 348, 350, 1 L. Ed. 862. But two insurances on the same ship, not for the same entire risk, do not constitute double insurance. Thus a policy "at and from Bayonne to the first port the ship might make in the United States" is not identical with another policy on the same ship "from Bayonne to New York." The first policy covers the time the vessel is at Bayonne, and terminates at the first port the



ship might make in the United States whether it be New York or some other port. Hence the two policies do not constitute double insurance. *Columbian Ins. Co. v. Lynch* (N. Y.) 11 Johns. 233, 238, 239.

A double insurance is where one insures the same thing twice against the same perils. Where, however, the perils undertaken by the owners of a ship are not the same which the defendants assume, there is no double insurance. The risk taken, in order to constitute double insurance by the different insurers, must be identical. *Perkins v. New England Marine Ins. Co.*, 12 Mass. 214, 218.

In order to constitute double insurance, so as to vitiate a policy of insurance, both policies must be upon the same insurable interest. *Aetna Fire Ins. Co. v. Tyler* (N. Y.) 16 Wend. 385, 30 Am. Dec. 90. Consequently, where it appeared that insurance was taken upon a joint interest in property, further insurance on the interest or title of one of the joint owners did not vitiate the policy, under a clause providing that, if any other insurance shall be "made upon the said property" without the company's consent, the policy should be void. *Pitney v. Glens Falls Ins. Co.* (N. Y.) 61 Barb. 335, 342.

Double insurance may be defined to be additional and valid insurance, prior or subsequent, on the same subject, risk, and interest effected by the same insured or for his benefit, and with his knowledge and consent; but owners of different interests in the same property may respectively insure their interests without risk of violating a provision in a policy on the property prohibiting other insurance. *Home Ins. Co. v. Gwathmey*, 1 S. E. 209, 213, 82 Va. 923.

"A double insurance is where the same person has insurance made on the full value of his interest in different policies. Whether made in his own name or the name of others is immaterial, so that he is to have the benefit of both policies." *Wells v. Philadelphia Ins. Co.* (Pa.) 9 Serg. & R. 103, 107.

Double insurance, which makes a proper case for contribution between the several insurers, is where the property insured and the interest insured is identical. *Royster v. Roanoke, N. & B. Steamboat Co.* (U. S.) 26 Fed. 492, 494.

A double insurance exists when the same person is insured by several insurers separately in respect to the same subject and interest. *Civ. Code Cal.* 1903, § 2641; *Rev. Codes N. D.* 1899, § 4531; *Civ. Code S. D.* 1903, § 1877; *Civ. Code Mont.* 1895, § 3520; *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591, 597; *American Ins. Co. v. Griswold* (N. Y.) 14 Wend. 399, 460; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121, 124; *Lebanon Mut. Ins. Co. v. Kepler*, 106 Pa. 28, 45; *Clarke v. Western Assur. Co.*, 23 Atl.

248, 249, 146 Pa. 561, 15 L. R. A. 127, 28 Am. St. Rep. 821; *Clarke v. Western Assur. Co.*, 146 Pa. 561, 569, 570, 23 Atl. 248, 249, 15 L. R. A. 127, 28 Am. St. Rep. 821. Like the new phrase, "concurrent insurance," it was formerly held that, to be double insurance, the policies had to be upon precisely the same property. *Gough v. Davis*, 52 N. Y. Supp. 947, 948, 24 Misc. Rep. 245. If there be double insurance by successive policies or simultaneously, in which priority of insurance is not provided for, all are insurers and liable pro rata. *Sloat v. Royal Ins. Co.*, 49 Pa. 14, 18, 88 Am. Dec. 477. All the policies are considered as making out one policy, and therefore any one insurer, who pays more than his proportion, may claim a contribution from others who are liable. Fire policies usually contain express and exact provisions upon this subject. *Clarke v. Western Assur. Co.*, 23 Atl. 248, 249, 146 Pa. 561, 15 L. R. A. 127, 28 Am. St. Rep. 821 (citing *Arnold, Ins.*); *Meigs v. Insurance Co. of North America*, 54 Atl. 1053, 1054, 205 Pa. 378. Thus a policy on lumber of every description, including lath, shingles, and pickets, does not include the same subjects as one on lumber, lath, and pickets, and therefore the two policies do not constitute a double insurance. *West Branch Lumberman's Exchange v. American Cent. Ins. Co.*, 38 Atl. 1081, 1083, 183 Pa. 366.

## DOUBLE PLEA.

A double plea is one which consists of several distinct and independent matters alleged to the same point and requiring different answers. *Gould*, Pl. p. 420. But this rule is not violated by introducing several matters into a plea, if they be constituent parts of the same entire defense. 1 Chit. Pl. p. 512; *Handy v. Waldrom*, 18 R. I. 567, 29 Atl. 143, 49 Am. St. Rep. 794. In assumption against a town treasurer, a plea that the town had reached its debt limit when it contracted the debt in suit, and that there was no money in defendant's hands then, nor at any time since, with which the debt could have been paid, is not bad for duplicity, since the first allegation alone does not state a complete defense. *McAleer v. Angell*, 36 Atl. 588, 19 R. I. 688.

## DOUBLE TAXATION.

See "Duplicate Taxation."

"Double taxation," within the policy of the law which prohibits double taxation, means the taxing of the same piece of property twice to the same person, or taxing the same piece of property once to one person and again to another; but the imposing of a tax on the shares of a corporation in the hands of its stockholders, and also on the property of a corporation, will not constitute such double taxation. *Cook v. City of*

Burlington, 13 N. W. 113, 114, 59 Iowa, 251, 44 Am. Rep. 679. See, also, *Oheshire County Tel. Co. v. State*, 63 N. H. 167, 169. But see *Smith v. Burley*, 9 N. H. 423, 427, where it is said that a taxation of the shares of a corporation at their appraised value would in fact be a "double taxation" of the property, once to the corporation itself and again to the corporators, which would be unjust, oppressive, and unconstitutional.

The fact that mortgages held by savings banks represent deposits, and depositors are taxed, does not render the result produced by the taxation of the mortgages as real estate a double taxation within the meaning of the Constitution. *Common Council of City of Detroit v. Assessors of City of Detroit*, 91 Mich. 78, 116, 51 N. W. 787, 16 L. R. A. 59.

### DOUBLE TRIPPING.

The term "double tripping" has been used in the towing trade on the Ohio and Mississippi rivers to designate the practice of tow boats in splitting up their tow and taking a portion up the river for a distance and then returning for the remainder. *Pittsburgh Ins. Co. v. Dravo (Pa.)* 2 Wkly. Notes Cas. 194, 195.

### DOUBLE USE.

In regard to patents, "double use" is the application of a principle which had been discovered and applied before. In such cases, although there may be in the new application some degree of novelty, and something may have been discovered or found out that was not known before, yet, unless the new occasion on which the principle is applied leads to some kind of new manufacture or to some new result, it will be but a double use. *In re Blandy (U. S.)* 3 Fed. Cas. 671, 673.

A patent which is but the application of the old process to a new use is denominated in the patent law a "double use." *De Lamar v. De Lamar Min. Co. (U. S.)* 110 Fed. 538, 542.

### DOUBLE WILL.

The term "double will" has been used to designate an instrument by which two persons join in disposing of their separate property to the survivor. *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751.

### DOUBT.

See "Rational Doubt"; "Reasonable Doubt."

Webster defines "doubt" to mean uncertainty; uncertainty of mind. *Rowe v. Barber*, 3 South. 865, 866, 93 Ala. 422.

Doubt implies a want of settled conviction or opinion on a proposition considered. It is that state of mind in which we hesitate as to two contradictory conclusions. *Smith v. Missouri Pac. Ry. Co.*, 44 S. W. 718, 719, 143 Mo. 33.

A doubt implies a condition or state of the mind where the judgment is not at rest, and is not decidedly on one side or the other of a question. *West Jersey Traction Co. v. Camden Horse R. Co.*, 29 Atl. 333, 346, 52 N. J. Eq. (7 Dick.) 452.

### Timidity distinguished.

It is a doubt, as the word is used in the expression "reasonable doubt necessary to conviction," where the mind hesitates because it is not convinced; not where a convinced mind hesitates, because of fear of consequences, in declaring its conclusion. The latter is not doubt. It is timidity. *McCabe v. Commonwealth (Pa.)* 8 Atl. 45, 47.

### DOUBTFUL CLAIM.

The expression "doubtful claim," as used in the phrase that "the compromise of a doubtful claim will support a promise to pay," means that the claim must have some probable foundation, but must be really doubtful. A mere pretended claim is not sufficient. *Morey v. Town of Newfane (N. Y.)* 8 Barb. 645, 654.

Code 1882, § 2537, authorizing administrators, executors, and guardians to compromise all contested or "doubtful claims" against the estates or wards that they represent, means demands of doubtful validity or which are disputed. The two terms, "contested" and "doubtful," are not precisely synonymous, so as to make the use of both an idle repetition. Claims whose justice and legality may be questioned are matters here referred to. *Maynard v. Cleveland*, 76 Ga. 52, 70.

### DOUBTFUL CREDIT.

The term "doubtful credit" is very comprehensive, and, when used without words of limitation or qualification, is understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals. *Merchants' Bank v. Bank of Commerce*, 24 Md. 12, 54.

### DOUBTFUL TITLE.

A "doubtful title" is defined to be one which conveys no property to the purchaser of the estate. *Heller v. Cohen*, 36 N. Y. Supp. 668, 671, 15 Misc. Rep. 378.

In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact. Every title is

doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazard of litigation. *Herman v. Somers*, 27 Atl. 1060, 1061, 158 Pa. 424, 38 Am. St. Rep. 851.

## DOVE.

It is held in all authorities that doves are *feræ naturæ*, and as such are not the subject of larceny, except in the custody of the owner. *Commonwealth v. Chace*, 28 Mass. (9 Pick.) 15, 19 Am. Dec. 348.

Doves are animals *feræ naturæ*, except when in the care and custody of the owner, when confined in the dovecot or pigeon house, and when in the nest not able to fly. When not in such care, they are not, in contemplation of law, the property of any one, and are not the subject of larceny. *Ruckman v. Outwater*, 28 N. J. Law (4 Dutch.) 581, 585.

## DOVER'S POWDERS.

Dover's powders "is a well-known preparation containing opium as one of its ingredients." But such fact does not make a representation in an application for insurance that applicant had never used opium false, where he had used Dover's Powders. *Higbee v. Guardian Mut. Life Ins. Co. (N. Y.)* 68 Barb. 462, 472.

## DOWEL PIN.

Webster's Dictionary defines a "dowel pin" as a pin of wood or metal used for joining two pieces, as of wood, stones, etc., by inserting part of its length in one piece, the rest of it entering a corresponding hole in the other. In *Knight Mech. Dict.* (1876) p. 735, a "dowel" is defined as a pin used to connect adjacent pieces, penetrating a part of its length into each piece at right angles to the plane of junction. *Perry v. Revere Rubber Co. (U. S.)* 103 Fed. 314, 43 C. C. A. 248.

## DOWER.

See "Inchoate Right of Dower"; "Widow's Dower"; "Right of Dower"; "Assignment of Dower"; "Suit for Dower"; "Tenant in Dower."

It is difficult to trace the true origin of dower, but all writers admit it to be of great antiquity. It is probable that it first grew out of the customs of the northern na-

tions, who subdued the Roman Empire, and that its introduction into the jurisprudence of England was borrowed from the usages of the Germans and Danes. Like every other species of property, dower underwent a great many changes. It was, however, finally established and confirmed by the law of Magna Charta; and from that time to the present the term "dower" has had a legal and technical meaning, which in England it still retains. Dower at the common law exists where a man, seised of an estate of inheritance, dies in the lifetime of his wife, in which case she is entitled to be endowed during her natural life of one third part of all his lands and tenements whereof he was seised at any time during the coverture, and which any issue she might have had could by possibility have inherited. 2 Bl. Comm. 129; 4 Kent, Comm. 35. The reason of this allowance is said to be for the maintenance of the wife and the support and education of her younger children. To constitute a tenancy in dower, three things are necessary: (1) Marriage; (2) seisin of the husband; and (3) his death. A seisin in law, as well as in deed, entitled the wife to dower, upon the principle that she had no power to reduce her husband's lands into actual possession. The right of dower attached upon all marriages not absolutely void and existing at the death of the husband. The seisin of the husband for the mere transitory instant, where the estate passes in and out of him at the same time, or where he was a mere naked trustee, without any beneficial interest in the inheritance, will not entitle the wife to dower. *Hill's Adm'rs v. Mitchell*, 5 Ark. (5 Pike) 608, 610. See, also, *Lamar v. Scott (S. C.)* 3 Stro. 562, 563; *Beebe v. Lyle*, 40 N. W. 944, 946, 78 Mich. 114; *Seager v. McCabe*, 52 N. W. 299, 302, 92 Mich. 186, 16 L. R. A. 247; *Eberle v. Fisher*, 13 Pa. (1 Harris) 526, 527; *Butler v. Fitzgerald*, 61 N. W. 640, 43 Neb. 192, 27 L. R. A. 252, 47 Am. St. Rep. 741; *Sanders v. Wallace*, 24 South. 354, 356, 118 Ala. 418; *Adams v. Storey*, 26 N. E. 582, 583, 135 Ill. 448, 11 L. R. A. 790, 25 Am. St. Rep. 392; *Sutherland v. Sutherland*, 69 Ill. 481, 485; *Wait v. Wait (N. Y.)* 4 Barb. 192, 202; *Johnson v. Vandyke (U. S.)* 13 Fed. Cas. 888, 894.

The word "dower" is unambiguous. It has a fixed, definite, and legal meaning; and it is determined by statute to apply to and extend to all the lands, tenements, and hereditaments whereof the husband, or any other to his use, was seised of an estate of inheritance at any time during the intermarriage, to which the wife shall not have relinquished her right of dower by deed, except in cases provided for by the statute. *Chapin v. Hill*, 1 R. I. 446, 452.

Common-law dower is defined to be that portion of lands which a wife has for the

term of her life of the lands of her husband after his death. But in South Carolina statutes have been passed authorizing in certain cases a sum of money to be assessed in lieu of the widow's dower. Commissioners are to be appointed for the purpose of admeasuring dower, and the law requires that they shall mete out to the widow and put her in full and peaceable possession of one third part of all the lands of her deceased husband, and, where this cannot be done without manifest disadvantage, then the commissioners shall assess a sum of money to be paid to the widow in lieu of her dower. *Jeffries v. Allen*, 33 S. C. 268, 270, 271, 11 S. E. 764.

A wife's right of dower is an emanation from the ownership of her husband, and subject to all its qualifications, though not to his alienations or incumbrances, during the coverture, without her consent declared as prescribed by law. *Wilson v. Davisson* (Va.) 2 Rob. 384, 405.

Dower is a title, inchoate and not consummate until the death of the husband; but it is an interest which attaches on the land as soon as there is a concurrence of marriage and seisin. *Youngs v. Carter* (N. Y.) 50 How. Prac. 410, 411 (citing 4 Kent, Comm. p. 51).

Dower is a right which, inchoate during coverture, becomes absolutely vested in the wife as an estate upon the death of her husband, and is as much beyond his control or power of disposition as her own inheritance. It not being his to give, every devise which he makes of his land upon which the right of dower attaches is presumed to be given subject to the legal estate, unless the contrary appears on the face of the will in express words or by the strongest kind of implication. *Cunningham v. Shannon* (S. C.) 4 Rich. Eq. 135, 140.

The right to dower is an interest which the law casts on the wife, and may be compared to a life estate vested in one person, to take effect only in case he survives another. The right to enjoy the estate is but a possibility. He may, and he may not, survive. If he does survive, the right becomes perfect. A right to dower is an interest contingent during the life of the husband, but rendered absolute by his death. "Dower," says Kent, "is a title inchoate, and not consummate until the death of the husband; but it is an interest which attaches on the lands as soon as there is the concurrence of marriage and seisin." The right to dower in personal property is an inchoate interest, contingent during the life of the husband, but rendered absolute by his death. The right is of a double contingency, viz.: He may, before death, will or give it away, and she may not survive him. *Smith v. Hines*, 10 Fla. 258, 283.

The words "right of dower," in a will wherein the testator states that he is informed that by the laws of the state concerning the wife's right of dower she is entitled to the possession of one-third of his personal estate and a life interest to the extent of one-third of his real estate, held used as descriptive of the widow's right, both under the statutes of dower and distribution, and not in their strict technical sense. They meant what the law gives a widow in case of intestacy, and when her rights are controlled and measured by nothing but the law. *Woodford's Ex'rs v. Woodford*, 44 N. J. Eq. (17 Stew.) 79, 80, 14 Atl. 273, 274.

An estate in dower is a continuation of the estate of the husband, and upon his death the right thereto becomes consummate. *Young v. Tarbell*, 37 Me. 509, 513.

The word "dower," in its ordinary acceptance, since its first introduction into this country, has been used synonymously with the word "third," so that by dower out of all lands of which the husband is seised, or is in coverture, is meant one-third of such land. Dower in the equity of redemption means dower in the land subject to incumbrances pursuant to dower; that is, one-third for life of what remains of the land after satisfying the incumbrances. *Hoy v. Varner*, 42 S. E. 690, 693, 100 Va. 600.

The term "dower" is one very well understood by laymen, and therefore a return, assigning certain real estate to the widow as and for her dower, is a sufficiently correct description. *Skolfield v. Skolfield*, 34 Atl. 27, 28, 88 Me. 258.

Under the act relative to dower (Rev. Laws, p. 397) the widow is entitled to dower of all lands, etc., whereof any person was seised of an estate of inheritance at any time during coverture to the use of the husband, if in equity the husband was the real owner of the land and had the right at any time to have a conveyance to himself of the legal title and estate in possession. *Yeo v. Mercereau*, 18 N. J. Law (3 Har.) 387, 395.

Under section 24, c. 62, Gen. St. 1878, allowing dower to a wife divorced on the ground of the adultery of her husband as if he were dead, the term "dower" must be held to extend to and include the present statutory provisions for the wife in lieu of dower in lands of a deceased husband. *Holmes v. Holmes*, 54 Minn. 352, 354, 355, 56 N. W. 46.

The word "dower," as used in Rev. St. c. 109, § 46, relating to wills, should be construed to include a saving to the widows of persons dying intestate of one-third of the personal estate, forever, after payment of debts. *Sess. Laws*, p. 168, § 6. *Rawson v. Rawson*, 52 Ill. 62, 68.

The term "dower" is sometimes applied to the estate of the husband given by law, and Judge Scott, in *Hastings v. Meyers' Adm'r*, 21 Mo. 519, seems to use it in this sense; but it properly refers to the interest of the widow as such in his lands. The allowance to the widow of household furniture, provisions, etc., is not part of the dower proper, though it pertains to its nature in being absolutely without regard to the claims of creditors, and also without regard to the husband's right of disposition by will. *Bryant v. McCune*, 49 Mo. 546, 547.

The word "dower," as used in a will whereby the testator left all his property, real and personal, in the possession of his wife during her widowhood, for the purpose of raising and educating the children, and providing that, if the wife married again before the children were all of age, she should have her dower under the law, and the balance to remain in common stock to the children, each drawing an equal proportion as he or she should come of age, does not mean dower in the legal sense, as the interest of the widow in the real estate of her deceased husband before the manifest intent of the testator in case his widow married again was that she should have such portion of his real and personal estate as the law entitled her to have if the testator had died intestate, and the word "dower" should be so construed. *Paine v. Gupton*, 30 Tenn. (11 Humph.) 402, 403.

Where a will provides that a devise to testator's widow shall be in lieu of all statutory allowances, strictly speaking, dower is not included. Dower is something more than an allowance. It is an estate in real property which vests in the widow immediately on the death of her husband; and, where the relationship of husband and wife exists, it cannot be taken from her without her consent. In other words, it is an estate of which she cannot be deprived, except by due course of law. Both the widow's quarantine and the exemption specified in Code Civ. Proc. § 2713, are provisions which inure to the benefit of the widow, whether her husband dies testate or not, unless, where he dies testate, some provision is made to bar that which the law has created expressly for her benefit, and she has elected to accept the same in lieu of the statutory provisions. In *re Mersereau*, 77 N. Y. Supp. 329, 332, 38 Misc. Rep. 208.

A will devising real estate gave to the testator's widow a right to one-fifth of all the grain and money rent that might be produced on the land devised during her natural life, unless she choose to renounce the will. The devisee, after the death of the testator, sold the land subject to the dower right, and gave a bond conditioned to satisfy said dower right, so that the grantee should have en-

tire possession thereof, without any hindrance. The widow elected to take under the will, and thereafter an action was brought on the bond. Held, that the words "dower" or "dower right," as used in the bond, meant the "interest of the widow, which was charged on the land by the will." *Heorath v. Hogan*, 41 Ill. App. 472, 475.

Laws 1895, p. 169, entitled "An act to amend chapter 55, Rev. St. 1889, entitled 'Dower,' by adding a new section thereto," provided that, when the wife shall die without any child or other descendant, her widow shall be entitled to one-half of her estate absolutely, subject to the payment of her debts. It was contended that this provision was void, as not being within the term "dower." It was held that the word "dower," as thus used, will be construed in the light of the general meaning of that term—that is, that with which one is gifted or endowed—and, as so construed, the subject of the act was embraced in the title. *O'Brien v. Ash*, 69 S. W. 8, 13, 169 Mo. 283.

Though tenancies in dower were abolished in Indiana in 1852, lawyers and courts continue to speak of the provision established for the wife in lieu thereof as a dower; and, indeed, Webster's Dictionary defines dower as the provision for a widow on her husband's death. For these reasons the use of the word "dower" in a will cannot be held to prove that the testator did not understand that the law had been changed, and that the will in other portions thereof was drawn up in view of the law before the change. *Durbin v. Redman*, 40 N. E. 133, 134, 140 Ind. 694.

Gen. St. c. 62, § 24, allowing dower to a wife divorced on the ground of the adultery of her husband as if he were dead, should be construed to extend to and include the statutory provisions for the wife in lieu of dower in the lands of her deceased husband; the interest created by such statutes being inchoate on the marriage and seisin, becoming absolute at his death, and her estate extending to the homestead and one-third of other lands of which the husband was seised during coverture, and which could not be divested without her consent. *Holmes v. Holmes*, 56 N. W. 46, 54 Minn. 352.

#### **Curtsey distinguished.**

There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife. On the other hand dower is not in any sense an estate until assigned. This is the common-law rule; the widow not being vested with the title or possession. She has no legal seisin or right of entry until dower is assigned. *Malone v. Conn*, 23 S. W. 677, 673, 95 Ky. 93.

**Distribution of estate distinguished.**

See "Distribution."

**Dowry distinguished.**

The words "dower," "dowery," and "dowry" are regarded by lexicographers as etymologically different forms of the same word. Dowery has become obsolete, and dower and dowry have in modern times acquired, both in law and in popular uses, distinct significations. *Johnson v. Goss*, 132 Mass. 274, 275.

Dower is not equivalent to dowry. The former is a provision for a widow at her husband's death, but the latter is a bride's portion on her marriage. *Wendler v. Lambeth*, 63 S. W. 684, 686, 163 Mo. 428.

**Homestead distinguished.**

Dower and homestead rights are different in character. Dower is a life estate, that after assignment may be sold and conveyed as other estates. The homestead is not such a right as can be used in any manner other than as provided by the Constitution. The grant of a homestead was intended to be in addition to the right of dower. *Horton v. Hilliard*, 24 S. W. 242, 243, 58 Ark. 298.

**Legacy distinguished.**

Dower is a provision made by law for the support of the widow. A legacy is a provision made by affection for the better support of the wife. *Brown v. Caldwell* (S. C.) Speers, Eq. 322, 327.

**As an estate in land.**

Dower unassigned is a mere right of action, and nothing more. *Rayner v. Lee*, 20 Mich. 384, 386.

Dower before assignment is purely an equitable right, which confers no specific estate or interest in the land that can be sold or assigned. *Turnipseed v. Fitzpatrick*, 75 Ala. 297, 303 (citing *Barber v. Williams*, 74 Ala. 331).

An estate of dower is a freehold estate; but a right of dower in a married woman, before it has become consummated by the death of her husband, is a mere intangible, inchoate, contingent expectancy, and not only is not an interest in the land, but does not even rise to the dignity of a vested right. *Goodkind v. Bartlett*, 26 N. E. 387, 136 Ill. 18.

The right of dower in a married woman is a mere intangible, inchoate, and contingent expectancy, and even in a widow, until it is assigned, it is no estate in the land; but it is a right resting in action only, and cannot be aliened. *Blain v. Harrison*, 11 Ill. (1 Peck) 384, 385; *McNeer v. McNeer*, 32 N. E. 681, 683, 142 Ill. 388, 19 L. R. A. 256.

The estate in dower is everywhere treated of as an estate in lands, tenements, and

hereditaments. *Lamar v. Scott* (S. C.) 3 Strob. 562, 563.

Until there is an actual admeasurement of the dower, it is a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law. The wife has no interest or estate in the lands, and her deed operates, not as a grant, but as an estoppel. *Traders' Ins. Co. v. Newman*, 22 N. E. 428, 430, 120 Ind. 554.

While it is true that the wife's inchoate right of dower is a mere intangible expectancy, and is not, strictly speaking, an estate in land, and does not even rise to the dignity of a vested estate, it is a valuable right, which the law will protect as possessing elements of property. *Morgan v. Wickliffe* (Ky.) 70 S. W. 680, 681 (citing *Helm v. Board* [Ky.] 70 S. W. 679; *Petty v. Petty*, 43 Ky. [4 B. Mon.] 215, 39 Am. Dec. 501).

Dower is a title inchoate, and not consummate until the death of the husband; but it is an interest which attaches on the land as soon as there is a concurrence of marriage and seisin. 4 Kent, Comm. 50. It has been compared to a life estate, vested in one person, to take effect only in case he survives another. *Madigan v. Walsh*, 22 Wis. 501, 504.

Dower is not an estate in land, vested or otherwise. It is a right without value, unless by some modern methods a possibility may be valued. A possibility or contingency is not an estate. It may be affirmed generally, where a right is given by law, until that right becomes vested in some way in property, the law may be changed or repealed, and the right taken away. Dower does not become a vested right in the wife until the death of her husband. A possibility of dower is no vested right in the estate of dower, or anything the law recognizes as property. *Richards v. Bellingham Bay Land Co.* (U. S.) 54 Fed. 209, 211, 4 C. C. A. 290.

"The right of dower is not an undivided one-third of the entirety, but is a one-third in severalty; nor is it one-third in quantity of the lands of which the husband died seised, but the widow is entitled to the use of such parts as will yield one-third of the entire income of the whole. The right, until assignment, is inchoate, and cannot be set up by any one in ejectment against an heir entitled to the fee." *King v. Merritt*, 34 N. W. 689, 699, 67 Mich. 194.

**As an incumbrance.**

See "Incumbrance (On Title)."

**As inheritance.**

Blackstone, following Littleton and the old writers on the common law, classes an

"estate in dower" with estates of freehold not of inheritance. *Lamar v. Scott* (S. O.) 3 Strob. 562, 563.

Comp. Laws, § 646, providing that, when a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be entitled to certain property and alimony, etc., and that, if the wife survive her husband, she shall also be entitled to her right of dower in the real estate of her husband, not allowed her as alimony, of which he was seised at the time during coverture, and to which she had not relinquished her right of dower, should not be construed to mean inheritance; for it will be presumed that, if the Legislature had intended "inheritance," it would have said so. *Crane v. Fipps*, 29 Kan. 585, 588.

The interest of a widow of an intestate in the lands of her deceased husband after the sale of the lands in partition remains the same as before the sale, to wit, that of a tenant for life. *Kunselman v. Stine*, 38 Atl. 414, 41 Wkly. Notes Cas. 82, 83, 183 Pa. 1.

#### As a lien.

A widow's dower is an estate and interest during her life, and not merely a lien. In *re Emig's Estate*, 40 Atl. 522, 186 Pa. 409; *Diefenderfer v. Eschleman* (Pa.) 6 Atl. 568, 570, 18 Wkly. Notes Cas. 315, 317, 118 Pa. 305.

The statutory dower of a widow is not treated as a lien on land; but it is an interest in it. It is an estate given by the intestate laws. *Enyard v. Enyard*, 42 Atl. 526, 527, 190 Pa. 114, 70 Am. St. Rep. 623.

Dower is a freehold estate growing out of marriage, seisin, and death of the husband. The right of dower after marriage is absolute, and fixes a lien on all lands of which the husband was seised of an estate of inheritance. No subsequent act of his, without the wife's consent, can divest her of it. It takes by way of lien created by and at the time of marriage, and, when once fixed, is paramount to the claim of creditors and purchasers. *Tate v. Jay*, 31 Ark. 576, 579.

#### As arising by operation of law.

Dower is an estate which arises solely by operation of law, and not by force of any contract, express or implied, between the parties. It is the silent effect of the relation entered into by them, not in itself incidentally to the marriage relation, or as implied by the marriage contract, but merely as that contract calls into operation the positive institution of the municipal law. *Martin's Heirs v. Martin*, 22 Ala. 86, 105.

"Dower is not the result of the marriage contract, but is a provision which the law makes, founded on public policy, for the ben-

efit of the wife as an incident to the marriage relation, and contingent on the seisin and death of the husband before the right of dower becomes fixed and consummate by his death. It is, therefore, subject to legislative control, and may be modified or taken away." *Morrison v. Rice*, 29 N. W. 168, 169, 35 Minn. 436.

"To entitle to dower there must be a marriage. So the death and seisin of lands by the husband are always necessary to establish a right to this estate. But they are not embraced by, nor are they the subjects of, a marriage contract. The estate is by law made an incident of the marriage relation. It stands, like an estate by the curtesy, on the foundation of positive law." *Moore v. City of New York*, 8 N. Y. (4 Seld.) 110, 113, 59 Am. Dec. 473.

Dower is not the result of contract, but a positive institution of the state, founded on reasons of public policy. *Moore v. City of New York*, 8 N. Y. (4 Seld.) 110, 113, 59 Am. Dec. 473.

Dower is the provision the law makes for a widow out of the lands of her husband. It is not the result of contract, but a positive institution of the state, founded on reasons of policy. *Moore v. New York*, 8 N. Y. (4 Seld.) 110, 59 Am. Dec. 473. It is a life estate granted by operation of law in favor of the wife on decease of her husband, by which she is endowed for life of a third of the land of which he was seised of an estate of inheritance at any time during coverture. *Jourdan v. Haran*, 3 N. Y. Supp. 541, 542.

Dower at common law was a right institutional in character arising in law, and not out of the pact or consent of the parties. It springs from marriage and seisin, and at once fastens on the land by a right paramount to that of any person claiming on the husband by a subsequent act. 2 Co. Litt. 32. It follows, therefore, that neither the alienation of the husband, nor any act suffered or done by him, such as bankruptcy, will confer a title on the alienee or assignee. It will defeat dower if the right of the dowress becomes consummated by survivorship. The right of the dowress is derivative from the title of the husband, and is an offshoot from it; and therefore, if the husband loses the land by title paramount, the inchoate interest of the wife falls with it. *Pickett v. Buckner*, 45 Miss. 226, 239.

#### As applying to personality.

The word "dower," both technically and in popular acceptance, has reference to real estate exclusively. *Dow v. Dow*, 36 Me. 211, 216.

The term "dower" at common law applies only to real estate, and, in the absence of statute extending the term, it cannot now

be given a more liberal construction, so as to mean an interest in all the property and estate, both real and personal, of which the husband died seised. *Perkins v. Little*, 1 Me. (1 Greenl.) 148, 150; *Dow v. Dow*, 36 Me. 211, 216; *Brackett v. Leighton*, 7 Me. (7 Greenl.) 383, 384; *Stearns v. Perrin*, 90 N. W. 297, 298, 130 Mich. 456; *In re Davis' Estate*, 36 Iowa, 24, 30. It is so used in the Revised Statutes of Missouri, providing that, if any woman be divorced from her husband for his fault or misconduct, she shall not thereby lose her dower, and hence such person is not entitled to the personal estate of the husband. *Weindel v. Weindel*, 29 S. W. 715, 126 Mo. 640.

A contract providing that a legacy given the wife was accepted by her as her full dower in her husband's estate should not be construed to include real estate only, but includes all estate, both real and personal. *Ditson v. Ditson*, 52 N. W. 203, 205, 85 Iowa, 276.

An antenuptial contract, in which the wife agreed to surrender her right to dower or homestead in or to any property which should belong to the estate of her husband, should be construed as meaning her interest in his real estate only, and not in his personal property. *Pitkin v. Peet*, 54 N. W. 215, 216, 87 Iowa, 268.

In Florida by statute the term "dower" includes the widow's interest, not only in the realty, but also in the personality, of her deceased husband. *Woodberry v. Matherson*, 19 Fla. 778, 781.

A deed conveying the grantor's right, title, and interest of dower in said estate would convey the grantor's statutory dower interest in the personal property, as well as the real property. *McFarland v. Blaze's Adm'r*, 24 Mo. 156, 157.

A will providing that testator's wife should have her lawful right of dower out of his estate should not be construed in its strict legal sense, as meaning the estate which the wife takes by operation of law in the lands of which her husband was seised, but as used inartificially, meaning one-third of the husband's entire estate, both real and personal. *Adamson v. Ayres*, 5 N. J. Eq. (1 Halst. Ch.) 349, 352.

The word "dower," as used in Rev. St. § 2435, declaring that the widow's dower cannot be affected by any will of her husband, if she objects thereto and relinquishes the rights conferred upon her by the will, is applicable only to real property, and does not apply to personal property; hence, a widow cannot claim as distributee of the estate of her husband, when he has fully disposed of the same by his will. *In re Davis' Estate*, 36 Iowa, 24, 30.

Where one devised to his wife dower in all his estate according to the laws of the

state, the term "dower" should be taken in its legal acceptation, and limited exclusively to realty. *Brackett v. Leighton*, 7 Me. (7 Greenl.) 383, 384.

#### Reversion included.

A deed conveying certain land, except the widow's dower, meant the widow's right to the use of a third of the real estate described during her life, and did not include the reversion thereof. *Starr v. Brewer*, 8 Atl. 479, 483, 58 Vt. 24.

#### DOWER EX ASSENSU PATRIS.

This form of dower must have the same quality of certainty as dowment ad ostium ecclesiæ. It must be of "parcels of his father's lands or tenements with the assent of the father, who afterwards assigns the quantity and parcels, and after the death of the son the wife enters into the same parcels." *Grogan v. Garrison*, 27 Ohio St. 50, 61.

#### DOWER INTEREST.

A dower interest is a continuance of the estate of the husband, and is held of him by appointment of law. Hence, also, certain proceedings may be necessary to extend and fix the extent of the interest. When that is done the interest must rest first, by relation or otherwise, on the death of the husband. *Farnsworth v. Cole*, 42 Wis. 408, 405.

#### DOWMENT AD OSTIUM ECCLESIAE.

"Dowment ad ostium ecclesiæ is where a man of full age, seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, then, after their affiance and troth plighted between them, he endoweth the woman of his whole land, or the half, or other lesser part thereof, and then openly doth declare the quantity and certainty of the land which she shall have for her dower. Here be two things that the law doth delight in, viz., to have this and the like openly done, \* \* \* and to have certainty, which is the mother of quiet." *Grogan v. Garrison*, 27 Ohio St. 50, 61 (citing Co. Litt. tit. "Dower," § 39).

#### DOWN.

See "Payment Down."

A land grant, describing one boundary of land from a certain point on a river bank "down the river" to another point, means down the river according to its windings and turnings. The stream thus forms the boundary of the granted land. *Brown v. Huger*, 62 U. S. (21 How.) 305, 320, 16 L. Ed. 125; *Slade v. Etheridge*, 35 N. C. 353, 355, 57 Am. Dec. 557.



In *McCulloch's Lessee v. Aten*, 2 Ohio (2 Ham.) 307, in construing a deed describing the boundaries of the land conveyed as commencing at a tree on the bank of a stream, thence down the creek with the several meanders thereof, the courts say that the fact that the marked corner called for stands four rods from the water does not create any ambiguity in the term "down the creek with the several meanders thereof." They import the water's edge at low water, which is a decided natural boundary, and must control a call for corner trees on the bank. *French v. Bankhead* (Va.) 11 Grat. 136, 155.

A contract for the sale of all standing timber on designated land, suitable for sawing, and down to 12 inches in diameter at the smallest end of the log, further provided that the purchasers should take the timber clean as they go, including all fit for sawing, and down to 12 inches in diameter at the smallest end of the log. Held, that the phrase "down to 12 inches in diameter at the smallest end of the log" was not a reservation of the timber below 12 inches in diameter, but that it simply defined the duty of the purchasers, making it obligatory on them to cut all timber above the designated size, but leaving the suitability for sawing of the smaller trees to be determined as they were reached by the purchasers in the process of cutting the timber. *Dexter v. Lathrop*, 20 Atl. 545, 547, 136 Pa. 565.

#### As middle of channel.

The words "to," "by," "along," "with," "in," "up," or "down" a creek, river, slough, strait, or bay, mean the middle of the main channel thereof, unless otherwise expressed. *Pol. Code Cal.* 1903, § 3906; *Pol. Code Mont.* 1895, § 4106.

The words "up" or "down" a creek or river mean the middle of the main channel thereof. *Rev. St. Ariz.* 1901, par. 930.

#### DOWN-CAST.

The term "down-cast" is used to designate the compartment of the air shaft of a coal mine which is used to carry pure air into the mine. *Coal Run Coal Co. v. Jones*, 19 Ill. App. (19 Bradw.) 365, 366.

#### DOWRY.

By dowry is meant the effects which the wife brings to the husband to support the expenses of marriage. *Civ. Code La.* 1900, art. 2337. The income from it belongs to the husband, and is intended to help him to support the charges of the marriage, such as the maintenance of the husband and wife, their children, etc. *Buard v. De Russy* (La.) 6 Rob. 111. "Whatever in the marriage contract is declared to belong to the wife, or to

be given to her on account of the marriage, by other persons than the husband, is a part of the dowry, unless there is a stipulation to the contrary; but a donation or gift by the future husband to the wife forms no part of it." *Gates v. Legendre* (La.) 10 Rob. 74, 78.

"Dowry" is that which the wife gives the husband on account of marriage, and is a sort of donation made with a view to his maintenance and the support of the marriage. *Cutter v. Waddingham*, 22 Mo. 206, 254.

#### As dower.

"Dowry" is not identical in meaning with "dower," the former being a provision for a widow on her husband's death, while the latter is a bride's portion on her marriage. The term "dowry," though limited in its strict legal significance to the meaning above given, is popularly used in other senses; as, for instance, where a testator devised land to his nephew, with the exception that if testator's sister living in Germany came to this country she should have a dowry therein, the court said in construing the same: "If we ascribe to 'dowry' its technical meaning, it would be utterly senseless in the connection in which it is used. If we give it a popular meaning as a portion or provision, it can well mean a use for life of the real estate designated, and such we feel sure was the testator's intention, and that must govern, in order that his words may avail something rather than nothing." *Wendler v. Lambeth*, 63 S. W. 684, 686, 163 Mo. 428, 438.

#### DOZEN.

Under certain conditions, parol evidence is admissible to show that a dozen of a certain article means thirteen by virtue of a custom to that effect. *Coquard v. Bank of Kansas City*, 12 Mo. App. 261, 265.

#### DR.

When a statement of account is made out, using the term "Dr." without more, it simply indicates that the person owes the various items, but does not indicate a matured indebtedness. *Jaqua v. Shewalter*, 37 N. E. 1072, 10 Ind. App. 234.

#### DRAFF.

"Druff" means waste matter, sweepings, refuse, lees, dregs. This word is entirely distinct in its meaning from "draught" or "draft." *Marriott v. Brune*, 50 U. S. (9 How.) 619, 633, 13 L. Ed. 282 (cited and approved in *Seeberger v. Wright & Lawther Oil & Lead Mfg. Co.*, 15 Sup. Ct. 583, 584, 157 U. S. 183, 39 L. Ed. 665).

**DRAFT.**

A draft is an arbitrary deduction or allowance to merchant for loss of weight in handling, differences in scales, etc., so as to insure good weight to him. This is the meaning of the word in Rev. St. § 2898 [U. S. Comp. St. 1901, p. 1919], which provides that in all cases the real care shall be allowed, but in no case shall there be any allowance for "draft," and as so used the word is not a misspelling for "draff." *Marriott v. Brune*, 50 U. S. (9 How.) 619, 633, 18 L. Ed. 282 (cited and approved in *Seeberger v. Wright & Lawther Oil & Lead Mfg. Co.*, 15 Sup. Ct. 583, 584, 157 U. S. 183, 39 L. Ed. 665). It is a small allowance in weighable goods, made to the importer as if to compensate for any loss that may occur from the handling of the scales in the weight, so that when weighed the second time the article will hold out good weight. Tare is allowed for the outside or covering of the article imported, whether it be box, barrel, bag, bale, mat, etc. *Napier v. Barney* (U. S.) 17 Fed. Cas. 1149.

**DRAFT (In Commercial Law).**

See "Master's Draft."

A draft is for the payment of money drawn by one person on another. *Prehm v. State*, 36 N. W. 295, 297, 22 Neb. 678. The word is nomen generalissimum, and includes all orders for the payment of money drawn by one person against another. *Wildes v. Savage* (U. S.) 29 Fed. Cas. 1226, 1229.

An instrument in common parlance is known as a "draft" whenever the drawer requests the payment of money to the holder of the order, or draws on the payee in any terms, and has special reference to inland bills. *Cole v. Dalton* (N. Y.) 6 Daly, 484, 485.

The term "draft" does not include a paper styled a "draft" on its face, but which merely contains a statement that the person signing it will receive it for a hundred dollars in part payment for any organ which the holder may purchase from him. *Prehm v. State*, 36 N. W. 295, 297, 22 Neb. 678.

A by-law of a bank, providing that drafts may be made personally or by the order in writing of the depositor, or by letters of attorney duly authenticated, does not mean the instruments in writing commonly known as such—that is, bills of exchange or orders for money—but the acts or fact of drawing money by the depositor from the funds of the bank. *Allen v. Williamsburg Sav. Bank*, 69 N. Y. 314, 317.

"Drafts," as used in a letter stating that the writer guaranteed to pay at maturity any drafts that the person to whom the letter was written might draw on a certain person, does not imply negotiation of those instru-

ments to third persons. "Drafts," as used in the collection of debts, are not usually negotiable. The office of a draft is to collect for the drawer from the drawee, residing in another place, money to which the former may be entitled, either on account or balance due or advanced on consignments, and though they may sometimes be used for raising money. That is not the necessary or ordinary purpose for which they are employed. *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 282, 45 Am. Rep. 204.

A commission merchant in Minneapolis agreed to sell apples to be shipped from Medina, N. Y., and to advance to the shipper a dollar and a quarter per barrel. The shipper went to plaintiff bank, and requested it to advance him a dollar and a quarter per barrel on his drafts on the commission merchant against consignments, which it agreed to do if the commission merchant would wire or write that he would accept the drafts. Thereafter the commission merchant wired the bank as follows: "Will honor draft against apples, dollar quarter barrel, have been taking care of everything promptly;" and at the same time he wired the shipper, "Will advance dollar quarter on apples." He also afterward wrote the shipper requesting him to make his draft at five days' sight instead of at sight, as it was taking a large amount of money to carry on the business, adding, "but if your bank objects to the five days, and it is not customary with you, it is all right." Thirty-three drafts in all were discounted by the plaintiff bank in Medina, of which the defendant commission merchant accepted and paid twenty, but refused to pay the remaining thirteen, though he received and sold the apples, the bills of lading for which were attached to the remaining thirteen drafts. Held, that the word "draft" in the singular, in the consignee's telegram that he would honor shipper's draft against apples, could not be construed, as contended by the consignee, to only obligate him to pay one draft, since the language of the telegram was to be taken in connection with the subject-matter and the position of the parties, and that the word was to be construed in its plural as importing an obligation to accept a succession of drafts on successive consignments. *Union Bank of Medina v. Shea*, 58 N. W. 985, 986, 57 Minn. 180.

**As bill or note.**

See "Bill"; "Note."

**Bill of exchange or check synonymous.**

The word "draft," as used in Laws 1891, c. 43, § 16, relates to forgery, is a general term, and includes checks. *State v. Warner*, 55 Pac. 342, 343, 60 Kan. 94.

The term "draft" is commonly employed as a synonym for the words "bill of ex-

change" or "check," and was so used where a company saw fit to indorse on a voucher a statement to the effect that when approved, dated, and signed it should become a draft on the company, and such voucher will be treated as an accepted bill, and not a non-negotiable chose in action. *Cudahy Packing Co. v. Sioux Nat. Bank* (U. S.) 75 Fed. 473, 477, 21 C. C. A. 428.

A draft is an open letter of request from, and an order by, one person on another to pay a sum of money therein mentioned to a third person, on demand or at a future time therein specified. A "draft" at the present day is the common term for all bills of exchange. The words "draft" and "bill of exchange" are used indiscriminately. Edwards says: "The bill of exchange, popularly termed a 'draft,' is in the form of an open letter directing to whom it is addressed to pay the sum of money therein specified to a third person named in the instrument, on account of the writer or person by whom it is drawn. It must be payable in money." *Hinnemann v. Rosenback*, 39 N. Y. 98, 100.

"A 'check' or 'draft' on a banker is defined to be a written order or request addressed to persons carrying on the business of bankers, drawn on them, by a party having money in their hands, requesting to pay on presentment, to a person therein named or to bearer, a specified sum of money. *Chit. Bills*, 322. It is said in *Cruger v. Armstrong* (N. Y.) 3 Johns. Cas. 5, 7, 2 Am. Dec. 126, a check, although generally received as cash when given in payment, is in form and reality a bill of exchange. It possesses all the requisites of the bill, and has been treated as such. Lord Kenyon said in the case of *Bohem v. Sterling*, 7 Term R. 423, 430, that at the trial of that case he thought there was a distinction between a banker's check and a bill of exchange, but on further consideration he did not think that distinction well founded." *Douglass v. Wilkeson* (N. Y.) 6 Wend. 637, 643.

#### City warrant.

A city warrant is a "draft," within a statute making it forgery to falsely make, alter, or counterfeit any draft. *State v. Brett*, 40 Pac. 873, 16 Mont. 360.

#### As equitable assignment.

See "Equitable Assignment."

#### Negotiability imported.

The word "draft" does not necessarily or even usually import negotiability. *Baer v. English*, 11 S. E. 453, 454, 84 Ga. 403, 20 Am. St. Rep. 372.

#### As personal property.

See "Personal Property."

## DRAIN.

See "Public Drain"; "Servitude of Drain."

To drain land is to rid it of its superfluous moisture. This is generally done by deepening, straightening, or embanking the natural water courses which run through it, and by supplementing them, when necessary, by artificial ditches and canals. But it is not within the art of the drainer to promote drainage by building reservoirs for the storage of debris from mining and other operations, unless the word is to be wrenched from its geological or ordinary signification and meaning, and changed so as to mean water at any mining or other locality where debris may have accumulated. *People v. Parks*, 58 Cal. 624, 639.

To drain sugar is to separate molasses contained in all sugars, cooked or boiled, in open kettles, from the sugar itself, through small holes or apertures made through the bottom of a hogshead large enough for liquid to run through, but not large enough to pass sugar or solid matter. The molasses runs into a reservoir usually of cemented brick, over which the hogsheads containing sugar are placed on beams or rafters laid on the brick walls of the reservoir at a short distance from each other. *Meyer v. Queen Ins. Co.*, 6 South. 899, 900, 41 La. Ann. 1000.

#### Ditch synonymous.

The word "ditch," as used in the drainage act, shall be held to include a drain or water course. *Horner's Rev. St. Ind.* 1901. § 4316; *Cobbey's Ann. St. Neb.* 1903, § 5501; *Rev. St. Mo.* 1899, § 8278; *Briar v. Job's Creek Drainage Dist. Com'rs*, 185 Ill. 257, 260, 56 N. E. 1042, 1044.

Wherever the word "drain" occurs in the article relating to ditches and drains for agricultural purposes only, it shall be construed to mean open ditch. *Rev. St. Mo.* 1899, § 6972.

The word "drain" has no technical or exact meaning. It may mean a hollow space in the ground, natural or artificial, where water is collected or passes off, and is synonymous with "ditch." *Goldthwait v. Inhabitants of East Bridgewater*, 71 Mass. (5 Gray) 61, 64.

In common parlance, the words "drain" and "ditch" are used interchangeably, but, technically speaking, each has its own appropriate meaning when used in certain connections. The word "ditch" is mostly used to designate a trench on the surface of the ground, and the word "drain" is commonly used in connection with a sewer, sink, or other undersurface drain. Outside of this we can find no distinctive difference. To constitute either, there must be a well-defined

channel for the drainage of water. *Byrne v. Keokuk & W. Ry. Co.*, 47 Mo. App. 383, 389.

#### **Sewers.**

See, also, "Sewer."

"Drain," as used in Act July 1, 1895, authorizing the construction of drains, should be construed as broad enough to include sewers. *City of Charleston v. Johnston*, 48 N. E. 985, 986, 170 Ill. 336.

#### **DRAINAGE.**

See "Local Drainage"; "Work of Drainage"; "Right of Drainage."

Drainage is a system of drains and other operations, by which water is removed from towns, railway beds, and other works. *People v. Parks*, 58 Cal. 624, 648 (citing *Goldthwait v. Inhabitants of East Bridgewater*, 71 Mass. [5 Gray] 61, 63).

Statutes concerning the drainage of land ordinarily contemplate the removal of water therefrom by means of an artificial channel or trench. *Royse v. Evansville & T. H. R. Co.*, 67 N. E. 446, 447, 160 Ind. 592 (citing *City of Valparaiso v. Parker*, 148 Ind. 379, 47 N. E. 830).

#### **As public use.**

See "Public Use."

#### **As sewerage.**

Sewage distinguished, see "Sewage."

The word "drainage," as used in Rev. St. 1894, § 3598, providing that whenever the council shall find it necessary for the successful drainage of any city to construct any drain, they shall cause and serve, etc., includes sewerage, in view of section 3603, providing that the drainage act shall be liberally construed to permit the drainage of cities, the reclamation of wet lands, and the improvement of the public health. *City of Valparaiso v. Parker*, 47 N. E. 830, 331, 148 Ind. 379.

When the term "drainage" is used as appurtenant to lands, the most obvious suggestion is a drainage of water. So it is held that an agreement giving a right of drainage into and through a drain gives no right to turn sewerage into the drain. *Wetmore v. Flake*, 5 Atl. 375, 378, 15 R. I. 354.

#### **As surface drainage.**

In reference to an action for obstructing or preventing the natural drainage of a lot, the word "drainage" imports surface drainage, unless accompanied by averment telling what kind. *McCray v. Town of Fairmount*, 33 S. E. 245, 246, 46 W. Va. 442.

#### **As watershed.**

The word "drainage" has been defined to mean that district of country that drains into a river or stream, as the drainage of the valley of the river Thames. The word has the same legal significance as the term "watershed." *Maxwell Land Grant Co. v. Dawson*, 34 Pac. 191, 193, 7 N. M. 133.

An allegation that a sewer carried not only ordinary sewage, but also "waters from the drainage area of the brook," meant the waters which, if collected naturally, would form the brook, and includes the rainwater which instead of soaking into the ground, and forming reservoirs to supply the springs feeding the brook, runs off immediately and rapidly, because of the building of paved streets and sidewalks and dwellings. *State Board of Health v. City of Jersey City*, 35 Atl. 835, 836, 55 N. J. Eq. 116.

#### **DRAINAGE DISTRICT.**

A drainage district created under the levee act of the state of Illinois of May 29, 1879, is a corporation strictly in invitum. It is to be classified in this respect with counties, towns, school districts, road districts, and other quasi involuntary corporations, as distinguished from municipal corporations or private corporations. It is a subdivision merely of the general powers of the state for the purposes of civil and governmental administration. *Rood v. Claypool Drainage & Levee Dist. (U. S.)* 120 Fed. 207, 211, 56 C. C. A. 527.

#### **DRAM.**

In common parlance a "dram" is something that has alcohol in it—something that can intoxicate; so that proof of the sale of a dram is sufficient to sustain a conviction without proof of the ingredients, whether whisky or otherwise. *Lacy v. State*, 32 Tex. 227, 228.

#### **DRAMA.**

A "drama" is defined by the best lexicographers to be either a tragedy, comedy, play, or a theatrical entertainment. *Commonwealth v. Fox (Pa.)* 10 Phila. 204, 205.

A drama "is a story represented by action. The representation is as if the real persons were introduced and employed in the action itself. It is ordinarily designed to be spoken, but it may be represented in pantomime, when the actors use gesticulation, sometimes in the form of the ballet, but do not speak; or in opera, where music takes the place of poetry and of ordinary speech." *Bell v. Mahn*, 15 Atl. 523, 121 Pa. 225, 1 L. R. A. 364, 6 Am. St. Rep. 786.

Though the term "theater" has an extended signification, and comprehends a variety of performances, yet it is conceived that all that it does legitimately comprehend partakes more or less of the character of drama. The term "drama" means a poem or composition representing a picture of human life, and accommodated to action. It may be conceded that its signification is broad enough to cover any representation in which a story is told, a moral conveyed, or a passion portrayed, whether by words and actions combined, or by mere actions alone. The dramatic performances which are recognized as belonging to a theater are those adapted to the stage, with the appropriate scenery for their representation. *Jacko v. State*, 22 Ala. 73, 74.

#### DRAMATIC COMPOSITION.

A dramatic composition is a work in which the narrative is not related, but is repeated by a dialogue and action. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1135 (cited and approved, *Carte v. Duff* [U. S.] 25 Fed. 183).

A dramatic composition is a work in prose or poetry, in which stories are told or characters represented, both by conversation and action. Some are poems cast in a dramatic form, capable of representation upon the scene rather than adapted to it, and whose most valuable characteristic is there purely literary merit. Others of but slight literary pretense, and affording but little satisfaction in the perusal, are found agreeable in the representation from the spirited development of the story which is told in action; the vivacity and interest of the events displayed. *Tompkins v. Halleck*, 133 Mass. 32, 35, 43 Am. Rep. 480.

#### Music.

A "dramatic composition," within the meaning of the copyright laws, is a work in which the narrative is not related, but is represented by dialogue and action. "Music designed to be interpreted by instruments alone as a symphony can hardly be considered a dramatic work, within the meaning of the law." *Carte v. Duff* (U. S.) 25 Fed. 183, 187.

A song which relates to the burning of a ship at sea and the escape of those on board, describes their feelings in vehement language, and sometimes expresses them in the supposed words of the suffering parties, though sung only by one person sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress, is dramatic. *Russell v. Smith*, 12 Adol. & B. 217, 236.

#### Play without words.

Under Act Aug. 18, 1856, conferring on the author or proprietor of a copyrighted

"dramatic composition" the sole right to print and establish it, and act or represent it on any stage, a written play, consisting of directions for its presentation by one without the use of spoken language by the characters, is included in the term "dramatic composition." A dramatic composition is a work in which the narrative is not related, but is represented by dialogue and action. *Daly v. Palmer* (U. S.) 6 Fed. Cas. 1132, 1135.

#### Spectacular exhibition.

A spectacular piece, in which the dialogue is very scant and meaningless, a sort of verbal machinery tacked on to a succession of ballet and tableaux, the principal part and attraction of the spectacle appearing to be the exhibition of women in novel dress, or in no dress, and in attractive attitudes or action, the closing scene being called *Paradise*, a sort of Mohammedan paradise, with imitation grottos and unmaidenly hours, is not a "dramatic composition." To call such a spectacle a dramatic composition is an abuse of language, and an insult to the genius of the English drama. *Martinetti v. McGuire* (U. S.) 16 Fed. Cas. 920, 922.

#### Stage dance.

"Dramatic composition," as used in the copyright act, means a composition which tells some story. It may be but the narrative or representation of a single transaction; but it must repeat or mimic some action, speech, emotion, passion, or character, real or imaginary, and hence does not include a stage dance, the explanation or description of which shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. The mere mechanical movements by which effects are produced on the stage cannot be called dramatic composition, since they convey no idea of narrative; and therefore a performance in which no other idea than that of a comely woman, illustrating the poetry of motion in a singularly graceful fashion, is not dramatic, and hence not within the copyright act. *Fuller v. Bemis* (U. S.) 50 Fed. 923, 929.

#### DRAMATIC ENTERTAINMENT.

See "Place of Dramatic Entertainment."

#### DRAMSHOP.

A dramshop is a saloon or bar where spirituous or intoxicating liquors are sold. *Brockway v. State*, 36 Ark. 629, 636; *Snow v. State*, 9 S. W. 306, 50 Ark. 557.

A "dramshop," within the meaning of the liquor laws, is a place where spirituous,

vinous, or malt liquors are retailed in less quantity than a gallon. *Hewitt v. People*, 57 N. E. 1077, 1078, 186 Ill. 336; *Commonwealth v. Marzynski*, 21 N. E. 223, 229, 149 Mass. 68; *Feldman v. City of Morrison*, 1 Ill. App. (1 Bradw.) 460; *Rank v. People*, 80 Ill. App. 40, 41; *Strauss v. City of Galesburg*, 67 N. E. 836, 838, 203 Ill. 234.

Where premises were leased to be occupied as a studio and salesroom, and for no other purpose, a sublease to a person occupying the premises as a dramshop was a breach of the contract, the court saying that "while we often hear dramshops spoken of as saloons, and see them so mentioned in city ordinances, and signs upon them often read 'Sample Room,' 'Family Resort,' and other designations, yet no one has ever, we believe, yet endeavored to attract custom by calling a dramshop a studio or a salesroom." *Bryden v. Northrup*, 58 Ill. App. 233, 235.

In Rev. St. art. 43, § 2, entitled "Dramshops," providing that whoever, not having a license to keep a dramshop, shall by himself, etc., sell liquors, shall be fined, etc., and defining a "dramshop" as a place where spirituous, vinous, or malt liquors are retailed in less quantity than one gallon, the term is not limited to a place where liquors are sold as an entire business and devoted to drinking, as a saloon or tippling house, but includes as well drug stores and other places where liquor is sold. *Wright v. People*, 101 Ill. 126, 129.

As used in a statute providing for the continuing in force of all ordinances of a municipality, the whole or any part of which is annexed to another city, incorporated town, or village, whereby the licensing of dramshops is prohibited or regulated therein, "dramshops" is generic, and means the liquor traffic generally. *People v. Harrison*, 61 N. E. 99, 101, 191 Ill. 257.

#### DRAMSHOP KEEPER.

A "dramshop keeper" is a person permitted by law, being licensed according to the provisions of the chapter relating thereto, to sell intoxicating liquors in any quantity, either at retail or in the original package, not exceeding ten gallons. Rev. St. Mo. 1899, § 2990.

A "dramshop keeper" is defined by the liquor law of 1845 to be a person permitted by law, being licensed according to the provisions of the act, to sell intoxicating liquors in any quantity less than a quart. *State v. Slate*, 24 Mo. 530, 531; *State v. Owen*, 15 Mo. 506, 507.

#### DRAUGHT.

Rev. St. U. S. § 2898 [U. S. Comp. St. 1901, p. 1919], prohibits the allowance of "draught" in assessing customs duties. It

was contended that such section prohibited the collector from making any allowance or deduction from any article subject to specific duty by reason of impurities contained therein; but the court said: "I am of the opinion that the words 'draught' and 'draft,' used in these acts of Congress, do not apply to or mean the impurities contained in an imported article, but mean the arbitrary allowance for loss of weight in handling, or shrinkage, or variations in scales or devices for weighing, and have no reference to such deductions as should be made to ascertain the exact, or as nearly as possible the exact, amount of the article imported on which the tax is imposed." *Wright & Lawther Lead Co. v. Seeberger* (U. S.) 44 Fed. 258, 259; *Seeberger v. Wright & Lawther Oil & Lead Mfg. Co.*, 15 Sup. Ct. 583, 584, 157 U. S. 183, 39 L. Ed. 665 (citing and approving definition in *Marriott v. Brune*, 50 U. S. [9 How.] 619, 633, 13 L. Ed. 282).

#### DRAW.

To "draw" has several well-understood meanings, but as applied to a writing but one, and that, according to Webster, is "to write in due form; to prepare a draft of, as to draw a memorial, a deed, or bill of exchange; to draw up; to compose in due form; to draft; to form in writing." This is the meaning generally given by the lexicographers. *Winnebago County State Bank v. Hustel*, 119 Iowa, 115, 93 N. W. 70 (quoting Webster, Dict., and citing *Hawkins v. State*, 28 Fla. 363, 367, 9 South. 652).

Rev. St. 1894, § 2808 (Rev. St. 1881, § 1984), making it a misdemeanor to draw a pistol upon another person, etc., means to so draw it that it may be used to his injury, as to point the muzzle of a gun or revolver at another; but it is not necessary that he intend to discharge or fire it off, or shoot the person, in order to constitute a violation of the statute, and hence any one who intentionally points the muzzle of a pistol at another is guilty of a violation of the statute. *Siberry v. State* (Ind.) 47 N. E. 458, 459.

#### As part of a bridge.

See, also, "Drawbridge."

A "draw," as the term is used in reference to bridge building, is defined by all dictionaries as the movable section of the bridge, whether raised up, as was the earlier practice, or moved to one side, as at present. *Gildersleeve v. New York, N. H. & H. R. Co.* (U. S.) 82 Fed. 763, 766.

"Draw," as used in Act Cong. July 2, 1864, providing that the Northern Pacific Railway shall be constructed in a substantial manner, with all necessary draws, culverts, bridges, etc., means that part of a bridge across a navigable stream which is no

made that it may be drawn up or aside to enable the unobstructed passage of water craft. *Hughes v. Northern Pac. R. Co.* (U. S.) 18 Fed. 106, 114.

#### **As depression in land.**

The word "draw," as used in the Northwestern states, implies a depression which may run for many miles in length, in which there is not necessarily a running stream, but the waters from melting snows and rains which fall on the area on either side of the draw drain into it, and thence make their way, through other channels, to the broad rivers of the West. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859.

#### **As write in due form.**

One of the definitions of the word "draw" is to write in due form; to prepare a draft of, as to draw a memorial, a deed, or a bill of exchange. *Hawkins v. State*, 9 South. 652, 28 Fla. 363.

#### **As applied to warrants.**

Drawing a warrant is incident to the auditing of claims. The manner in which the state auditor gives or records his decision is by indorsing the decision on the claim, and if it is favorable he does what is denominated as "drawing a warrant." But drawing a warrant is not a part of the auditing, except as it is made so by statute. Drawing a warrant is not drawing money out of the treasury, nor does it entitle the holder to receive money out of the treasury unless all the requisites of the law concur with the act. Drawing a warrant is a part of the formal and convenient mode provided by statute for recording the auditor's decision, but the decision would be as effectual if the Legislature had provided some other mode of entering the decision. *Brown v. Fleischner*, 4 Or. 182, 149.

#### **DRAW LOTS.**

The phrase "to draw lots" is said by Webster to mean: "To determine an event by drawing one thing from a number whose marks are concealed from the drawer." *Wilkinson v. Gill*, 74 N. Y. 63, 65, 30 Am. Rep. 264; *People v. Noelke*, 1 N. Y. Cr. R. 252, 256.

#### **DRAWBACK.**

One of the definitions of "drawback" is that it is a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all. *Downs v. United States*, 113 Fed. 144, 148, 51 C. C. A. 100.

#### **DRAWBRIDGE.**

Whether a structure is or is not a bridge may sometimes be a question of fact, and where a statute requires trains to slow down

to a certain speed before running on or crossing any "drawbridge" the restriction as to speed applies to the entire bridge, and the term "drawbridge" should be construed to mean the bridge proper; that is to say, that part of the structure which is directly over the river, and not including the tressels or approaches on either side of the river. Though the term "drawbridge" is often applied to the movable section of the bridge, it also means the whole bridge, of which the draw or movable section is a part. *Savannah, F. & W. R. Co. v. Daniels*, 17 S. E. 647, 648, 90 Ga. 608, 20 L. R. A. 416.

The word "draw," as used in Act Cong. July 2, 1864, incorporating the Northern Pacific Railway Company, and authorizing the company to locate, construct, and maintain a continuous railway from Lake Superior to Portland, Or., with all the powers, privileges, and immunities necessary to carry into effect the purpose of the act, the same to be constructed in a substantial and workmanlike manner, with all the necessary draws and bridges, means a contrivance by which a section of a bridge across a navigable water is turned upwards or at right angles to itself, and parallel with the direction of the stream, so as to admit of the passage of vessels through the open space that could not otherwise pass the point. *Hughes v. Northern Pac. R. Co.* (U. S.) 18 Fed. 106, 114.

"Drawbridge," as used in a contract for the construction of a drawbridge on which the cars of a railroad could cross, meant a bridge serviceable for that purpose, and capable of being used with like facility as similar bridges properly constructed. *Florida R. R. v. Smith*, 88 U. S. (21 Wall.) 255, 263, 22 L. Ed. 513.

#### **DRAWERS.**

The word "drawers" in the statute, providing that in actions on bills or notes the plaintiff shall be compelled to sue the drawers and indorsers living and resident in this state in a joint action, must have been designed to embrace all parties who had signed a note or bill as maker. *Stevenson v. Walton*, 10 Miss. (2 Smedes & M.) 262, 265.

Where a note signed by sureties recited that the drawers and indorsers waived all defenses on the ground of any extension of the time of payment, the word "drawers" did not apply to either payees or indorsers, but should be construed as designating the original promisor and sureties. *Winnebago County State Bank v. Hustel*, 93 N. W. 70, 119 Iowa, 115.

#### **DRAWING.**

Judicial notice will not be taken that the words "drawing," or "Kentucky drawing," designate a game of chance. *State v. Bruner*, 17 Mo. App. 274, 275.

"Drawing a prize," as the term is used in speaking of a lottery, is, according to common parlance, the ascertainment, by chance or otherwise, of who is entitled to a particular result or a particular thing, by means of some prearranged mode of ascertaining the result, and as soon as the number which entitled the ticket holder to the money or article is drawn upon the wheel or otherwise ascertained the prize is said to be drawn. *People v. Kent*, 6 Cal. 89, 90.

Under a statute requiring the commissioners of waterworks of a city, before entering into any contract, to cause plans and specifications, detailed drawings, and forms of bids to be made, where the commissioners cause plans to be prepared they are the judges of the sufficiency of such plans, and no other body can determine the question of sufficiency. A "drawing" is a representation of a plain surface, by means of lines and shades. Its synonyms are "delineation"; "picture." The term "synonymous" is applied to a word that has the same import or signification with another. Accordingly such words as are synonyms agree in expressing one principal idea. A diagram of a pump, showing a longitudinal section and cross-section from the intake pier, with elevations of mains and basins, is a scale drawing as well as a plan. *Ampt v. Cincinnati*, 8 Ohio Dec. 624, 628.

#### DRAWING SLATE.

Drawing or graphic slate is a soft kind of slate, containing carbon, which is used for pencils. *Plastic Fireproof Construction Co. v. City & County of San Francisco* (U. S.) 97 Fed. 620-628.

#### DRAWN.

Code, § 5004, provides that at least one day before any capital case set for trial the court shall cause not less than 25 or more than 50 names to be publicly drawn from the jury box. Section 5005 provides that the special jurors so drawn, together with a panel of petit jurors organized for the week at which the case is set for trial, shall constitute a venire, from which the jury to try the case shall be selected. It was held that the word "drawn" was employed in the sense of "selected," whether by drawing from the jury box or by summoning by the sheriff to supply a deficiency in the regular jurors for the week. *Smith v. State*, 34 South. 168, 170, 186 Ala. 1.

#### DRAWN IN ORDINARY FORM.

See "Ordinary Form."

#### DRAWN IN QUESTION.

Judiciary Act, § 25, providing that a final decree in the highest court of equity in

a state where is "drawn in question" the validity of a statute of any state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity, may be examined and reversed in the Supreme Court, means that it must appear clearly from the whole record that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied. It is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsisimilis verbis*. *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 68 U. S. (1 Wall.) 116, 143, 17 L. Ed. 571 (citing *Crowell v. Randell*, 35 U. S. [10 Pet.] 368, 9 L. Ed. 458; *Armstrong v. Athens County*, 41 U. S. [16 Pet.] 281, 10 L. Ed. 965).

#### DRAWN STEEL.

The word "drawn," when used as an adjective in describing steel as drawn steel, distinguishes from steel which merely passes through rolls. As used in *Tariff Act Oct. 1, 1890*, par. 148, relating to the duties on flat steel wire, or sheet steel in strips, whether drawn through dies or rolls, etc., it is used as a verb, and in that use it was well known, with reference to ductile metals, in a sense other than its primary one, long before the art of drawing through dies existed. The verb "draw" is recognized by all lexicographers as sometimes meaning extending in either length or breadth by hammering or other forging. *United States v. Wetherell* (U. S.) 65 Fed. 987, 988, 13 C. C. A. 264.

#### DRAY.

As vehicle, see "Vehicle."

In an ordinance requiring "drays" to be licensed, but allowing any person hiring a dray for the purpose of hauling for themselves or others to use it without a license, the word "dray" is used in its common and popular sense, as contradistinguished from a wagon in its common and popular sense. *City of Griffen v. Powell*, 64 Ga. 625, 627.

A wagon drawn by four horses, and used in the transportation of property and for transferring goods of grocers and merchants, is not a dray. *Snyder v. City of North Lawrence*, 8 Kan. 82, 84.

"Drays and wheeled vehicles run for profit," as used in Knoxville city ordinance taxing "hacks, carriages, drays, and wheeled vehicles run for profit," includes a dray kept by a firm of merchants for hauling goods to the depot for nonresident customers, for which service drayage is charged. *City of Knoxville v. Sanford*, 81 Tenn. (13 Lea) 545, 546.



**DRAYAGE.**

"Drayage," as used in a toll rate prescribed by harbor commissioners, allowing a reduced rate on merchandise landed on wharfs and taken thence in lighters or other vessels or warehoused without drayage, meant loaded means of conveyance, whether in wagons, drays, or cars. *Soule v. San Francisco Gaslight Co.*, 54 Cal. 241, 242.

**DREDGE.**

As vessel, see "Vessel."

An agreement to "dredge" a dock implies of its own force the deposits of the materials dredged in some proper place. *Boynton v. Lynn Gaslight Co.*, 124 Mass. 197, 201.

**DRESS.**

See "New Dress."

**DRESSED FURS.**

"Dressed furs or skins," within Tariff Act 1890, par. 444, providing a special duty on "dressed furs or skins," means skins which have been cured, and of which the pelt has been leathered; furs which are dressed on the skin. *United States v. Wotton* (U. S.) 53 Fed. 344, 346, 3 C. C. A. 553.

**DRESSING.**

"Dressing" is the process by which the skin or pelt is treated in the way to be converted into leather, and be made soft and flexible. It means curing and leathering the pelt. *United States v. Wotton* (U. S.) 53 Fed. 344, 346, 3 C. C. A. 553.

**DRESSING VICTUALS.**

The sale of liquor is not the dressing of victuals, within Pa. Act Assem. April 22, 1794, § 1, prohibiting the doing or performing of any worldly employment or business on Sunday, works of necessity and charity alone excepted, provided always that nothing therein contained should be construed to prohibit a dressing of victuals in private families, bakehouses, lodging houses, and other houses of entertainment, for the use of sojourners, travelers, or strangers. To dress victuals is to prepare food fit for consumption, and hence the table or bench on which the meat or other things are dressed or prepared for use is sometimes called a "dresser," from the French "dressoir," and there is no figure of speech or any rule of construction, either in grammar or law, that can make the selling of liquor the dressing of victuals. *Omit v. Commonwealth*, 21 Pa. (9 Harris) 426, 428.

**DRESSMAKER.**

Where under a contract plaintiff obligates herself to take charge of the dress-making department of the defendant as manager and dressmaker, with power to employ and discharge the employees of the department, etc., the word "dressmaker," taken in connection with the entire context of the contract, cannot be construed as meaning that she was employed as a seamstress, but rather merely descriptive of the position or office which she was to fill, and imposed no obligation upon her to do the work of a seamstress; and hence where her discharge was for her refusal to work as seamstress she was entitled to recover under the contract. *Marx v. Miller*, 32 South. 765, 767, 134 Ala. 347.

**DRIED FRUIT.**

Leghorn citron, which is commercially classed among "dried fruits," is entitled to free entry, under the tariff act of 1883, as a dried fruit. *Nordlinger v. United States* (U. S.) 69 Fed. 92.

**DRIFT.**

"Drifting in a tunnel" means taking earth, gravel, or ore from ground made accessible by means of the tunnel, and is not synonymous with "running a tunnel," and so is not a part of the construction, alteration, or repair of any building or improvement on or in a mine, within Code Civ. Proc. Cal., providing for a lien on every such building or improvement done with the knowledge of the owner. *Jurgenson v. Diller*, 46 Pac. 610, 611, 114 Cal. 491, 55 Am. St. Rep. 83.

**DRIFT STUFF.**

"Drift stuff," in its common acceptance, does not signify goods which are the subject of salvage, but means matter floating at random without any known or discoverable ownership, which, if cast ashore, will probably never be reclaimed, but will, as a matter of course, accrue to the riparian owner. *Watson v. Knowles*, 13 R. I. 639, 641.

**DRIFTWAY.**

"Driftway" is defined by lexicographers to be a "common way for driving cattle." *Smith v. Ladd*, 41 Me. 314, 320.

**DRINK.**

See "By the Drink."

"Drinking wine," within the meaning of a representation in an application for a

life policy that the applicant does not drink wine, must be interpreted to mean that he has not drunk the liquor habitually, and the fact that he occasionally drinks to excess does not show a misrepresentation. *Mutual Life Ins. Co. v. Simpson (Tex.)* 28 S. W. 837-839.

Within the meaning of a statute providing that no person without a state license shall sell, offer, or expose for sale spirituous liquors, wine, porter, beer, "or any drink of like nature," includes, by reason of the use of the term in connection with the liquors specifically enumerated, all similar preparations, made by similar process of fermentation, of similar nature. *State v. Oliver*, 28 W. Va. 422-427, 53 Am. Rep. 79.

#### DRINKING SHOP.

Within a city ordinance providing for the licensing of barrooms in drinking shops, and prohibiting the sale of liquor without a license, a "drinking shop" is a place where liquors are sold, bartered, or delivered to be drunk on the premises. *City of Portland v. Schmidt*, 6 Pac. 221, 225, 13 Or. 17.

#### DRIP.

See "Servitude of Drip."

#### DRIVE.

The words "riding" and "driving" are of common use, and must be taken and construed according to their ordinary signification. In an ordinance requiring persons "riding or driving" to halt for pedestrians, the use of the words in the disjunctive form shows that it was intended to designate by each a different act. Webster defines the words "ride" and "drive" as follows: "Ride. (1) To be carried on a horse or other animal, or in any kind of vehicle or carriage. (2) To be carried or travel on horseback." "Drive. To go or pass in a carriage." It will be seen that "ride" in its broadest sense embraces "drive," but as used in the ordinance it was evidently not so intended. *Citizens' Ry. Co. v. Ford*, 93 Tex. 110, 113, 53 S. W. 575, 576, 46 L. R. A. 457.

"Drive" means to go or pass in a carriage. As used in an ordinance requiring any person riding or driving to check up or halt for pedestrians, if necessary, on approaching alley or street crossings, the phrase "any person driving" means one passing in a vehicle under his own control, and does not apply to street cars. *Citizens' Ry. Co. v. Ford*, 53 S. W. 575, 576, 93 Tex. 110, 46 L. R. A. 457.

"Driven into," as used in Rev. St. § 3845, providing for the assessing of any

personal property brought or driven into the territory with a regular assessment in any year, refers only to live stock. *Frontier Land & Cattle Co. v. Baldwin*, 31 Pac. 403, 404, 3 Wyo. 764.

"Driven," as used in Sp. Laws 1875, c. 48, § 2, entitling a corporation to toll on all logs driven down a certain river, will be construed to include logs driven by the unaided action of the stream, as well as logs driven by artificial means. *St. Louis Dalles Imp. Co. v. C. N. Nelson Lumber Co.*, 44 N. W. 1080, 1082, 43 Minn. 130.

Where a statute authorizes one to "drive" the logs by which his own may be obstructed or with which they are intermingled, the term has a well-understood meaning, and involves the exercise of the requisite care and effort to take the logs down the stream. *Miller v. Chatterton*, 46 Minn. 338, 340, 48 N. W. 1109, 1110.

"Take," "drive," and "sell," in their usual sense, denote innocent action, and hence, as used in a statement, standing alone, that "he took and drove off my ducks and sold them," without any averment, do not import the commission of a crime, so as to render the words slanderous per se. *Hinesley v. Sheets*, 48 N. E. 802, 803, 18 Ind. App. 612, 63 Am. St. Rep. 356.

#### DRIVEN WELL.

A "driven well" is one made by driving an iron pipe into the ground to the required depth. *Pickett v. Pacific Mut. Life Ins. Co.*, 144, Pa. 79, 90, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618.

A "driven well" consists of an air-tight tube sunk into the earth until a water-bearing stratum is reached, and then by means of a pump at the top of the tube a vacuum is created in the tube, thus causing the water to flow to the surface with greater rapidity than it would flow from purely natural causes. *Andrews v. Carman (U. S.)* 1 Fed. Cas. 868, 870.

A "driven" well is one constructed by driving or forcing an instrument into the ground until it is projected into the water, without removing the earth upward, as it is in boring. "The distinguishing characteristics of a driven well, as it differs from a dug well, is that when the pressure is relieved from the interior of the tube, which itself forms the body of the well, not only does the force of gravity act to supply it with water directly from the earth, but there being no intervening body of water between the wall of the well itself and the earth surrounding it on which the atmosphere can act directly and with greater effect to force it into the well (as it can and does in the open well), the water is supplied di-

rectly to it from the earth surrounding it in a direct inverse ratio to its distance from the well, and, the friction of the water through the earth being directly as the square of its velocity, as the distance from the well increases, the water moves very much slower than it does immediately next to the well itself; but the area of the source of supply being increased exactly in the ratio of the square of its distance from the well, and the friction being increased exactly as the square of its velocity, the one exactly counterbalancing the other, it follows that from natural laws the surface of the water of the earth surrounding the well is and must be maintained practically at a given level; whereas, in the open well supplied by gravity only, the water in the earth inclines from the natural surface of the stratum in the earth to the bottom of the well, the angle of that decline decreasing as the supply is taken from the well, and, unless pumping is stopped and time allowed for a resupply, a lowering of the water in the earth extends to a continually increasing distance, and a longer time is required to obtain the original quantity in the well, while the supply to the driven well is continuous and steady and practically inexhaustible, the supply in a given time being in proportion to the size of the pipe forming the well, having openings proportionate to its size, different wells varying in the supply according to the nature of the soil in which they are inserted, but remaining virtually constant at all times in the same soil. Water cannot be pumped from a driven well in any given stratum with greater ease than from an open well sunk in the same stratum. One peculiar characteristic of a driven well, as distinguished from the bored artesian well, is that the driven well is for use in soil where no rock is to be penetrated, and where the pressure of the atmosphere is free to act on the surface of the water in the earth surrounding it; while the artesian well is usually, if not always, bored into a rock stratum, and is supplied with water through fissures in the rock, instead of through the earth itself surrounding the entrance or opening to the well." *Driven Well Cases*, 7 Sup. Ct. R. 1073, 1079, 122 U. S. 40, 30 L. Ed. 1064.

### DRIVER.

The word "driver," as used in the sections regulating the use of vehicles on the highways, shall be construed to include any person riding or propelling a bicycle or tricycle or directing a motor carriage. Gen. St. Conn. 1902, § 2033.

A person riding a bicycle is a "driver" of that vehicle within the meaning of a statute prohibiting the riding or driving of any horse or beast so as to endanger the life or limb of any passenger. *Davis v. Petrino-*

*vich*, 21 South, 344, 112 Ala. 654, 36 L. R. A. 615.

A conductor of a street railroad car is not a "driver" of a carriage within the statute making a master liable for the wilful acts of his driver while driving such carriage. *Isaacs v. Third Ave. Railroad Co.*, 47 N. Y. 122, 124, 7 Am. Rep. 418.

### DROIT.

"Droit" is defined by Black's Law Dictionary as equivalent to the English word "right." *Opel v. Shoup*, 100 Iowa, 407, 420, 69 N. W. 560, 37 L. R. A. 583.

### DROIT D'AUBAINE.

"Droit d'aubaine" is defined by Black as, in French law, a rule by which all the property of a deceased foreigner, whether movable or immovable, was confiscated to the use of the state, to the exclusion of his heirs, whether claiming ab intestato or under a will. *Opel v. Shoup*, 100 Iowa, 407, 420, 69 N. W. 560, 37 L. R. A. 583.

### DROP.

Where an insurance company sent to its agent an expiration sheet containing a list of certain policies, opposite all of which except one was the word "renew," and opposite this one, which was for \$2,000, was the word "drop," such word was at least ambiguous and equivocal, and the agent had a right to interpret the instrument by decreasing the insurance and renewing for half the amount. *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185, 192.

### DROP FEED.

A "drop-feed" sewing machine means that particular form of feed in which the feeding instrument is applied from underneath the table (in distinction from being applied on the top of the table), and which recedes from underneath the bottom of the table after the feeding is done. *Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co.*, 110 Mass. 70, 86, 14 Am. Rep. 579.

### DROP IN TENSION.

"Drop in tension" means "loss of the propulsive force which measures initially the forward movement of the electrical energy, or so-called 'current,' as it leaves the generator and seizes upon and follows the conductor." This drop in tension is the necessary resultant of the obstructive operation of the molecules of the conductor to and upon the electrical energy or potential," as it is called, as it forces its way through the

conducting matter. *Edison Electric Light Co. v. Westinghouse* (U. S.) 55 Fed. 490, 496.

### DROP WRIST.

An injury on the wrist known as the "drop wrist" is the paralysis of the nerves which control the muscles on the back of the wrist. *Missouri, K. & T. R. Co. v. Bodie* (Tex.) 74 S. W. 100, 105.

### DROUGHT.

A ship was chartered in Liverpool to carry a cargo of lumber from Ship Island. The charter party provided that in the computation of days allowed for delivering the cargo any time lost by reason of droughts, floods, storms, or any extraordinary occurrence beyond the control of the charterer, should be excluded. Held, that the word "droughts" could not include a drought prevailing at the time of the charter along the tributaries of a river, which prevented the charterers from obtaining the timber, especially as it was the custom of the port to prepare cargoes at another place, between which place and Ship Island no drought could affect a delivery. *Sorensen v. Keyser* (U. S.) 51 Fed. 30, 31, 2 C. C. A. 92.

### DROVE.

A "drove" is defined by Webster to be a collection of cattle; a number of animals driven in a body. We speak of a "herd" of cattle, a "flock" of sheep, when a number is collected, but properly a "drove" is a herd or flock driven; and, as used in an ordinance forbidding the driving of any drove of horned cattle throughout the city, it forbids the driving at any time of cattle throughout the streets of a city, without any regard to the number in the drove. *McConvill v. Jersey City*, 39 N. J. Law (10 Vroom) 38, 43.

Under Act June 2, 1873, providing that it should not be lawful for any persons to herd any "drove of cattle" numbering more than twenty-five head on any land in the state, not his own, within one-half mile of the residence of any resident of the state, without the consent of the owner of the land, an information charging that the defendant willfully herded fifty cattle contrary to the statute is sufficient, the term "fifty cattle" being equivalent to "drove of cattle." *Caldwell v. State*, 2 Tex. App. 53, 54.

### DROVER.

See "Stock Drover."

As used in the article relating to domestic animals, "drover" means every person having charge or control of any herd of

neat cattle, horses, or mules, numbering 5 or more, or any flock of sheep numbering 25 or more, as owner, agent, or employé, while the same is being driven from one place to another not within the same range or neighborhood. Rev. Codes N. D. 1899, § 1544a.

### DROVER'S PASS.

A "drover's pass" is a carriage for hire, for while the person was entitled to pass free, yet the passage was one of the mutual terms of an agreement for carrying his cattle. *Norfolk & W. R. Co. v. Tanner*, 41 S. E. 721, 723, 100 Va. 379 (citing *New York Cent. R. Co. v. Lockwood* [U. S.] 17 Wall. 357, 21 L. Ed. 627).

"Drovers' passes" are passes given to drovers of stock who accompany the same; but such carriage is not gratuitous, and a person riding on such a pass is entitled to protection as a passenger, both while going and returning; and this rule is not altered by a recital in the contract that he is to be deemed an employé of the carrier while so traveling. *Missouri Pac. Ry. Co. v. Ivy*, 9 S. W. 346, 349, 71 Tex. 409, 1 L. R. A. 500, 10 Am. St. Rep. 758; *St. Louis S. W. R. Co. v. Nelson* (Tex.) 44 S. W. 179, 180.

### DROWN.

The present participle "drowning" is a well-known word, indicating, when applied to a human being, a condition which demands prompt succor, otherwise the result will be death. The past participle "drowned" means, and for centuries has meant in common and legal parlance, a fixed condition, deprived of life by immersion in water; dead. No diligent inquiry of lexicographers is demanded; the use of the word "drowned" to convey the fact and the manner of death in an indictment is a use of it in its plain and ordinary signification, and, in the phrase "mortally choked, suffocated, and drowned," means "dead." *United States v. Barber*, 20 D. C. 79, 93.

### DRUG.

See "Uncompounded Medicinal Drug."

Webster defines "drugs" to be substances used in the composition of medicines; and, again, as used in dyeing or any chemical operations. *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 281, 28 Am. Rep. 322.

A "drug or medicine" is a substance or commodity used as a remedy for diseases. The use contemplated must be a general or primary one, and in the construction of a statute forbidding the sale of goods on Sunday, but excluding drugs and medicine, the Legislature could not have intended to in-

clude tobacco. *State v. Ohmer*, 34 Mo. App. 115, 124.

The term "drug" shall include all medicines for internal or external use. Gen. St. N. J. 1895, p. 1175, § 75; Comp. Laws N. M. 1897, § 1256; Civ. Code S. C. 1902, § 1581; Code Miss. 1892, § 2095; Pen. Code Tex. 1895, art. 431.

The term "drug" shall include all medicines for internal or external use, antiseptics, disinfectants, and cosmetics. Rev. Laws Mass. 1902, p. 660, c. 75, § 17; Bates' Ann. St. Ohio 1904, §§ 4200-4205.

The term "drug" includes any medicinal substance, or any preparation authorized or known in the Pharmacopœia of the United States, or the National Formulary, or the American Homeopathic Pharmacopœia, or the American Homeopathic Dispensatory. P. & L. Dig. Laws Pa. 1897, vol. 3, col. 397, § 2.

"Drugs in a crude state," as used in Tariff Act Oct. 1, 1890, par. 560, includes elaterium in cakes, prepared from the juice of the fruit of *echallium elaterium* by evaporation and drying, and containing a medicinal drug known as "elaterin," which, however, is extracted from the cakes before it is used by the physician. *United States v. Merck* (U. S.) 68 Fed. 251, 252, 13 C. C. A. 452.

"Guarana" is a medicinal drug, consisting of a dried paste in the form of rolls, such being the crudest state in which it is ever imported, and which before being used as a medicine must be further prepared, and is free of duty under paragraph 548, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 197 [U. S. Comp. St. 1901, p. 1683], relieving from duty "drugs in a crude state." *Cowl v. United States* (U. S.) 124 Fed. 475, 476.

#### Benzine.

A "drug" is any animal or mineral substance in the composition of medicines; any stuff used in dyeing or chemical operations; any ingredient used in chemical preparations or employed in the arts. Benzine put up in bottles containing from two to six ounces each, to be sold for cleansing purposes, is included within the term "drugs" as used in a fire policy insuring drugs and chemicals. *Phoenix Ins. Co. v. Flemming*, 44 S. W. 464, 465, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. Rep. 900.

"Webster defines a 'drug' as including any mineral substance used in chemical operations, so that the court held that it could not say as a matter of law that benzine was not included in the term as used in an insurance policy." *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 426, 38 Am. Rep. 687.

#### Intoxicating Liquors.

"Drugs" are not within the meaning of an act of the Legislature prohibiting mer-

chants from selling intoxicating liquors without a license. *Anderson v. Commonwealth*, 72 Ky. (9 Bush) 569, 571.

A "drug" is a compound, mostly of mineral, animal, or vegetable substance, made by apothecaries and others, and used as a medicine in the treatment of diseases, and commonly called "physic." Whisky cannot with propriety be included in the term "drug." That term carries along with it an idea inseparable from it, of something repulsive, nauseous, at which the gorge heaves. Whisky, on the contrary, is inviting and exhilarating. Whisky is sometimes taken medicinally, but never as a drug. *Gault v. State*, 34 Ga. 533, 535.

Under the express provisions of 81 Ohio Laws, p. 67, and 87 Ohio Laws, p. 248, providing against the adulteration of foods and drugs, the term "drugs" includes all medicines for internal or external use, antiseptics, disinfectants, cosmetics, and hence will be construed to include whisky. *State v. Hutchinson*, 46 N. E. 71, 72, 56 Ohio St. 82.

In a will of a wholesale and retail druggist giving and bequeathing his stock of medicines, drugs, paints, and furniture belonging to or contained in his store to certain persons, the terms "medicines" and "drugs" cannot be construed to include 50 barrels of whisky which were stored in a distillery bonded warehouse, though whisky may be sold by druggists in comparatively small quantities as medicine, and which a great many people so take. *Kloch v. Burger*, 58 Md. 575, 578.

#### Saltpetre.

"Drugs" are defined by Webster to be "substances used in the composition of medicines; substances used in dyeing or in chemical operations." Thus saltpetre is a drug, and may be kept as a drug under a policy insuring a stock of drugs and medicines with a proviso against the keeping of gunpowder, fireworks, saltpetre, etc. *Collins v. Farmville Ins. & Banking Co.*, 79 N. C. 279, 281, 28 Am. Rep. 322.

#### Tobacco.

Tobacco is not a "drug" within the meaning of a Sunday statute permitting the selling of drugs and medicines on Sunday. *State v. Ohmer*, 34 Mo. App. 115, 125.

Tobacco in its manufactured form, or cigars, cigarettes, smoking tobacco, chewing tobacco, snuff, and the like, is not a "drug" or "medicine," within the meaning of a city ordinance excepting drugs and medicine from its operation. *Penniston v. City of Newnan*, 45 S. E. 65, 66, 117 Ga. 700.

Cigars are manufactured articles familiar to everybody. The materials of which they

are composed are carefully prepared and put into form until they lose their original character as mere materials, and become articles of commerce, known by a new name and adapted to a particular use. Cigars sold by a tobacconist in the ordinary way are not "drugs" or "medicines," within the meaning of those words as used in St. 1887, c. 391, § 2, permitting the retail sale of drugs and medicines on Sunday. *Commonwealth v. Marzyuski*, 21 N. E. 228, 229, 149 Mass. 68.

### DRUG STOCK.

A chattel mortgage describing the mortgaged property as a "drug stock" covers all articles ordinarily and usually kept therein at the place where the stock is situated, and it is a question for the jury to determine what such articles consisted of. *Kern v. Wilson*, 35 N. W. 594, 596, 73 Iowa, 490.

### DRUGGIST.

A brief and clear definition of the term "druggist" by a standard lexicographer, Dr. Webster, is that it properly means one whose occupation is to buy and sell drugs without compounding or preparation. The term, therefore, has a much more limited and restricted meaning than the word "apothecary," and we find little difficulty in concluding that the term "druggist" may be applied in a technical sense to persons who buy and sell drugs. A man may be a "druggist" in the sense of being a purchaser and vendor of medicines, whether he have a license as a druggist or not, although he cannot legally deal in drugs (buying and selling) without a license. A retail merchant selling drugs and medicines is a "druggist" within a statute requiring a special license for the sale of such articles by a druggist. *State v. Holmes*, 28 La. Ann. 765, 767, 26 Am. Rep. 123.

The word "druggist" is not limited to one who actually compounds his medicine, but means one who compounds or sells drugs at retail; and hence one retailing drugs was a "druggist," though he did not compound them himself, within a statute relating to the sale of liquors by druggists without a license, in quantities of less than a quart, in good faith for medical purposes. *Hainline v. Commonwealth*, 76 Ky. (13 Bush) 350, 352.

In this country the business of "pharmacist," "apothecary," or "druggist" is all one, and the same person who prepares and compounds medicines also sells them, so that in popular speech all three are used interchangeably, as practically synonymous. *State v. Donaldson*, 42 N. W. 781, 41 Minn. 74.

**As a merchant.**

See "Merchant."

### Wholesale alcohol dealer.

In the popular acceptance of the word, a "druggist" means one who deals in medicines or in the materials which are used in the preparation of medicines, the term "medicines" as here used being taken in its largest signification. As used in St. 1869, c. 415, § 28, which provides that druggists may sell, for medicinal purposes only, pure alcohol to other druggists, etc., the word "druggists" does not include a commission merchant dealing principally in alcohol, merely because the article in which he deals is susceptible of use in the preparation of medicines or admits of medical use. *Mills v. Perkins*, 120 Mass. 41, 42.

### DRUMMER.

See, also, "Commercial Traveler"; "Traveling Salesman."

As engaged in interstate commerce, see "Interstate Commerce."

"Drummers" are persons employed by merchants to work up business for their employers. *Weller v. Penn. R. Co.* (U. S.) 113 Fed. 502, 505.

A "drummer" is a person engaged in soliciting the sale of goods, for a seller located in another place, by the exhibiting of samples for the purpose of effecting such sales and taking orders for goods to be subsequently shipped by his employer. *Robbins v. Shelby County Taxing Dist.*, 7 Sup. Ct. 592, 593, 120 U. S. 489, 30 L. Ed. 694; *Robbins v. Taxing Dist.*, 81 Tenn. (13 Lea) 303, 305; *Singleton v. Fritsch*, 72 Tenn. (4 Lea) 93, 96; *Ex parte Hanson* (U. S.) 28 Fed. 127, 129; *Thomas v. City of Hot Springs*, 34 Ark. 553, 557, 36 Am. Rep. 24.

A "drummer" is a traveling salesman taking orders for goods and transmitting them to the house by which he is employed for approval or rejection. *John Matthews Apparatus Co. v. Renz* (Ky.) 61 S. W. 9, 10.

A "drummer" is a traveling agent, one acting as an intermediary between the importer or the wholesaler and the local trade. *Titusville v. Brennan*, 22 Atl. 893, 894, 143 Pa. 642, 14 L. R. A. 100, 24 Am. St. Rep. 580.

The term "drummer" has acquired a common acceptance, and is applied to commercial agents who are traveling for wholesale merchants and supplying the retail trade with goods, or, rather, taking orders for goods to be shipped to the retail merchants. *Singleton v. Fritsch*, 4 Lea (Tenn.) 96. More accurately, perhaps, a "drummer" is a traveling agent who sells or offers to sell by sample, by representation of his employer's goods, or by soliciting orders. *Robbins v. Taxing Dist.*, 13 Lea (Tenn.) 303, 305.

See, also, *City of Brookfield v. Kitchen*, 63 S. W. 825, 826, 163 Mo. 546 (citing *State v. Hoffman*, 50 Mo. App. 585, and authorities there cited).

A "drummer" is one who solicits trade from retail dealers or others by sample, or one whose business is to canvass and take orders for future delivery of books or other commodities. *Twining v. City of Elgin*, 38 Ill. App. 356, 361.

**Commission merchant.**

"A 'drummer' is a traveling and soliciting salesman." As used in Acts 1885, c. 175, § 28, taxing drummers, it does not include a commission merchant conducting a regular and recognized business in a certain town. *State v. Miller*, 93 N. C. 511, 515, 53 Am. Rep. 469.

**Hawker or peddler distinguished.**

A "drummer" is one who solicits custom, being a commercial or business agent, and not to be confounded with a hawker or peddler. *Thomas v. City of Hot Springs*, 34 Ark. 553, 557, 36 Am. Rep. 24; *Emmons v. City of Lewiston*, 24 N. E. 58, 59, 132 Ill. 380, 8 L. R. A. 328, 22 Am. St. Rep. 540.

The term "drummers" is used to designate persons who solicit orders by exhibiting samples or by catalogue or in any other way, and not those who actually sell and deliver the goods at the time, as peddlers do. *In re Wilson*, 19 D. C. 341, 349.

A "drummer" is a mere solicitor of orders for others, and differs in no respect from clerks or salesmen except that he is ambulatory in his operations and does not usually carry or deliver the goods sold. He follows no independent business, makes no contracts for himself, and does not come ordinarily under any sort of personal obligation. By his engagement he binds his employers and not himself, and has no other interest in the result of the bargains made than any ordinary clerk would. A right to impose a privilege tax on the business, trade, or employment of all auctioneers, grocers, merchants, brokers, bankers, cotton factors, cotton sellers, retailers, peddlers, hotels, junk dealers, and others of like character, does not include a drummer, who is more nearly like merchants and peddlers than any of the others named, but yet is quite unlike either. *Ex parte Taylor*, 58 Miss. 478, 481, 38 Am. Rep. 336.

One selling personal property by sample, taking orders for future delivery, to be paid for only on such delivery, and who does not deliver the goods sold, is a "drummer," as contradistinguished from a "peddler." *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *State v. Emert*, 103 Mo. 241, 15 S. W. 81, 11 L. R. A. 219, 23 Am. St.

Rep. 874. A peddler is an itinerant vender of goods, who sells and delivers the identical goods carried with him. He who sells by sample, taking orders for goods for future delivery, to be paid for wholly or in part on subsequent delivery, is not a peddler. It has never been understood either by the profession or the people that one who is ordinarily styled a "drummer"—that is, one who sells to retail dealers or others by sample—is either a hawker or peddler. *Potts v. State (Tex.)* 74 S. W. 31, 33 (citing *Emmons v. City of Lewiston*, 132 Ill. 380, 24 N. E. 58, 8 L. R. A. 328, 22 Am. St. Rep. 540).

**Merchant tailor.**

The merchant tailor who takes measures and supplies the citizen with clothing has never been known or recognized as a "drummer," within the meaning of the act of 1877, repealing so much of the act of 1867-68 as taxes "drummers." *Singleton v. Fritsch*, 72 Tenn. (4 Lea) 93, 96.

**DRUNK.**

A person is "drunk," in a legal sense, when so far under the influence of liquor that his passions are visibly excited or his judgment impaired by the liquor. *State v. Pierce*, 21 N. W. 195, 197, 65 Iowa, 85.

There are degrees of intoxication or drunkenness. A man is said to be "dead drunk" when he is perfectly unconscious—powerless. He is said to be "stupidly drunk" when a kind of stupor comes over him. He is said to be "stagging drunk" when he staggers in walking. He is said to be "foolishly drunk" when he acts the fool. All these are cases of drunkenness, of different degrees of drunkenness. So it is a very common thing to say a man is "badly intoxicated," and again that he is "slightly intoxicated." There are degrees of drunkenness, and therefore many persons may say that a man was not intoxicated because he could walk straight; he could get in and out of a wagon. Whenever a man is under the influence of liquor so as not to be entirely himself, he is intoxicated; although he can walk straight. Although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be himself, so as to be excited from it, and not to possess that clearness of intellect and control of himself that he otherwise would have, he is intoxicated. *Elkin v. Buschner (Pa.)* 16 Atl. 102, 104.

Under the law a man is intoxicated whenever he is so much under the influence of spirituous or intoxicating liquors that it so operates upon him, that it so affects his acts or conduct or movement, that the pub-

lic or parties coming in contact with him could readily see and know that it was affecting him in that respect. A man to that extent under the influence of liquor that parties coming in contact with him or seeing him would readily know that he was under the influence of liquor by his conduct, or his words or his movements, would be sufficient to show that such party was intoxicated. The word "intoxicated" is synonymous with "drunk," and in a standard dictionary "drunk" is defined as under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly to evince a disposition to violence, quarrelsomeness, and bestiality. In *State v. Pierce*, 85 Iowa, 85, 21 N. W. 195, it was held that one is "drunk" who is so far under the influence of intoxicating liquors that his passions are visibly excited or his judgment impaired. In *Elkin v. Buschner* (Pa.) 16 Atl. 102, it was held that whenever a man is under the influence of liquor so as not to be entirely at himself he is "intoxicated," though he can walk straight, though he may attend to his business, and though he may not give any outward and visible signs to the casual observer that he is drunk. *Sapp v. State*, 42 S. E. 410, 411, 116 Ga. 182.

#### DRUNKARD.

See "Common Drunkard"; "Habitual Drunkard."

As incompetent, see "Incompetent—Incompetency."

A "drunkard," as used in the chapter on habitual drunkenness, includes a person who uses alcoholic, spirituous, malt, fermented, or intoxicating liquors, morphia, laudanum, cocaine, opium, or other narcotics, to such a degree as to deprive him of a reasonable degree of self-control. Rev. Codes N. D. 1899, § 1802.

A "drunkard," as used in the chapter relating to inebriates, is deemed to include any person who has acquired the habit of using spirituous, malt, or fermented liquors, cocaine, or other narcotics, to such an extent or degree as to deprive him of reasonable self-control. Rev. St. Okl. 1903, § 3167.

A "drunkard" is defined, in the statute in reference to the drink cure, as any person who has acquired the desire of using alcoholic or malt drinks, morphine, opium, cocaine, or other narcotic substances, for the purpose of producing intoxication to such a degree as to deprive him or her of reasonable self-control. In re House, 46 Pac. 117, 23 Colo. 87, 33 L. R. A. 832.

The term "drunkard" designates a person whose habits of drunkenness are continual and confirmed. It is synonymous with the term "habitual drunkard." *Gour-*

*lay v. Gourlay*, 19 Atl. 142, 143, 16 R. I. 705; *Commonwealth v. Whitney*, 71 Mass. (5 Gray) 85, 86.

A "drunkard" is one with whom drunkenness has become a habit; one who habitually drinks to intoxication; a sot. *People v. Radley*, 86 N. W. 1029, 1030, 127 Mich. 627 (citing *Apperson v. Burgett*, 33 Ark. 328; *Walton v. Walton*, 34 Kan. 195, 8 Pac. 110; *Mack v. Handy*, 39 La. Ann. 491, 493, 2 South. 181, 183; *State v. Savage*, 89 Ala. 1, 8, 7 South. 7, 183, 7 L. R. A. 426).

A "drunkard" is not an incompetent, like an idiot or one insane. He is simply incompetent upon proof that at the time of the act in question his understanding was clouded or his reasoning dethroned by actual intoxication. *Wright v. Fisher*, 32 N. W. 605, 610, 65 Mich. 275, 8 Am. St. Rep. 886.

#### DRUNKENNESS.

See "Absolute Drunkenness"; "Confirmed Drunkenness"; "Continued Drunkenness"; "Gross Drunkenness"; "Habitual Drunkenness or Intoxication." See, also, "Intoxicated—Intoxication."

Blackstone calls drunkenness "an artificial, voluntarily contracted madness, which, depriving men of their reason, puts them in a temporary frenzy, and which the law looks upon as an aggravation of the offense. The Roman law made allowance for the vice. The Greek law provided that he who committed a crime when drunk should receive a double punishment. The law of England, considering how very easy it is to counterfeit this excuse, and how weak an excuse it is, though real, will not suffer any man thus to privilege one crime by another." The common-law rule is adopted in Missouri in all its vigor, and there is no possible reason why the same principle would not hold in civil actions for torts quasi crimes. *Mix v. McCoy*, 22 Mo. App. 488, 491.

"Drunkenness," as it is commonly understood in the community, is the result of excessive drinking of intoxicating liquors. It is "inebriety," "inebriation," "intoxication," all words nearly synonymous, and all expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of such liquors. *Ring v. Ring*, 38 S. E. 330, 332, 112 Ga. 854; *Commonwealth v. Whitney*, 11 Cush. (Mass.) 477, 479.

"Drunkenness" is that effect produced on the minds, passions, or body by intoxicants taken into the system, which so far changes the normal condition as to materially disturb and impair the capacity for health, rational action, or conduct; which causes abnormal results, or such as would not ensue



in the absence of intoxicants; the changed effect produced by the immoderate use of intoxicants, as contrasted with the normal status and conduct. *State v. Savage*, 7 South. 183, 89 Ala. 1, 7 L. R. A. 426; *State v. Robinson*, 20 South. 30, 31, 111 Ala. 482.

"Drunkenness," as used in the chapter punishing drunkenness in office, is the immoderate use of any spirituous, vinous, or malt liquors to such an extent as to incapacitate an officer from the discharge of the duties of his office, either temporarily or permanently. *Pen. Code Tex.* 1895, art. 149.

A city charter empowering the council of such city to "prevent and restrain drunkenness" should be construed to include the prohibiting the sale or giving of intoxicating liquors to an habitual drunkard. *Woods v. Town of Prineville*, 23 Pac. 880, 881, 19 Or. '08.

"Drunkenness, improvidence, or want of understanding," within the meaning of *Code Civ. Proc.* § 2861, as amended by the Laws of 1893, providing that letters of administration shall not be granted to a person convicted of an infamous crime, nor to one who is judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding, does not include every species of drunkenness, improvidence, or want of understanding, but only applies when such defects or faults are of such a character as to amount to a lack of intelligence or habitual drunkenness. *In re Manley's Estate*, 34 N. Y. Supp. 258, 259, 12 Misc. Rep. 472.

Drunkenness is a wholly self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we concede to blindness or deafness, or any other physical infirmity. Trespassers go at their peril. Much more is it just to hold that they make themselves drunk at their peril. Drunkenness will never excuse one for a failure to exercise the measure of care and prudence due from a sober man under the same circumstances. *Beach, Contrib. Neg.* § 492. Approving this rule, the court said, "The law exacts from one intoxicated the same care and precaution to avoid injury as it would from a sober person of ordinary prudence under like circumstances." *Nash v. Southern R. Co.*, 33 South. 932, 136 Ala. 177, 96 Am. St. Rep. 19 (citing *Johnson v. L. & N. R. Co.*, 104 Ala. 246, 16 South. 76, 53 Am. St. Rep. 39).

By "drunkenness not amounting to habitual drunkenness," as used in the chapter relating to the removal of county and district officers, in connection with county officers is meant the immoderate use of any spirituous, vinous, or malt liquors to such a degree as to incapacitate the officer, for the time being or permanently, from the discharge of the

duties of his office. *Rev. St. Tex.* 1895, art. 3538.

#### As avoiding contract or will.

Drunkenness sufficient to be a defense to an action on a contract must be such as to incapacitate the party from the proper exercise of his judgment, and prevent him from understanding his contract, and render him for the time being non compos mentis. *Wright v. Waller*, 29 South. 57, 127 Ala. 557, 54 L. R. A. 440.

The "drunkenness" of one under a commission of drunkenness is not presumed to continually exist, so as to render him incompetent to make a will. Drunkenness always has its sober intervals, and always exposes itself; and it is impossible for a person who is too drunk to transact business correctly to feign sobriety so as to deceive any one of ordinary sagacity. Besides insanity, properly so called, a species of insanity, the mere effect of drunkenness and excitement from intoxicating liquors, has sometimes been set up for the purpose of defeating an alleged will. It has, however, been very justly observed that, whatever resemblance there may be in the conduct and actions of a man under such excitement and those of a man properly insane, their apparent similarity was subject to a very different condition. Where actual insanity has shown itself, either perfect recovery, or at least a lucid interval at the time, must be clearly proved to entitle an alleged testamentary paper to be pronounced for as a valid will. Either of these is highly difficult to prove, for the reason that insanity will often exist, though latent; so that a person may, in effect, be completely mad or insane on some subjects, and in some parts of his conduct apparently rational; but the effects of drunkenness only subsist while the cause—the excitement—visibly lasts. There can scarcely be such a thing as latent ebriety; so that a case of incapacity from mere drunkenness, and yet the man be capable, to all outward appearance, can hardly arise. Strictly speaking, a man is not of unsound mind simply because he is an habitual drunkard. His mind is unsound only while the fit of intoxication lasts. And that is all that is adjudged by an inquisition finding him to be an habitual drunkard. *Lewis v. Jones* (N. Y.) 50 Barb. 645, 667.

#### As crime.

See "Crime"; "Disorderly Conduct."

#### As insanity.

See "Insane—Insanity."

#### Intoxication from opiates included.

"Drunkenness," as used in *St.* 1889, c. 447, making gross and confirmed drunkenness caused by the voluntary and excessive use of opium or other drugs a ground for di-

voice, will be presumed to refer to the state of exhilaration, and subsequent coma or other deplorable effects as detrimental to the marriage relation, caused by such drugs. *Burt v. Burt*, 46 N. E. 622, 623, 168 Mass. 204 (citing *Dawson v. Dawson*, 23 Mo. App. 169; *Ring v. Ring*, 38 S. E. 330, 332, 112 Ga. 854).

The use of morphine by means of hypodermic injections is not "drunkenness" within the meaning of Rev. St. c. 40, § 1, which makes habitual drunkenness a cause for divorce, though the effects of morphine thus administered are very similar and in many respects apparently identical with those produced by the excessive use of intoxicating liquors. The word "drunkenness" is used in the statute in its ordinary and popular sense. *Youngs v. Youngs*, 22 N. E. 806, 807, 130 Ill. 230, 6 L. R. A. 548, 17 Am. St. Rep. 313.

**As affecting responsibility for crime.**

The old and well-established maxim of the common law is that drunkenness does not mitigate a crime in any respect; on the contrary, that it rather aggravates it. Insanity is a full and complete defense to a criminal charge, yet drunkenness is a species of insanity, and is attended with a temporary loss of reason and self-control. But drunkenness is voluntary; it is brought about by the act of the party; while insanity is an infliction of Providence for which a party is not responsible. Drunkenness cannot be considered by a jury in determining whether a person committed the homicide, acting thereon willfully, deliberately, and premeditatedly, so as to constitute the crime committed murder in the first degree. *State v. Cross*, 27 Mo. 332, 334.

Drunkenness is not insanity, and is no excuse for crime, though it may be the result of long-continued and habitual drinking without any purpose to commit crime, and may have produced temporary insanity during the existence of which the criminal act was committed. *Boswell v. Commonwealth (Va.)* 20 Gratt. 860, 872.

Drunkenness may be insanity, but it is voluntary. It is no excuse from the consequences of crime; why should it be against those of acts affecting property? Sound policy requires that it should not, unless brought about by the other party, or unless it was so total as to be palpable evidence of fraud in the person entering into a contract with the one so intoxicated. *Burroughs v. Richman*, 13 N. J. Law (1 J. S. Green) 223, 238, 23 Am. Dec. 717.

Drunkenness may be said to have two degrees; the one of these is mere intoxication, and the other effect of drunkenness is mental unsoundness brought on by excessive drinking, which remains after the intoxication has subsided. This latter mental unsoundness, if it exists to such extent that the accused loses

the government of his reason, may be interposed as a palliation or excuse for crime. *Beasley v. State*, 50 Ala. 149, 152, 20 Am. Rep. 292.

"Drunkenness is a species of insanity that may be attended, when carried far enough, with loss of reason and control while under the direct effects of the intoxicant, but this effect is voluntary and brought about by the acts of the party, and thereby differs from ordinary insanity, which is the act of Providence, and the sufferer is not responsible." *Evers v. State*, 20 S. W. 744, 748, 31 Tex. Cr. R. 318, 18 L. R. A. 421, 37 Am. St. Rep. 811.

"Drunkenness cannot be relied on as establishing the insanity of a person which excuses him from accountability for crime. The habit of intoxication is highly immoral and vicious, tending to the destruction of the best interests of society—the severance of the dearest relations of life. He who takes an intoxicating draught voluntarily makes himself mad, and the law, by reason of such madness, will not excuse him from responsibility for crime committed under its influence." *State v. Turner (Ohio)* Wright 20, 30.

"Drunkenness" is the condition resulting from the immoderate use of intoxicating liquors. As a defense to crime it is only available when it can be shown that the defendant, prior to his intoxication, did not intend to commit the crime, and did not become intoxicated for that purpose, and at the time of committing the crime he was so intoxicated "as not to know what he was doing." *State v. Garvey*, 11 Minn. 154 (Gil. 95, 103).

Drunkenness is sometimes called "dementia affectata." It is that which deprives men of the use of reason, caused by immoderate use of intoxicating liquors. According to some civilians, a person so afflicted, if he committed homicide, should not be punished simply for the homicide, but he should also suffer for his drunkenness. By the laws of England such a person has no privilege by his voluntarily contracted madness, but has the same judgment as if he were in his right mind. There are exceptions to this rule, one of which is where intoxication is without fault on the part of the party intoxicated, as where it is caused by drugs administered by an unskillful physician, and the other where indulgence in habits of intemperance has produced permanent mental disease, which is called "fixed phrensy." *State v. Hundley*, 46 Mo. 414, 419 (citing *Hale's P. C.* 32).

**DRY.**

According to Webster's Dictionary, to "dry" is "to free from water, or from moisture of any kind, and by any means;" and according to the Century Dictionary, "to pre-

pare and expose to the sun, or any heat, in order to free from moisture." Asphaltum from an asphalt lake, holding water mechanically, and so tenaciously that intense heat, with stirring, is necessary for drying, and which has accordingly been exposed in a vessel to heat from steam pipes, and from steam jets which stirred it, thereby expelling the water, and, incidentally and necessarily, some volatile oils also, is entitled to free entry as asphaltum, "dried." *United States v. Trinidad Asphalt Co.* (U. S.) 77 Fed. 609, 610.

### DRY DOCK.

A "dry dock" is a structure contrived for the purpose of taking ships out of the water in order to repair them. It consists of a large oblong box with a flat bottom and perpendicular sides. When it is desired to dock a steamboat or other vessel, it is sunk by letting in water until the vessel to be docked can be floated into it. It is then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. Where it was furnished with engines which could only be used for pumping, and has no means of propulsion, either by wind, steam, or otherwise, and is not designed for navigation, and cannot be practically used therefor, it is not subject to salvage. *Cope v. Vallette Dry Dock Co.*, 7 Sup. Ct. 336, 119 U. S. 625, 30 L. Ed. 501.

A dry or graving dock is a water-tight chamber fitted with timber or iron gates, which are shut against the tide after the vessel has entered for the purpose of being inspected or repaired. When admitted, she is placed on certain blocks in the center of the dock, and, as the tide recedes, the water is let out until it is level with low water. And, if it becomes necessary for examination or repair, the water below low tide is generally pumped out by steam, and the vessel must be continually shored up as the process of emptying is carried on, that she may be kept on an even keel and prevented from straining or careening. And, notwithstanding a vessel during inspection may rest high and dry on the bottom of the dock—and, indeed, ships and other water craft are frequently thus left alongside a wharf on the recession of the tide—yet when a vessel enters a dry or graving dock she floats in, and when she leaves it she floats out. *The Vidal Sala* (71 S.) 12 Fed. 207, 211.

### DRY GOODS.

"Dry goods" are defined as textures and fabrics such as are sold by linen drapers, mercers, and others, in distinction from "groceries." *Levy v. Friedlander*, 24 La. Ann. 439, 441.

An insurance policy insuring the stock of a merchant keeping a store of "dry goods

and groceries" covers all such goods and merchandise as are usually kept in such stores, and are called "dry goods and grocery stores," in the place where the insured did business. *Germania Fire Ins. Co. v. Francis*, 52 Miss. 457, 468, 24 Am. Rep. 674.

It is error to exclude evidence that the term "dry goods," used in a written contract, bears a meaning, according to the usage of the locality, under which notions, clothing, hats, and caps are excluded. Such evidence does not contradict the terms of the contract, but merely applies them to its subject-matter. *Wood v. Allen*, 111 Iowa, 97, 100, 82 N. W. 451.

### DRY MORTGAGE.

A mortgage which creates a lien for the security of money, without any absolute personal liability beyond the value of the property, is sometimes called a "dry mortgage." *Frowenfeld v. Hastings*, 66 Pac. 178, 179, 184 Cal. 128.

### DRY TRUST.

The term "dry trust" is used to designate a trust in which there is no benefit to the trustee. *Bradford v. Robinson* (Del.) 30 Atl. 670, 671, 7 Houst. 29.

A "dry trust," as defined by Perry in his work on Trusts (section 520), arises "when property is vested in one person in trust for another, and, the nature of the trust not being prescribed by the donor, is left to construction of law. In such case the cestui que trust is entitled to the actual possession and enjoyment of the property, and to dispose of it, or to call upon the trustee to execute such conveyance of the legal estate as he directs." In a case of dry trust the duty of the trustee is simple, and is to permit the cestui que trust to occupy and receive the rents and incomes of the estate, to execute such conveyances as the cestui que trust directs, and to protect the title, or allow his name to be used for that purpose. *Cornwell v. Wulff*, 50 S. W. 439, 443, 148 Mo. 542, 45 L. R. A. 53.

### DRY WEIGHT.

The term "dry weight" as used in Tariff Act Oct. 1, 1890, par. 415, imposing a certain duty per ton "dry weight" on unbleached chemical wood pulp, does not refer to the absolute dry weight of the material immediately after desiccation in a kiln, but to the "air-dry weight" as understood in commerce. *United States v. Perkins* (U. S.) 66 Fed. 50, 51, 13 C. C. A. 324.

### DUCK.

As animal, see "Animal."

## DUCKING STOOL

A "ducking stool," etymologically, signifies a town bucket, and anciently meant a machine used in the siege of towns, but now signifies a stool used in ducking common scolds, and consisted of a beam or rafter on which a stool was placed, and which moved on a fulcrum, which extended to the center of a large pond, into which the stool could be dipped. *James v. Commonwealth (Pa.)* 12 Serg. & R. 220, 226.

The "ducking stool" was an instrument of punishment known to the ancient common law, by which a woman convicted of being a common scold was punished by being plunged into the water. Lord Coke says that in law "it signifieth a stool that falleth down into a pit of water, for the punishment of the party in it." *United States v. Royall (U. S.)* 27 Fed. Cas. 907, 908.

## DUE

See "Now Due."

"Due," as used in the description in a deed, requiring the line to be run due north, means "exactly," and adds nothing to the description. The point of a compass, if due north, is exactly north, and so is simply north. *Wells v. Jackson Iron Mfg. Co., 47 N. H.* 235, 260, 90 Am. Dec. 575.

In respect to surveys in Ohio, "west" or "due west," in one class of original surveys, means a line at a right angle to the true meridian, and in another class "west" or "due west" is west according to the bearings of the surveyor's compass at the time of the original survey. In giving interpretation to these words, a fixed, determinate judicial construction cannot be adopted, and their meaning must frequently depend upon, and be controlled by, extraneous facts. *McKinney v. McKinney, 8 Ohio St.* 423, 426.

### DUE (In Commercial Law).

See "Absolutely Due"; "Justly Due and Owing"; "Legally Due"; "Become Due"; "Grow Due"; "Balance Due"; "Demands Due."

The word "due," according to the consensus of judicial opinion, has a double meaning: (1) That the debt or obligation to which it applied has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with "owing," and includes all debts, whether payable in present or in futuro. *Ryan v. Douglas County, 66 N. W.* 30, 32, 47 Neb. 9 (citing *Allen v. Patterson, 7 N. Y.* [3 Seld.] 476, 57 Am. Dec. 542; *United States v. Bank of North Carolina, 31 U. S.* [6 Pet.] 29, 8 L.

Ed. 308; *Jasper Tp. v. Sheridan Tp., 47 Iowa.* 183; *Foster v. Singer, 69 Wis.* 392, 34 N. W. 395, 2 Am. St. Rep. 745; *Scudder v. Scudder, 10 N. J. Law* [5 Halst.] 340; *Hoyt v. Hoyt, 16 N. J. Law* [1 Har.] 138; *Looney v. Hughes, 26 N. Y.* 514; *Fowler v. Hoffman, 31 Mich.* 215, 218. In this case it was held not to include money subsequently earned under a contract partly performed at the time of the assignment of the amount due under it).

The word "due," considered by itself, has many definitions. Bouvier defines it, in its first and broadest sense, as that which is just and proper, and, in another and less general sense, as "what ought to be paid; what may be demanded." Webster gives its definition, so far as applicable to the matter under consideration, in the following order: "Owed, as a debt; that ought to be paid or done to or for another; payable; owing and demandable; suitable." *Elkins v. Wolfe, 44 Ill. App.* 376, 380; *Allen v. Patterson, 7 N. Y.* (3 Seld.) 476, 479, 57 Am. Dec. 542; *United States v. Bank of North Carolina, 31 U. S.* (6 Pet.) 29, 35, 8 L. Ed. 308; *Buehler v. Pierce, 67 N. E.* 573, 175 N. Y. 264.

The word "due" has two meanings. The one indicates a debt ascertained and fixed, though payable in the future; and the other a debt where the money has become payable, so that a suit will lie on it presently. Under Comp. Laws, § 7326, providing that suits at law may be maintained against an insurance company for claims which may have accrued, if payments are withheld more than 60 days after such claims have become due, an action will lie on a policy of insurance, providing that the sum for which the company might be liable should be payable 60 days after due notice, at the expiration of 60 days after satisfactory proof of loss was received by the company. *Putze v. Saginaw Valley Mut. Fire Ins. Co. (Mich.) 94 N. W.* 191, 192.

"Freight due or to become due," as used in 53 Geo. III, c. 159, § 1, by which the owners of vessels are not to be charged with any loss arising from any act, though their fault, further than the value of the ship and the freight due or to become due for and during the voyage, means all the freight for that voyage, whether paid in advance or not; and, in calculating the value of the freight due or to become due, money actually paid in advance is to be included. *Wilson v. Dickson, 2 Barn. & Ald.* 2, 16.

### As acknowledgment and promise to pay.

By virtue of a statute, the word "due," though not connected with or relating to a time clause, as on demand or on a day certain, imports both an acknowledgment of an existing indebtedness, and a promise to pay the same. The common as well as the statutory signification of the word "due," when

not qualified by a time clause, is that the money or property in the duebill mentioned is due at the time of executing the instrument. *Lee v. Balcom*, 9 Colo. 216, 218, 11 Pac. 74, 76.

The word "due" has a variety of meanings, depending on the connection in which it is used. It has been defined generally to be that which is owed; that which custom, statute, or law requires to be paid. As used in a writing reciting "due F. a certain sum of money, with interest," it imports an obligation to pay; making the instrument an acknowledgment of present indebtedness. *Feesser v. Feesser*, 50 Atl. 406, 407, 93 Md. 716.

"Due on demand," as used in writing as follows, "Due A. B. one hundred dollars on demand," imports an express promise to pay on demand. *Smith v. Allen* (Conn.) 5 Day, 387, 340.

"Due," as used in an instruction in an action on promissory notes given for machinery that the notes were undisputed as to their execution and the "amount due," means due according to the terms of the notes, and not that the amount sued for was admitted to be due. *Cottrell v. Gammon*, 84 Ind. 243, 244.

#### Contingent claims or debts.

An assignment to pay and discharge all debts due by the assignor is not necessarily restricted to debts unreservedly and absolutely due at the time of the assignment, but may include claims in a certain measure contingent, as where the assignor was an indorser of a note, and his liability therefore legally conditioned on presentment, demand, and due notice of dishonor. *Bank of Pennsylvania v. McCalmont* (Pa.) 4 Rawle, 307, 313.

"Due," as used in 2 Ballinger's Ann. Codes & St. § 6229, requiring every claim presented to the administrator to be supported by the affidavit of the claimant that the amount is justly due, was not used in the sense of "mature," but was intended to apply to all claims, whether due, to become due, or contingent. *Barto v. Stewart*, 59 Pac. 480, 482, 21 Wash. 605.

In Gen. St. c. 87, relating to debts justly due from an estate of a deceased person, "due" means debts already accrued, or such as will be absolutely payable in the future, and the liability for which does not rest on any contingency. *Ames v. Ames*, 128 Mass. 277, 279.

A statute authorizing the garnishment of debts due or to become due relates only to such as the garnishee owes absolutely, though payable in the future, and does not include in the language "to become due" a debt which may possibly become due on the performance of a contract by the defendant. *Bishop v. Young*, 17 Wis. 46, 52.

A salary payable to an employe at the end of each month is not liable to garnishment before the end of the month in which it is to be earned, as it is neither then due nor to become due. The liability or nonliability of the garnishee is fixed at the time of the service of the process, and depends upon whether at the time of the service the principal defendant's right to such property had become fixed. *Edwards v. Roepke*, 43 N. W. 554, 556, 74 Wis. 571.

An assignment for the payment of the assignor's indebtedness to the assignee, "due and to become due," should be construed to include an indebtedness arising on the payment by the assignee of a note on which he is then contingently liable as indorser; and if, in addition to the contingent liability, it appeared that the indorser had assumed to pay, or that the parties expected he would pay, when due, it might certainly with great propriety be treated as an existing indebtedness not yet due. *Kellogg v. Barber* (N. Y.) 14 Barb. 11, 13.

A contingent claim is a claim not due, within the purview of Code Civ. Proc. § 1498, providing that, where a claim against an estate is rejected, the holder must bring suit within three months after the date of its rejection, if it be then due, or within two months after it becomes due; otherwise the claim shall be forever barred. *Morse v. Steele*, 64 Pac. 690, 691, 132 Cal. 456.

#### Days of grace allowed.

*Wagner's St. c. 216, § 15*, providing that every promissory note for payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, cannot be construed as meaning that such notes fall due on the day mentioned on their face, but days of grace are allowable on such paper. *Turk v. Stahl*, 53 Mo. 437, 438.

#### As delinquent.

A recital in a tax deed that the tax was "due" does not show it to have been delinquent. *Sherburne v. Rippe*, 29 N. W. 322, 323, 35 Minn. 540; *Gildilian v. Chatterton*, 38 Minn. 335, 37 N. W. 583, 584.

#### Deposits.

"Debts due," within the meaning of Laws 1896, c. 908, § 3, taxing personal estate, which is defined to include all debts due, from solvent debtors, include money deposited in banks without the state on bills receivable, owing to a domestic corporation for goods sold to persons without the state, on sums due for goods sold and in transit to purchasers without the state, and for bonds of a foreign railroad kept without the state. *People v. Feltner*, 66 N. Y. Supp. 769, 772, 54 App. Div. 217.

Under a bequest of all debts due testator at the time of his death, money which had been paid into a banker, passes. *Carr v. Carr*, 1 Mer. 541.

Act June 16, 1836, § 35, providing for the issuance of an attachment of execution for a debt due, should be construed to include a sum deposited for a certain use, if not so used. It is a debt due to the depositor. *Baliet v. Brown*, 103 Pa. 546, 551.

#### Fines.

"Due," as used in an act providing that overdue coupons on state bonds shall be receivable for taxes and debts due and demands due the state, authorizes the discharge of fines imposed for violation of the law by such coupons. The words "debts" and "demands" are not uncertain and ambiguous, but have a certain, definite, and explicit meaning. The word "due" is defined by Webster to be that which is owed; that which custom, statute, or law requires to be paid—and by Worcester, that which any one has a right to demand, claim, or possess; that which can justly be required. A fine is something which the law requires to be paid, and that is the meaning of the word "due." A fine is a thing due or claimed to be due to the state—a liability which the state has a right to enforce and demand. *Clarke v. Tyler* (Va.) 80 Grat. 134, 139.

#### Future liabilities.

Where an assignment provided for the payment of all an assignor's indebtedness to the trustees, whether due or to grow due, the phrase quoted should be construed as providing only for existing liabilities, whether matured or to mature, and not as covering future transactions between the parties. *Van Hook v. Walton*, 28 Tex. 59, 75; *Brainerd v. Dunning*, 30 N. Y. 211, 214.

In a general assignment for the benefit of creditors, which, after making preferences for certain creditors, directed the assignee to pay and discharge in full, if the residue of the proceeds were sufficient, all the debts and liabilities now due or to grow due from the assignor, such phrase is synonymous with "liabilities," and refers only to debts then existing, including those payable in the future, and does not include a claim for rent accruing under a lease after the assignment. In *re Havenor*, 23 N. Y. Supp. 1092, 1093, 70 Hun, 56.

A will by which testator bequeathed to B. all his ships and money due to him at the time of his decease, did not include freight earned after his decease under a charter party executed before that event, but after the will. *Stephenson v. Dowson*, 3 Beav. 342.

Code, § 2975, requiring a garnishee to not pay any debt due or "thereafter to become

due," should be construed as meaning a subsisting debt, and does not include any debt which may thereafter originate. A debt which has yet to originate cannot properly be said to be a debt which is to become due. *Thomas v. Gibbons*, 15 N. W. 593, 60 Iowa, 755.

#### Immatured liabilities.

"Debts due," as used in a charter of a banking association providing that the shares of its stock shall not be transferred until the stockholder shall have discharged all debts due by him to the association, include liabilities of the shareholder which have not matured, as well as matured liabilities. *Leggett v. Bank of Sing Sing*, 24 N. Y. 283, 286.

Act March 3, 1797, c. 75, providing that where any revenue or other officer or other person hereafter becoming indebted to the United States by bond or otherwise shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the "debt due to the United States" shall be first satisfied, is not limited to a debt which is then actually payable to the United States, but includes a debt then arising to the United States, whether then payable, or payable only in futuro. *United States v. Bank of North Carolina*, 31 U. S. (6 Pet.) 29, 36, 8 L. Ed. 308.

Laws 1843, c. 218, § 3, as amended by Laws 1847, c. 419, relative to reports to be made by banks, requires that the report shall be made on the oath of the president or cashier, and must show, among other things, loans and discounts due from the directors of the bank. Held, that the word "due" was used in its larger sense, to signify and cover liabilities by the directors to the bank, whether matured or not. *People v. Vail* (N. Y.) 6 Abb. N. C. 206, 210; *Id.*, 57 How. Prac. 81, 85.

The word "due" in N. J. Laws, requiring an affidavit that the debt for which a judgment by confession is taken is justly due and owing to the person to whom the judgment is confessed, signifies simple indebtedness, without reference to the time of payment, as *debitum in presenti solvendum in futuro*, though in some cases it may mean that the day of payment has passed. *Scudder v. Scudder*, 10 N. J. Law (5 Halst.) 340, 345; *Hoyt v. Hoyt*, 16 N. J. Law (1 Har.) 138, 143; *Greene v. McCrane*, 37 Atl. 318, 321, 55 N. J. Eq. 436.

On the separation and division of a township, it was agreed by the officers of the townships remaining and those cut off that the original township should draw all the funds due, and make a certain disposition thereof. A railroad tax for two years preceding the division of the township, through oversight, had not been assessed; but it was afterwards assessed for those years, and paid

the same as if division had occurred prior thereto. It was contended in a suit to recover the same that the meaning of the word "due," as used in the agreement for the division of the funds due, meant only funds that were due when the time arrived at which payment could be enforced; but it was held that, while such was its ordinary meaning, the word was used in the agreement to include all assets in existence and claims not matured, as well as those matured at the time of the division. *Jasper Tp. v. Sheridan Tp.*, 47 Iowa, 183, 185.

#### As indebted.

In an affidavit for attachment, a statement that defendant is indebted to plaintiff in a sum named is a sufficient affidavit that the sum named is due. *Trowbridge v. Sickler*, 42 Wis. 417.

#### As legally enforceable.

The word "due," in its ordinary sense, means that which is justly owed; that which law or justice requires to be paid or done. *Griffith v. Speaks*, 63 S. W. 465, 466, 111 Ky. 149.

"A debt is due when it is legally enforceable, and if, at the option of the creditor, it may be enforced within the statutory limit, then we think it may be said to be due within that limit. It is undoubtedly a correct assumption that deposits in a bank are not due until a demand and refusal have taken place, but nevertheless money thus deposited becomes due the moment such demand is made, and it consequently lies in the power of the depositor to perfect his right of action at any time he may see fit so to do." *Barnes v. Arnold*, 61 N. Y. Supp. 85, 90, 45 App. Div. 314.

A receipt for money, declaring that the sum named therein is due on demand, "does not import an obligation or promise which can be enforced without a demand, for it is expressly limited to the time when demanded. It is therefor only due when demanded." *Smiley v. Fry*, 3 N. E. 186, 100 N. Y. 262.

A will providing that the testator's executors should pay the balance due his old creditors, whose claims had been compromised, will not be held to mean the balance which was legally due them, but that the executors should pay them the balance which was justly due and which ought to be paid to them, though there was no legal obligation resting on the executors for the payment thereof. *Appeal of Sinclair*, 9 Atl. 637, 638, 116 Pa. 316.

Bankr. Act 1867, § 19, providing that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy may be provable against his estate, includes all debts, no matter how long standing. No debt can be considered due and payable

which is barred by limitation, and a debt so barred cannot be proved in bankruptcy. A debt, to be barred by limitations, and hence not provable, must be one which is barred throughout the United States. *In re Ray* (U. S.) 20 Fed. Cas. 322, 324.

In a letter promising to pay every cent that is "due," due means owing, and, as applied to notes barred by limitations, is an insufficient admission to take them out of the statute. *Stout v. Marshall*, 75 Iowa, 493, 499, 39 N. W. 808.

#### License.

Taxes, debts, dues, and demands due the state, as used in Act March 30, 1871, providing that coupons on state bonds should be receivable for all taxes, debts, dues, and demands due the state, includes the "charges or assessments made by law as a condition precedent to obtaining license for pursuing a business or profession." *Royall v. State of Virginia*, 6 Sup. Ct. 510, 513, 116 U. S. 572, 29 L. Ed. 785.

#### As matured.

"Due," where used in a complaint alleging that a debt is due, indicates the maturity of the debt. *Jaqua v. Shewalter*, 37 N. E. 1072, 10 Ind. App. 234.

In a guaranty that a note payable at a future date is due, and that the maker has nothing to file against it, the word "due" has reference to the time when the note arrives at maturity. The word "due" sometimes means a present debt, though not payable then, but more generally it has reference to the time of payment, particularly as applied to notes, whether negotiable or not. Thus we speak of notes overdue, or that they will be paid when due. It is said money is due at the expiration of the credit given, or at the period promised. The contract, being not only that the note is due, but that the maker has nothing to file against it, must refer to the time when a suit could be instituted thereon, for until then it could not be ascertained or determined whether the maker had any claims to file against it or not. The meaning of the contract is that the note shall be paid when due, or that the present holder should be able to maintain a suit and recover judgment thereon at maturity without any defense on the part of the maker, and is equivalent to a warranty that it is due and collectible. *Adams v. Clarke*, 14 Vt. 9, 13.

The word "due" implies a debt matured, and therefore a breach in its nonpayment, as distinguished from the import of the word "indebted," since an indebtedness may exist without present liability to pay. *Yocum v. Allen*, 50 N. E. 909, 910, 58 Ohio St. 280.

If a debt is due, it can be truly said it has become due; and, if a demand is made

while it is due, the demand is made after it became due. Nothing can be due which has not become due. Becoming is before being, and becoming must be finished in order for it to be succeeded by that which becomes. Take the example of becoming 21 years of age. Every person is either a minor or an adult. There is no intermediate stage. So every debt is becoming due or has become due. The moment of time which by expiring terminates immaturity renders the debt mature. There is no intervening moment. To demand payment of a debt in the first moment of its matured existence is to demand payment after it becomes due. Hence, "at maturity," "when due," and "after due," applied to a demand for payment, will each include a demand made on the day of maturity. *Favors v. Johnson*, 4 S. E. 925, 928, 79 Ga. 553.

Gen. St. tit. 18, c. 11, pt. 2, § 7, declaring that any creditor residing within the state who shall have a claim amounting to \$100 against a nonresident debtor owning property within the state, may bring his petition to the court of probate of the district within which such property, or a part of it, is found, showing that said claim is justly due, etc., means a claim which has matured. *Appeal of Sperry*, 47 Conn. 87, 88.

#### As now payable.

"The word 'due,' without qualification, means owing and immediately payable." *Gies v. Bechtner*, 12 Minn. 279, 284 (Gil. 183, 185).

The word "due," as applied to rent, is convertible with "payable"; and rent, in legal parlance, is never considered to be due until it becomes actually payable. *Prentiss v. Kingsley*, 10 Pa. (10 Barr) 120, 123; *Bank of Pennsylvania v. Wise* (Pa.) 3 Watts, 394, 408.

Under a charter giving a lien on all cargoes and all subfreights for any amount "due under the charter," such words limit the extent of the lien given. They are used in their ordinary commercial sense, and mean sums which are due and payable at the time when any freights are due and collectible, and which might then be lawfully collected and applied to the sums then due in case of the charterers' default, as distinguished from future or contingent liabilities not then payable, and also such sums as become due under the provisions of the charter. *Freights of the Kate* (U. S.) 63 Fed. 707, 722.

Where one was arrested at the suit of a creditor, and A. agreed in writing that, in consideration that the creditor would discharge the debtor, he would pay the creditor, within 60 days, "all such sums of money as may now be due and owing," the word "due" meant that he undertook to pay only

those debts which were then actually payable. *Hawes v. Smith*, 12 Me. (3 Fairf.) 429, 433.

"Due," as used in Rev. St. 1878, c. 81, § 6, subd. 3, which requires that a notice of sale and foreclosure should state the amount claimed to be due, means the amount already payable, and for which the mortgagee has at the date of notice a right to sell. It is not used in the sense of owing. *Bowers v. Hechtman*, 47 N. W. 792, 793, 45 Minn. 238.

The word "due" has a well-defined meaning when applied to indebtedness, which is that the day when payment ought to have been made has already arrived. An "indebtedness due on contracts" means an indebtedness arising on contracts which have accrued, and as used in the statute requiring an affidavit for attachment to state that the debt is due on contract, express or implied, "due" signifies that the day when payment ought to be made has arrived. *Bowen v. Slocum*, 17 Wis. 181, 183.

"Due," as used in a statute authorizing a garnishment of a debt due absolutely, has reference to a debt, or something in the nature of an obligation to discharge, resting on some one in favor of another, and means absolutely payable at the time. *Cutter v. Perkins*, 47 Me. 557, 568.

In a complaint in an action on accounts, alleging that "there is now due" plaintiff from the defendant a certain sum, the word "due" should be construed to express the fact that the debt had become payable, and not to express the mere state of indebtedment or as equivalent to "owed" or "owing." *Allen v. Patterson*, 7 N. Y. (3 Seld.) 478, 479, 57 Am. Dec. 542.

The words "debts due," in the charter of a corporation, providing that in case of dissolution the debts due from it as trustee shall have the preference, mean the debts then owing and payable to the specified creditors. They do not give a preference for interest on such debts accruing after the appointment of the receiver. *People v. American Loan & Trust Co.*, 75 N. Y. Supp. 563, 567, 70 App. Div. 579.

"Due" as used in a statute requiring the affidavit to state that the sum sued for is due upon contract means an existing cause of action—a debt presently payable—and is not synonymous with the phrase "defendant is indebted." *Cross v. McMaken*, 17 Mich. 511, 515, 97 Am. Dec. 203.

Where by a deed a father assigns all debts "now due" to him to a trustee for his son, it is an assignment of all debts due and payable at the date of the deed, but not debts which, though contracted, had not become payable at such date. *Collins' Adm'x v. Janey* (Va.) 3 Leigh, 389, 391.



In an assignment of a policy of life insurance, providing that "in case of the death of the assignee before the policy becomes due," etc., "due" means nothing else than the ordinary understanding of the word "due" in its legal sense; and the policy, therefore, was not due, where the insured and the assignee were accidentally killed at the same time, at the death of the assignee, but 60 days later, when, according to the terms of the policy, it became payable. *Northwestern Mut. Life Ins. Co. v. Greiner*, 74 N. W. 187, 188, 115 Mich. 639.

Debts due, which are liable to a writ of garnishment, are not such as are only payable then, and not in the future; and a check, though not due and payable, may be attached. A debt payable in the future is a debt due, in the sense of the law, though it was not payable until after the service of the writ. *Fulweiler v. Hughes*, 17 Pa. (5 Harris) 440, 447.

A will assigning all debts "now due" testator to a trustee for his son will be construed to mean debts then payable, and not debts payable at a future day. *Collin's Adm'x v. Janey* (Va.) 3 Leigh, 389, 391.

#### As owing.

An amount due, in the primary sense, means "owing." *Sather Banking Co. v. Arthur R. Briggs Co.*, 72 Pac. 352, 355, 138 Cal. 724; *United States v. Bank of North Carolina*, 31 U. S. (6 Pet.) 29, 36, 8 L. Ed. 308.

The word "due," says Mr. Justice Ewing in *Scudder v. Scudder*, 10 N. J. Law (5 Halst.) 340, has more than one signification, or is used on different occasions to express distinct ideas. At times it signifies a simple indebtedness, without reference to the time of payment. At other times it shows that the day of payment or tender is passed. In *United States v. Bank of North Carolina*, 31 U. S. (6 Pet.) 29, 8 L. Ed. 308, Mr. Justice Story says that it is sometimes used to express a mere state of indebtedness, and then it is an equivalent to "owed" or "owing," and it is sometimes used to express the fact that the debt has become due. In *Carr v. Thompson*, 67 Mo. 472, it was held that the word "due" was improperly used for "owing." *Jones v. Adams*, 62 Pac. 16, 37 Or. 473, 50 L. R. A. 388, 82 Am. St. Rep. 766. See, also, *In re B. H. Gladding Co.* (U. S.) 120 Fed. 709, 710.

The meaning of the word "due" is "owe." It is so understood in common parlance. It is so used in official settlements and in settlements between individuals. *Roberts v. Beatty* (Pa.) 2 Pen. & W. 63, 67, 21 Am. Dec. 410.

An affidavit accompanying a claim against an estate, stating that the amount of the note claimed was justly due, was not

false from the fact that the note was not yet matured, since "due" is used in the sense of "owing." *Orocker-Woolworth Nat. Bank v. Carle*, 65 Pac. 951, 952, 183 Cal. 409.

"Due," as used in a pleading alleging a certain indebtedness to be due, is equivalent to the word "owed" or "owing." *Griffin v. Jackson*, 13 N. Y. Supp. 321, 322, 59 Hun, 620.

An affidavit that a debt was justly due was a substantial compliance with the statute requiring the affidavit to show that the debt was justly and honestly due and owing. *Reading v. Reading*, 24 N. J. Law (4 Zab.) 358, 364; *Mulford v. Stratton*, 41 N. J. Law (12 Vroom) 466, 468.

"Due" is equivalent to "owing" or "owed," so that an allegation that a certain sum is wholly owing and unpaid is equivalent to an allegation that the same is due and unpaid. *Tomlinson v. Ayres*, 49 Pac. 717, 718, 117 Cal. 568.

In Gen. St. p. 397, § 2, authorizing an attachment of a debt due from any person to the plaintiff's debtor, "due" is not employed in the restricted sense of "payable," although it does import an existing obligation. *Sand Blast File Sharpening Co. v. Parsons*, 7 Atl. 716, 717, 54 Conn. 310.

"Due," as used in a mortgage conditioned that the mortgagors should keep the property insured to the full amount due, should be construed as synonymous with "owing" or "remaining unpaid." It means the whole sum secured, and not the amount that has become payable presently, or, in other words, the amount overdue. *Fowler v. Hoffman*, 31 Mich. 215, 218.

Rev. St. c. 90, § 9, providing that where, in a suit on a mortgage, it appears that nothing is due on the mortgage, the judgment shall be for the defendant, means that it must appear that nothing is due or will become due, and does not mean merely that nothing is payable. *Mason v. Mason*, 67 Me. 546, 548.

"Due," as used in a mortgage providing that from the moneys arising from a sale thereunder the mortgagee shall retain the principal and interest which shall then be due on the notes and charges, etc., and pay the balance to the mortgagee, is to be construed as meaning "owing," since the word is sometimes used in such sense, though it is usually employed in the sense of "payable," as to give it the latter construction would be inconsistent with the general purpose of the mortgage, to wit, security for the whole debt, principal and interest, and might in part defeat such purpose. *Fowler v. Johnson*, 3 N. W. 986, 989, 26 Minn. 338.

In Code Va. § 2486, providing that no person shall be entitled to a certain lien

given by a preceding section unless he shall, within 90 days after the last item of his bill becomes due and payable, file a certain memorandum in the clerk's office, etc., "due" means "owing," rather than "payable." In re West Norfolk Lumber Co. (U. S.) 112 Fed. 759, 767.

"Due," as used in Laws 1891, Act No. 179, § 5, providing that a subcontractor who wishes to secure a lien must file an account of the demand due him, etc., is synonymous with "owing," and is not used in the sense of "presently payable." Smalley v. Ashland Brownstone Co., 72 N. W. 29, 30, 114 Mich. 104.

"Due" means "owed," and not payable eo instanti, but payable now or hereafter. Equitable Life Ins. Co. v. Board of Equalization of Des Moines, 74 Iowa, 178, 181, 37 N. W. 141, 142.

"Due," as used in a bank charter, where it provides that the bank shall not deal in articles of goods, wares, and merchandise, unless it be to secure a debt due the bank, means "payable to" or "owing to." Bates v. Bank of State, 2 Ala. 451, 452, 491.

In its ordinary meaning, when applied to indebtedness, "due" relates to the time when payment is enforceable; but the word has a broader meaning, and, as used in a receipt of certain notes, to be held as collateral to balance due on settlement, will not be held to have been used in a narrower meaning. D. M. Osborne & Co. v. Stringham, 57 N. W. 776, 777, 4 S. D. 593.

The term "due," as used in a phrase "debts due the United States," is said to be sometimes used to express a state of indebtedness, and that it is equivalent to "owe" or "owing," and seems to express the fact that the debt has become payable. In the clause of the act declaring that the priority of the United States shall attach where the estate of any decedent shall be insufficient to pay all the debts due from him, "due" is used as synonymous with "owing." Dunn v. Sublett, 14 Tex. 521, 523.

The term "due" is sometimes used to express the mere state of indebtedment, and then is an equivalent to "owed" or "owing," and it is sometimes used to express the fact that the debt has become payable. Thus, in the latter sense, a bill or note is often said to be due when the time for payment of it has arrived. In the former sense, a debt is often said to be due from a person when he is the party owing it, or primarily bound to pay, whether the time of payment has or has not arrived; and, under an act giving priority to debts due the United States, "due" is used in the sense of "owing." United States v. Bank of North Carolina. 81 U. S. (6 Pet.) 29, 36, 8 L. Ed. 308.

Rev. St. c. 86, § 55, providing that no trustee shall be charged by reason of any money, unless, at the time of the service of the writ on him, it is "due absolutely and not on any contingency," would include the past earnings of a party due in the future on the estimate and certificate of a third person. Ware v. Gowen, 65 Me. 534, 535.

Where the amount due upon a policy was settled by a resolution of the company, and the money declared to be payable in 60 days thereafter, the money became then due, and was payable in 60 days thereafter. Utica Ins. Co. v. American Mut. Ins. Co. (N. Y.) 16 Barb. 171, 176.

#### Pension money.

Rev. St. U. S. § 4747, providing that no sum of money due or to become due to any pensioner shall be liable to attachment, levy, or seizure, etc., does not include pension money after it has been received by the pensioner. Beecher v. Barber (N. Y.) 6 Dem. Sur. 129, 131. Nor money which has actually been received by the pensioner from the government, and by him placed in the hands of a third person for safe-keeping. Rozelle v. Rhodes, 9 Atl. 160, 161, 116 Pa. 129, 2 Am. St. Rep. 591.

#### Unascertained claims.

The words "sums due," in a statute providing that sums due for rent on leases under seal or otherwise may be recovered in an action of assumpsit, though it requires the sum to be certain, do not mean that the actual amount due must have been agreed upon. It is sufficient if the definite elements of which it is composed are agreed upon, or if a certain basis of computation is agreed upon. What remains will be merely a computation. Nor does the basis become indefinite or uncertain, in legal contemplation, because the parties may afterwards agree about the items which composed it. Rumford Falls Boom Co. v. Rumford Falls Paper Co., 51 Atl. 810, 812, 96 Me. 96.

A will requesting that, "if any debts due to me at my decease, I request my executors will collect and pay into the hands of my children," included a right of the testatrix to the residuary estate of her son, to which she was entitled, but the amount of which was uncertain at her death. Bainbridge v. Bainbridge, 9 Sim. 16, 17.

In a contract for the sale of land, reserving liens on the land for all sums of money due from the purchaser to the vendor, "due" should be construed in the sense of "owing," and can with as much propriety be applied to an unascertained sum as to one which was already ascertained and agreed on. Carr v. Thompson, 67 Mo. 472, 474.

In a voluntary assignment for the benefit of creditors, providing that, after the pay-

ment of expenses and the claims of certain preferred creditors, the assignee should pay in full all other indebtedness due and owing by the assignor, and that, after payment of lawful "debts due and owing" by him, the surplus should be returned, such phrase cannot be construed to include a claim by a lessor of premises for the difference between the rent contracted to be paid therefor by the assignor, and the amount for which the lessor was able to re-rent the premises after the assignment; the landlord, under the terms of the lease, having the right at the time to re-enter for the nonpayment of rent, thus rendering the claim for unpaid rent an uncertain and unliquidated amount, though the term "due and owing" in many instances includes money coming to the creditors, not yet payable. *In re Willis*, 18 N. Y. Supp. 412, 63 Hun, 634.

"Due" signifies, in its larger and general sense, that which is owed; that which one contracts to pay, do, or perform to another; that which is owing. In its larger sense, it covers liabilities matured and unmatured (*People v. Vail*, 6 Abb. N. C. 206, 210), and may import indebtedness, without reference to the day of payment, or that that day has passed, or be used not in the sense of "payable," but as importing an existing obligation. *Scudder v. Scudder*, 10 N. J. Law (5 Halst.) 340, 345; *Sand Blast File Sharpening Co. v. Parsons*, 54 Conn. 310, 313, 7 Atl. 716; *Fowler v. Hoffman*, 31 Mich. 215, 219. When used in an attachment statute, it signifies that the day when payment ought to be made has arrived. *Bowen v. Slocum*, 17 Wis. 181, 190. Much depends upon the context and evident purpose intended. *United States v. Bank of North Carolina*, 31 U. S. (6 Pet.) 29, 36, 8 L. Ed. 308. And as used in *Laws Wis. 1893*, c. 293, providing that insolvent and mutual insurance companies shall proceed to collect all claims due from policy holders, "claims due" import existing obligations or indebtedness, without reference to whether an assessment has been made and notified or not. *Wyman v. Kimberly-Clark Co.*, 67 N. W. 932, 933, 93 Wis. 554.

#### As unpaid.

The word "due," has the meaning sometimes of merely "owing," whether matured or not. Sometimes it means "mature." We say a note is "due and unpaid." Why do we use both words, except to say that the note is both matured and unpaid? The use of the word "due" alone in an affidavit under *Code 1899*, c. 125, § 46, which fails to say, in the language of the statute, that a certain sum is due and unpaid, but states that it is due, only, is insufficient. If there is a difference between the words, "unpaid" is the more essential. *Marsteller v. Ward*, 43 S. E. 178, 181, 52 W. Va. 74.

In a contract for the sale of lots, and providing for interest upon the amount remaining due, the word "due" means the unpaid purchase price. *Lawton v. Fonner*, 80 N. W. 808, 809, 59 Neb. 214.

In a finding that a certain sum is due on a promissory note, "due" is equivalent to a finding that such sum is due and unpaid. *Myers v. McDonald*, 8 Pac. 809, 812, 68 Cal. 162.

"Due," as used in *General Insurance Act*, § 16 (*Sess. Laws 1849*, p. 448), providing that suits at law may be prosecuted for losses if payment is withheld more than two months after such losses shall have become due, means the time when the property was destroyed. The loss became due immediately on the happening of the fire. *Allen v. Hudson River Mut. Ins. Co.* (N. Y.) 19 Barb. 442, 444.

In its usual acceptance, "due" signifies not only that the time of payment has expired, but that the debt is unpaid. *Manwell v. Manwell's Estate*, 14 Vt. 14, 24.

#### DUE ADMINISTRATION.

Where the course pointed out by law for the administration of an estate is properly pursued, it constitutes due administration. *In re Meagley's Estate*, 56 N. Y. Supp. 503, 505, 39 App. Div. 83.

The due administration of an estate, for which an executor gives security, consists in paying its obligations, and handing over the balance to the persons entitled—the persons to whom the law awards it. *Cunningham v. Souza* (N. Y.) 1 Redf. Sur. 462, 464.

#### DUE ADMINISTRATION OF JUSTICE.

*Code Cr. Proc.* art. 661, directs that the court shall allow testimony at any time before the argument is concluded, if it appear that it is necessary to the due administration of justice. Held, that the term "due administration of justice," as there used, should be construed to mean that the evidence offered should be admissible and held to be necessary to the due administration of justice, if it was legitimate and important to the defendant, and the fact that it was not introduced in its regular order was not sufficient reason for rejection. *Bostick v. State*, 11 Tex. App. 126, 132.

#### DUE AND PAYABLE.

Accrue as synonymous, see "Accrue."

*Swan*, in his *Pleadings and Precedents*, p. 188, says that the allegation of "due and payable" is not only an allegation of title and interest in the subject of the action, but is also an allegation that the claim is a

subsisting debt and unpaid. To the same effect are the decisions in *New York. Herahfield v. Aiken*, 3 Mont. 442, 448 (citing *Ketal-tas v. Myers*, 19 N. Y. 231).

#### DUE AND UNPAID.

If the obligation of a contract be to pay money, simply, at a certain time, and is independent of any other condition, the allegation that the defendant failed to pay it, and that such sum is due and unpaid, fully shows a right of action. *Riley v. Walker*, 34 N. E. 100, 102, 6 Ind. App. 622.

#### DUE APPRAISEMENT.

The term "due appraisalment," in admiralty rule 54, does not require prior notice to the damaged creditors of an appraisalment, but an ex parte appraisalment is not void. *Morrison v. District Court of United States for Southern District of New York*, 13 Sup. Ct. 246, 249, 147 U. S. 14, 37 L. Ed. 60.

#### DUE AUTHORITY.

As used in an affidavit of defense filed to a scire facias sur mortgage, setting out that one acting as attorney in fact for, and with due and lawful authority from, the assignee of the mortgage, executed under seal an agreement not to sue the mortgagor, the term "due and lawful authority" implies an instrument under seal. *May v. Forbes* (Del.) 43 Atl. 839, 2 Pennewill, 194.

#### DUE CARE.

Due care is such care as a person of ordinary prudence would have exercised under the same circumstances. *Ryan v. Town of Bristol*, 27 Atl. 309, 312, 63 Conn. 26; *Gahagan v. Boston & M. R. R.*, 50 Atl. 146, 147, 70 N. H. 441, 55 L. R. A. 426; *Davis v. Boston & M. R. R. Co.*, 49 Atl. 108, 110, 70 N. H. 519; *Asbury v. Charlotte Electric Railway & Power Co.*, 34 S. E. 654, 657, 125 N. C. 568; *Spurrer v. Front St. Cable Ry. Co.*, 29 Pac. 346, 347, 3 Wash. 659; *Overman Wheel Co. v. Griffin* (U. S.) 67 Fed. 659, 661, 14 C. C. A. 609; *City of Mendota v. Fay*, 1 Ill. App. (1 Bradw.) 418, 421; *Wallace v. Wilmington & N. R. Co.* (Del.) 18 Atl. 818, 820, 8 Houst. 529; *Hilton v. City of Boston*, 51 N. E. 114, 115, 171 Mass. 478.

The words "due care" are not susceptible of exact definition, applicable to every possible case, for the reason that there is no absolute standard by which the conduct of individuals in each particular case can be brought, and to which it can be compared and tested. For want of a more perfect standard, the courts have set up that somewhat shadowy personage, "the man of ordinary prudence," by defining "due care" as such

care as ought reasonably to be expected of an ordinarily prudent person in the same situation as the person whose conduct is in question. *Paden v. Van Blarcom*, 74 S. W. 124, 126, 100 Mo. App. 185.

"Due care" is a relative term, each case having its own requirements in that respect, or, in other words, each subject-matter under the control and management of a person having its own demands as to due care. Consequently, what was to be due care as to one matter would not be necessarily so as to another. It is therefore impossible for the law to establish any precise standard or legal definition of "due care," suited to every case, and which the trial judge should deliver to the jury as a matter of law, to be compared by them with the evidence, so as to reach a satisfactory conclusion on the question whether or not due care is absent or present in a special case. All that the law has determined, as a general law, and all that the judge, in charging upon the subject, need say, is that the presence of due care negatives negligence, and that the absence of such care constitutes negligence, or, rather, affirms its presence; the jury being left to determine for themselves what due care requires, which in most cases, and especially in all matters of common concern, they are supposed to know, having the standard in their own minds with which they can compare and consider the testimony. *Joyner v. South Carolina Ry. Co.*, 26 S. C. 49, 51, 1 S. E. 52.

The words "due care," in referring to negligence, mean care commensurate to the danger to be encountered. Hence, if one knows of a danger, and yet voluntarily encounters it, when, on account of darkness or other hindering causes, he knows that he can not see and avoid it, he takes the risk upon himself. *Trout v. City of Elkhart* (Ind.) 39 N. E. 1048, 1049.

"Due care" is correlative. A condition that will charge one party with notice must charge the other equally, and there is no gradation of peril which requires a court to say that deliberately walking into a known danger without excuse cannot be regarded as contributory negligence. *Nicholas v. Peck*, 43 Atl. 1038, 1039, 21 R. L. 404.

"Due care" is a degree of care corresponding to the danger involved. The term is relative, and its application depends upon the situation of the party, and the degree of care and vigilance which the circumstances reasonably impose. Where the danger is great, a high degree of care is necessary, and a failure to observe it is a want of ordinary care. *Ahern v. Oregon Telephone & Telegraph Co.*, 35 Pac. 549, 24 Or. 276, 22 L. R. A. 635.

"Due care," with reference to railroads, means, in the case of a railroad company, the

timely employment of sufficient signals or warnings notifying the approach of trains to public places, such as highway crossings, etc., and, in the case of individuals, due circum-spection or listening, or both, when practicable, to avoid collision. *Knopf v. Philadelphia, W. & B. R. Co. (Del.)* 46 Atl. 747, 748, 2 Pennewill, 892.

What is due care and ordinary care must depend on the circumstances of each particular case. What would be due and ordinary care in driving a carriage along a public highway might not be so when crossing a railroad, or approaching or standing at a railroad station in close proximity to a locomotive engine and train of cars. *Drake v. Mount*, 33 N. J. Law (4 Vroom) 441, 444.

It cannot be said, as a matter of law, that a railroad company was exercising due care in running a train up a steep grade on a curved track, where one train could not be seen from the other without a greater interval between them. *Louisville, N. A. & C. Ry. Co. v. Faylor*, 126 Ind. 128, 131, 25 N. E. 869.

#### As ordinary and reasonable care.

"Due care," in the law of negligence, means ordinary care and reasonable care. *Chicago, B. & Q. R. Co. v. Yorty*, 42 N. E. 64, 65, 158 Ill. 321.

The expressions "due care," "ordinary care," and "reasonable care" are convertible terms, and therefore it is not erroneous to substitute one for the other in instructions. *Baltimore & O. S. W. Ry. Co. v. Faith*, 51 N. E. 807, 808, 175 Ill. 58.

"Due care" is synonymous with "reasonable care," and what constitutes due care should vary according to the exigencies, which require vigilance and attention conforming in amount and degree to the particular circumstances under which they are exerted. *Fletcher v. Boston & M. R. Co.*, 83 Mass. (1 Allen) 9, 15, 79 Am. Dec. 695.

"Due and proper care" simply means that degree of care which the law requires under a given state of circumstances, so that, in every case where the measure of diligence is ordinary care, the exercise of such ordinary care would, within the meaning of the law, be using due care in that particular case; and so it would be in a case where the law exacts a higher degree of diligence. The exercise of this higher degree of diligence would, within the meaning of the law, be using due care or diligence under the circumstances of that case. The substitution in an instruction of the words "due and proper care" for the words "ordinary care" is not erroneous. *Schmidt v. Sinnott*, 103 Ill. 160, 165.

By "due care" is meant reasonable care adapted to the circumstances of the case, and

the failure of a person attempting to cross a railroad to make a reasonable use of his sense of sight and hearing to ascertain whether he is exposing himself to a collision is sufficient to show that he did not exercise due care. *Butterfield v. Western R. Corp.*, 92 Mass. (10 Allen) 532, 87 Am. Dec. 678.

#### Violation of law.

The term "due care," as usually understood in cases where the gist of the action is negligence, implies not only that a party has not been negligent or careless, but that he has been guilty of no violation of law in relation to the subject-matter or transaction which constitutes the cause of action, and therefore the failure of an engineer to ring the bell or sound the whistle as required by law is competent to show the want of due care. *Jones v. Inhabitants of Andover*, 92 Mass. (10 Allen) 18, 20.

#### DUE CAUSE.

Where a power to remove an officer for due cause is given, the words "due cause" operate as a limitation on the power, and the authority to determine finally what constituted due cause cannot rest with the body to which the power is given, as it would defeat the limitation. *State v. Common Council of City of Watertown*, 9 Wis. 254, 261.

#### DUE COMPENSATION.

The phrase "due compensation," when used in reference to the payment for property taken for public purposes, means "paying the full value," and value is determined by what a thing can be sold for. *Langdon v. City of New York*, 13 N. Y. Supp. 864, 866, 59 Hun. 434.

"Due compensation" for lands taken by a railroad company and used for its railroad would be the payment of their value at the time of the railroad's entry thereon, with interest. *Dows v. Congdon (N. Y.)* 16 How. Prac. (N. Y.) 571, 575.

#### DUE COURSE.

See "Indorsee in Due Course."

#### DUE COURSE OF ADMINISTRATION.

A direction in a judgment that a claim against an estate shall be paid in due course of administration means that it shall be paid as and pro rata with other claims of that class out of the assets administered. *McCall v. Lee*, 120 Ill. 261, 268, 11 N. E. 522; *Darling v. McDonald*, 101 Ill. 370, 377.

In *Briggs v. Upton*, 7 Oh. App. 376, a marriage settlement was in trust for the life of the wife, with power of appointment, and,

in default of such provision or appointment, then upon trust to pay or transfer the trust money unto the legal representatives of the said wife "in due course of administration." It was urged that these words "in due course of administration," indicated the executors as the legal representatives, but the Lord Chancellor said: "I do not think that to be the natural meaning of the words. The natural meaning of the words would be that the trustees were to pay it over to those who, in a due course of administration, beneficially represented him. That, of course, would bring in the statute with reference to the administration of intestate estates." *Davies v. Davies*, 11 Atl. 500, 502, 55 Conn. 318.

### DUE COURSE OF BUSINESS.

The phrase "due course of business," as used in mercantile law, applied to the transfer of negotiable paper, is a formulary way of stating a legal conclusion on certain facts that in the given case may be shown to exist. These facts are that the transfer was made on a sufficient consideration between the parties, and is bona fide. Whether or not a note is received in the ordinary course of business depends on whether or not it is received under circumstances involving all these three facts. *National Bank of Chelsea v. Isham*, 48 Vt. 590, 592.

### DUE COURSE OF LAW.

As synonymous with "due process of law," see "Due Process of Law."

By "due course of law" we are to understand those forms of arrest, trial, and punishment guaranteed by the Constitution or provided by the common law, or else such as the Legislature, in obedience to constitutional authority, have enacted to insure public peace and elevate public morals. In *re Dorsey* (Ala.) 7 Port. 293, 404.

"Due course of law," when applied to a prosecution of a demand in a court of law, means no more than a timely and regular proceeding to judgment and execution. *Backus v. Shipherd* (N. Y.) 11 Wend. 629, 635.

A guaranty that a note is collectible by due course of law means that the owner is bound to prosecute all the parties to the note with due legal diligence before he can resort to the person making the guaranty. *Cumpston v. McNair* (N. Y.) 1 Wend. 457, 460; *Moakley v. Riggs* (N. Y.) 19 Johns. 69, 72, 10 Am. Dec. 196; *Thomas v. Woods* (N. Y.) 4 Cow. 173, 182.

The phrase "due course of law," as used in a guaranty of payment of a note if not collected of the maker by due course of law, means an attempt to collect by an action pros-

ecuted to judgment and execution. Proof of failure to collect by such means establishes a prima facie case of an endeavor to collect by due course of law; and, if the failure to collect arose out of negligence or omission on the part of the holder, by reason of which a loss ensued, the burden of proving such loss is on the guarantor. *Backus v. Shipherd* (N. Y.) 11 Wend. 629, 635.

"Due course of law," as used in a guaranty to pay any balance that could not be collected on a certain bond after due course of law, meant any and every course of law necessary to reach the property of the obligor. The phrase "due course of law," when applied to the prosecution of a demand in a court of record, means no more than a timely and regular proceeding to judgment and execution. *Dwight v. Williams* (U. S.) 8 Fed. Cas. 187, 189 (citing *Clark v. McFarland* [N. Y.] 10 Wend. 634, 635, 17 Bac. Abr. 111; *Rudy v. Wolf* [Pa.] 16 Serg. & R. 79).

### DUE COURSE OF TRADE.

Due course of trade is where the holder has given for the note his money, goods, or credit, or has on account of it incurred some loss or liability. *Kimbrow v. Lytle*, 18 Tenn. (10 Yerg.) 417, 423, 81 Am. Dec. 585; *Nichol v. Bate*, 18 Tenn. (10 Yerg.) 429; *Bank of Charleston v. Johnston*, 59 S. W. 131, 133, 105 Tenn. 521; *First Nat. Bank v. Flath*, 86 N. W. 867, 869, 10 N. D. 281; *Merchants' Bank v. McClelland*, 13 Pac. 723, 725, 9 Colo. 608.

"Due course of trade," as used with reference to the transfer of a negotiable instrument, means that the assignees or holders thereof received the same, having given property and taken an assignment of it before maturity. *Galliber v. Galliher*, 78 Tenn. (10 Lea) 23, 29.

#### Pre-existing debt.

A surrender of an antecedent debt as consideration for the purchase of a negotiable note is sufficient to constitute it in due course of trade. *First Nat. Bank v. Flath*, 86 N. W. 867, 869, 10 N. D. 281.

Where a note was taken in payment of a debt due, and is secured by the indorsement of a third person, the note was taken in "due course of trade." *Nichol v. Bate*, 18 Tenn. (10 Yerg.) 429, 433.

### DUE DILIGENCE.

Due diligence is the diligence due from one as a reasonable and prudent man under the circumstances. *Perry v. City of Cedar Falls*, 54 N. W. 225, 87 Iowa, 315; *Jones v. McGuirk*, 51 Ill. 382, 387, 99 Am. Dec. 556; *Nixon v. Weyhrich*, 20 Ill. (10 Peck) 600, 606; *Dillman v. Nadelhoffer*, 160 Ill. 121, 126, 43 N.

El. 378; *Hamline v. Reynolds*, 22 Ill. (12 Peck.) 207, 210.

"Due diligence," in law, means doing everything reasonable, not everything possible. *State v. Scott*, 84 South. 479, 481, 110 La. 369.

What is "due diligence" or "reasonable care," which are practically synonymous, is nearly always, if not always, a manifest question of law and fact, difficult of definition, and still more so of determination; that depending on the relative facts in each case, and coming peculiarly within the province of the jury. *Hendricks v. Western Union Tel. Co.*, 35 S. E. 543, 546, 126 N. C. 304, 78 Am. St. Rep. 658.

"To constitute due diligence does not require unusual efforts or expenditures, but only such constancy in the pursuit of the undertaking as is usual with those in like enterprises. Such assiduity as shows a bona fide intention to do or complete it within a reasonable time." *Highland Ditch Co. v. Mumford*, 5 Colo. 325, 336 (citing *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550).

#### In collecting debts.

Due diligence in an administrator or executor in the collection of debts due the estate does not require that he should act in anticipation or should foresee the fact that at the close of the War of the Rebellion there was to be a military order forbidding the collection of old debts contracted for the purchase of slaves. *Keener v. Finger*, 70 N. C. 85, 42.

#### In collecting note.

"Due diligence," within the rule that the indorser of a promissory note payable on demand must use due diligence, means that he must make a demand of payment of the maker within a reasonable time, and, if there be nonpayment, give notice, as in other cases, to the indorser. *Perry v. Green*, 19 N. J. Law (4 Har.) 61, 62, 38 Am. Dec. 536 (citing *Sice v. Cunningham* [N. Y.] 1 Cow. 397, 411).

Where a note at the time of its assignment was overdue more than nine months, a suit commenced by the assignee within one week after the assignment was an exercise of due diligence, as it was not unreasonable that he should be allowed a few days to seek payment by other than compulsory means. *Kelsey v. Ross* (Ind.) 6 Blackf. 536, 538.

"Due diligence," as used in the bills and notes act (Rev. St. 1835, p. 106), declaring that, if the holder use due diligence in the institution and prosecution of a suit against the maker, he may maintain an action against the assignor for the amount due,

is not synonymous with "reasonable time"; and hence a substitution of the words "reasonable time" in an instruction requiring the institution and prosecution of a suit against the maker within a reasonable time, for "with due diligence," was erroneous. *Jacobs v. McDonald*, 8 Mo. 565.

"Due diligence," within the rule that the holder of a note must use due diligence to collect it from the mortgagors, in order to bind a guarantor, has been passed upon many times; and the general tenor of the cases appears to be that a contract for due diligence requires that the suit be brought within a reasonable time after the maturity of the claim, and be duly prosecuted to judgment and execution, before an action can be sustained against the guarantor, unless it appears that such proceedings could have produced no beneficial results. The question whether the failure to prosecute an action on a note for four months after its maturity was an exercise of due diligence was held to be for the jury. *Tissue v. Hanna*, 27 Atl. 1104, 1105, 158 Pa. 384.

Whether one suing an indorser of a note has exercised due diligence to coerce payment is a question of law. The holder of a note obtained judgment against the maker, and a fieri facias was issued, which was returned nulla bona. The maker was committed to jail by virtue of a ca. sa., and there kept in confinement until, without notice to the maker, or his consent, and without giving a schedule of his estate or taking the oath of an insolvent debtor, he was liberated by the jailer. The maker did not sue the jailer to recover against him the whole amount of the debt, as he might have done under a statute. Held, that due diligence had not been exercised, and that the holder was not authorized to proceed against his indorser. *Johnson v. Lewis*, 31 Ky. (1 Dana) 182, 183.

"Due diligence," within the principle that the blank indorsement of a note implies that the same shall be collectible by due diligence, imports not only a demand, but an attempt to collect by legal process. *Rhodes v. Seymour*, 36 Conn. 1, 5.

Under a statute providing that the assignee of a note, having used due diligence, shall have an action against his immediate indorser, it is held that the phrase "due diligence" must be taken to mean prompt employment of the means which the law affords for the enforcement and collection of debts due and payable. *Brown v. Nichols, Shepard & Co.*, 24 N. E. 839, 340, 123 Ind. 492.

In *Sayles' Civ. St. art. 267*, which provides that, in order to hold the assignor of a nonnegotiable note liable as surety for the payment thereof, the assignee must use due diligence to collect the same, the

expression "due diligence" means the bringing suit at the first term after the maturity of the note, and, if not at the first term, then, with cause shown, at the second term. *Burke v. Ward* (Tex.) 32 S. W. 1047, 1048.

The legal signification of the term "due diligence," as applied to a guaranteed note or account, is well understood, and parties using the term will be held to have contracted with reference to this meaning. *Clark v. Kellogg*, 55 N. W. 667, 96 Mich. 171.

#### **In digging oil well.**

An oil lease providing that the lessee should commence drilling a test well within a certain time, and prosecute said drilling with due diligence to success or abandonment, required that the lessee should not leave the work from December to April, even if he had found oil or gas in paying quantities. It would certainly not be diligence to leave the well, and cease all operations on it, if it was a producing well, for three entire months; and if it had not, at the time the work ceased, proved to be a producing well, it would be still less diligent to abandon the work for so long a period, especially as the lease was to become null and void unless oil or gas was produced in paying quantities by June 27th following. Such an amount of inactivity could not be regarded as due diligence in carrying on the work. *Kennedy v. Crawford*, 21 Atl. 19, 20, 138 Pa. 561.

#### **In making an attachment.**

"Due diligence," as the term is used in reference to the diligence required of an officer in making an attachment, is such diligence as men ordinarily would exercise in their own business to protect their rights and interests. *People v. Colerick*, 34 N. W. 683, 687, 67 Mich. 362.

#### **In making ship seaworthy.**

The term "due diligence," as used in the Harter act, limiting the liability of ship-owners who shall exercise due diligence to make the vessel seaworthy, etc., is not satisfied by the mere appointing of competent persons to repair. Due diligence in repair and equipment must be exercised in fact. *The Alvena* (U. S.) 74 Fed. 252, 254. It requires a carefulness of inspection and repair proportionate to the danger. Sudden and heavy leaks when a few days out of port—a mere rolling in a calm—are inconsistent with due diligence to make the center-board seam tight, as they are inconsistent with seaworthiness; that is, reasonable fitness for the voyage. *The Millie B. Bohannon* (U. S.) 64 Fed. 883, 884. The owners are not relieved from responsibility by merely selecting agents of good reputation whether such agents exercised due care, or not, to make their vessel seaworthy. *Nord-Deutscher Lloyd v. Insurance Co. of North*

*America* (U. S.) 110 Fed. 420, 427, 49 C. C. A. 1.

#### **In notifying indorser of dishonor.**

What constitutes due diligence as to presentment of notice of the dishonoring of a promissory note is a question of law, where the facts are disputed. *Peabody Ins. Co. v. Wilson*, 2 S. E. 888, 898, 29 W. Va. 528.

It is said that a written notice of dishonor of a note, properly addressed to the indorser, and put into the postoffice in due season, amounts to what is termed "due diligence," even if the letter should never be received. *Washington Banking Co. v. King*, 14 N. J. Law (2 J. S. Green) 45, 47.

#### **In securing deposition.**

Due diligence in securing the depositions of witnesses residing in another county implies that the party has used a means which the law provides. The issuance of a subpoena, merely, was not sufficient, when the witnesses resided in a different county. *Baker v. Kellogg*, 16 Tex. 117, 118.

#### **In serving process.**

A statute requiring a sheriff to make due diligence to effect the service of process on the designated parties does not require the utmost diligence to make such service, or intend that he shall do more than exercise due, appropriate, fit, and proper diligence; that is, ordinary diligence. *Winner v. Hoyt*, 32 N. W. 128, 133, 68 Wis. 278.

Within the requirement that, in an order for publication against a nonresident defendant, it must appear, among other things, to the court or judge granting the same, that the defendant cannot without due diligence be found within the state, the term "due diligence" means some attempt to find the party, which the court or judge shall be satisfied is reasonable under the circumstances. *Bixby v. Smith* (N. Y.) 49 How Prac. 50, 53.

Under Code Proc. § 135, providing that in certain cases the court or judge may grant an order of service of summons by publication, when it appears to his satisfaction, by affidavit, that defendant is a nonresident, and that he cannot, after due diligence, be found within the state, what is a due degree of diligence depends upon the circumstances surrounding each case; and the averment in an affidavit that the defendant cannot be found in the state does not tend to prove the exercise of due diligence to find him. *McCracken v. Flanagan*, 28 N. E. 385, 387, 127 N. Y. 493, 24 Am. St. Rep. 481.

#### **For personal safety.**

A policy of insurance requiring that the insured shall use due diligence for his per-



sonal safety and protection, etc., means that the insured shall not voluntarily expose himself to unnecessary dangers. *Freeman v. Travelers' Ins. Co.*, 12 N. E. 372, 375, 144 Mass. 572.

### DUE EXAMINATION.

Under a statute authorizing the expulsion of a pupil from school upon due examination, a formal trial of the objectionable pupil is not required, nor any written charges, with notice to appear, that a hearing of witnesses may be had; but the officers are simply required to investigate the conduct of the pupil, and act according to their best judgment. *State ex rel. Crain v. Hamilton*, 42 Mo. App. 24, 31.

### DUE EXECUTION.

The due execution of an instrument goes to the manner and form of its execution, according to the laws and customs of the country, by a person competent to execute it. *Cox v. Northwestern Stage Co.*, 1 Idaho, 376, 379.

The acknowledgment of a husband and acknowledgment and privy examination of the wife to the due execution of the "foregoing deed" raise no presumption of the delivery of the deed, though it has been held that the execution of a deed includes delivery. *Tarleton v. Griggs*, 42 S. E. 591, 593, 131 N. C. 216.

### DUE FORM.

#### Acknowledgment of deed.

"In due form of law" is equivalent to the expression "according to law." The legal intentment of both, in reference to an acknowledgment, is that the proper oath was administered by the proper officer. *Aldis v. Burdick*, 8 Vt. 21, 24.

A certificate that a wife acknowledged a deed to be her act and deed, in due form, is too vague and uncertain. The meaning of "due form" cannot be determined. Whether the words applied to her having signed, sealed, and delivered the deed, or to having done these things, and also that they were done with her free and voluntary assent, leaves uncertainty, doubt, and conjecture. *Lucas v. Cobbs*, 18 N. C. 228, 233.

#### Attestation of record.

The term "due form," in the act of Congress providing that the records and judicial proceedings of the courts of any state shall be proved or admitted in any courts within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that

the said attestation is in due form, means the mode of attestation in use in the state from whence the record comes. The record must be attested according to that mode, and the certificate of the judge is made the evidence of that fact. *Ducommun v. Hysinger*, 14 Ill. 249, 250; *Haynes v. Cowen*, 15 Kan. 637, 643.

Under an act providing that the records and judicial proceedings of the courts of any state shall be proved in any other court by attestation of the clerk, together with the certificate of the judge that the attestation is in due form, it is held that the term "due form" does not mean that the attestation of the clerk shall be according to the form used in the city where the record was offered in evidence, or to any other form generally observed, but according to the form prescribed for the court where the proceeding was had. *McRae v. Stokes*, 3 Ala. 401, 402, 37 Am. Dec. 698.

#### Certificate of mortgage sale.

"Due form," as used with reference to a sheriff's certificate of mortgage sale, means that the certificate contains a description of the property sold, the sum paid for it, and the time when the purchaser would be entitled to a deed. *Goenen v. Schroeder*, 18 Minn. 66, 77 (Gil. 51, 62).

#### Petition for removal.

Act Cong. March 2, 1867, providing that the removal of a cause from a state to a federal court by the filing of a petition in due form, with a bond, etc., means that the petition must contain averments, where the petitioner is the plaintiff, in harmony with the original petition. *Middleton v. Middleton*, 54 N. W. 143, 87 Iowa, 292.

### DUE INQUIRY.

"Due and reasonable inquiry" by a prospective purchaser of land in the possession of a third party means an inquiry of the occupant with respect to every ground, source, and right of his possession. Anything short of this would clearly fail to be "due and reasonable inquiry." Actual possession of land is constructive notice of ownership or of an interest, and such notice is sufficient to put creditors and purchasers on inquiry. *Bright v. Buckman* (U. S.) 39 Fed. 243, 244.

### DUE IN THE SAME RIGHT.

Under Rev. Code, p. 793, § 21, providing that mutual debts between two parties to an action, due in the same right, may be the subject of set-off, a partnership debt cannot be set off against an individual debt. *Greer v. Arlington Mills Mfg. Co.* (Del.) 43 Atl. 609, 613, 1 Pennewill, 581.

**DUE NOTICE.**

A plea by defendant, in an action against him for having abated a nuisance, stating that he had only abated it after giving due notice as required by statute, meant a notice of at least two hours; that being the statutory requirement. *Dreher v. Yates*, 43 N. J. Law (4 Vroom) 473, 478.

"Due notice" is a relative term, and must be applied to each case in the exercise of the discretion of the court in view of the particular circumstances. Every court of equity possesses the power to mold its rules in relation to time and manner of appearing and answering so as to prevent the rules from working an injustice; and, under ordinary circumstances, one day's notice of a motion for an injunction is too brief, though there may be no fixed limit as to time of such a notice. *Lawrence v. Bowman* (U. S.) 15 Fed. Cas. 21, 22.

Where an administrator is required by statute to give due notice of his appointment in such manner as the court may direct, and he is ordered to give notice by publication in a certain newspaper once a week for three weeks, a publication three times in one week and once the week following was insufficient, since "due notice" must mean "in the manner prescribed by law." *Slattery v. Doyle*, 61 N. E. 264, 180 Mass. 27.

The term "due notice," as used in a statute providing for alimony on due notice, means such notice as is prescribed for all motions in the general practice act. *Wilde v. Wilde*, 2 Nev. 306.

In laws relating to probate courts and proceedings, the words "due notice" denote public or personal notice, at the discretion of the judge. *Rev. St. Me. 1883*, p. 534, c. 63, § 38.

**DUE PRESENTMENT.**

"Due presentment" of a demand must be understood to mean "presented according to the custom of merchants," which necessarily implies an exception in favor of those unavoidable accidents which must prevent a party from doing it within regular time. *Windham Bank v. Norton*, 22 Conn. 213, 222, 56 Am. Dec. 397 (citing *Story, Bills*, § 258).

**DUE PROCESS OF LAW.**

The principle that no man shall be deprived of his liberty or property except by the "law of the land," or its synonym, "due process of law," is older than written constitutions—older even than *Runnymede*—and breathes so palpably of exact justice that it needs no formulation in the organic law. This principle is, however, in one form of

expression or another, incorporated into the federal Constitution as well as those of the several states. *Quimby v. Hazen*, 54 Vt. 132, 139.

No definite definition—none but the most general—has been or can be given of "due process of law." The best courts can do is to say in each case as it arises whether a given act or proceeding in a particular matter is due process of law. What would be due process of law if done under the police power or taxing power might not be, and in many cases would not be, if not done under either of these powers. *State v. Sponaugle*, 32 S. E. 283, 284, 45 W. Va. 415, 43 L. R. A. 727. See, also, *In re Fuller's Estate*, 70 N. Y. Supp. 1050, 1051, 34 Misc. Rep. 750; *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289; *Bardwell v. Collins*, 46 N. W. 315, 317, 44 Minn. 97, 9 L. R. A. 152, 20 Am. St. Rep. 547; *Gilmer v. Bird*, 15 Fla. 410, 421; *Ex parte Macdonald*, 76 Ala. 603.

The term "due process of law" is often misapprehended or misapplied. Indeed, it seems impossible to give a definition which is at once perspicuous and satisfactory. *Hodge v. Muscatine County*, 96 N. W. 968, 971, 121 Iowa, 482.

There are many definitions of "due process of law," which, while differing in the language used, do not differ in their scope and meaning. *Jones v. Yore*, 43 S. W. 384, 385, 142 Mo. 38.

The term "law of the land" has been often construed, and somewhat variously defined. When first used in the Magna Charta of the Kings of England, they probably meant the established law of the kingdom, in opposition to the civil or Roman law, which was about being introduced into the land, to the exclusion of the former laws of the country. *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 238; *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 251.

It is probably better to ascertain the intent and application of the phrase "due process of law" by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, and the reasoning on which such decisions may be founded. *Davidson v. New Orleans*, 98 U. S. 97, 104, 24 L. Ed. 616.

Due process of law is the mode of proceeding in the several courts prescribed by the lawmaking power. There is process by the common law and process by the statute law. If an act, or any portion of it, is otherwise constitutional, the violators of such act or portion may be deprived of their property under its provisions, and it will be by due process of law. *People v. Quant* (N. Y.) 12 How. Prac. 83, 89.

the law of the land, was not intended to limit the legislative power, but only to require that the proceedings should be according to the law for the time being; but the same limitation on the Legislature has been by our courts placed on the ground that the general grant of authority to make reasonable and wholesome laws confers no power to enact a law in violation of the fundamental maxims of justice and equity, and the interpretation given to the term "law of the land" in the Constitutions of other states, when applied as a limitation upon legislative authority, amounts, in substance, to the same thing, for, as interpreted there, the term "law of the land" is understood to embody, in legal meaning, the fundamental rules and maxims of justice which prevailed in the law of the time when the Constitutions were adopted. Either way—whether these elementary principles of justice and equity are supposed to be embraced in the term law of the land, or implied in the general nature of legislative authority—they equally limit the legislative power. *Town of East Kingston v. Towle*, 48 N. H. 57, 61, 97 Am. Dec. 575, 2 Am. Rep. 174.

**As restriction on all branches of government.**

"Due process of law," as used in Bill of Rights, § 9, declaring that no man shall be deprived of his property without due process of law, is synonymous with the phrase "except by the law of the land." This section has a place in perhaps all American Constitutions, being imported in them from Magna Charta, which was extracted from King John by the barons of England. The definitions of this clause are perhaps more diverse than those of any other in the Constitution. In one case the phrase is held to mean one thing. In another case another meaning is extracted. But when a court is resolved on pronouncing a law void, it serves a convenient purpose to refer the law to this section. Used originally to save the people, through the legislative branch, from the arbitrary conduct of the sovereign, exercised through his judges, its use is completely reversed, and we find that the people are to be saved under it from the unwarranted acts of the Legislature, through the judges. *Hallenbeck v. Hahn*, 2 Neb. 377, 403.

"Due process of law" and the "law of the land" are said to mean the same thing, and they are indifferently used in the Constitutions for the same purpose. They are said to refer to a pre-existing rule of conduct, and designed to exclude arbitrary power from every branch of the government. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37, 42, 29 Am. Rep. 356.

Due process of law is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty, or property, whether the process be judicial or

administrative or executive in its nature. *Stuart v. Palmer*, 74 N. Y. 183, 190, 30 Am. Rep. 289; *City of Buffalo v. Chadeayne*, 7 N. Y. Supp. 501, 503; *In re Fuller's Estate*, 70 N. Y. Supp. 1050, 1051, 34 Misc. Rep. 750.

"Due process of law," in its constitutional meaning, includes administrative process of the customary sort, as well as judicial process. *Musser v. Adair*, 45 N. E. 903, 906, 55 Ohio St. 466; *Weimer v. Bunbury*, 30 Mich. 201, 214.

"Due process of law," or the "law of the land," which means the same thing, is not necessarily judicial proceedings. Private rights and the enjoyment of property may be interfered with by the legislative or executive as well as the judicial departments of government. *State v. State Board of Medical Examiners*, 26 N. W. 123, 124, 34 Minn. 387; *Meffert v. State Board of Medical Registration and Examination*, 72 Pac. 247, 251, 68 Kan. 710.

"Due process of law" is defined as the law of the land, designed to protect and preserve the rights of the citizen against arbitrary legislation, as well as against arbitrary executive or judicial action. *State v. Ashbrook*, 55 S. W. 627, 632, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765.

**As prohibiting concurrent exercise of administrative, legislative, or judicial functions.**

"Due process of law," in judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the conduct and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there shall be an omission to exercise substantial powers appertaining to the other departments. *Western Union Tel. Co. v. Myatt* (U. S.) 98 Fed. 335, 354.

**As common-law, statutes, and constitutional provisions.**

The term "law of the land," as used in the Constitution, means the common law, which is unquestionably the sense in which it is understood in Magna Charta; but it also comprehends all acts of force at the time of making the Constitution. So any acts which then abridged any of the privileges secured by the Constitution may be considered as constitutional exceptions to the privileges themselves. *Byrne's Adm'r's v. Stewart's Adm'r's* (S. C.) 3 Desaus. 466, 478.

In *Mayo v. Wilson*, 1 N. H. 53, the court said that the phrase meant due process of law warranted by the Constitution, by the common law adopted by the Constitution,

and not altered, or by statutes made in pursuance of the Constitution. *Rowan v. State*, 30 Wis. 129, 146, 11 Am. Rep. 559. Chief Justice O'Neill, in *State v. Simons* (S. C.) 2 Speers, 761, says there can be no hesitation in saying that the term means the common law and the statute law existing in the state at the adoption of our Constitution. Altogether they constitute the body of the law, prescribing the course of justice to which a freeman is to be considered amenable in all times to come. *Stehmeyer v. Charleston City Council*, 31 S. E. 322, 330, 53 S. C. 259; *Mauldin v. Greenville City Council*, 20 S. E. 842, 846, 42 S. C. 293, 27 L. R. A. 284, 46 Am. St. Rep. 723.

"Due course of law," as used in Const. art. 1, § 2, providing that no person shall be deprived of life, liberty, or property without due course of law, which has the same general interpretation as the terms "law of the land" and "due process of law," does not mean the general body of law, common and statute, as it was at the time the Constitution took effect. For that would seem to deny to the Legislature the power to alter, change, or amend the law. It refers to certain fundamental rights, or that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by due course of law. *Brown v. Levee Com'rs*, 50 Miss. 468, 478.

**As proceeding according to course of common law.**

The meaning of the phrase "due process of law" is that no person shall be deprived either of life or of liberty or of property unless the matter shall be adjudged against him upon trial, and according to the course of the common law. *People v. Sponsler*, 46 N. W. 459, 462, 1 Dak. 289; *Beebe v. United States*, 11 N. W. 505, 507, 2 Dak. 292; *Taylor v. Porter* (N. Y.) 4 Hill, 140, 145, 40 Am. Dec. 274; per *Johnson, J.*, *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 446; *People v. Toynbee* (N. Y.) 20 Barb. 168, 198; *Campbell v. Campbell*, 63 Ill. 462, 464; *Risser v. Hoyt*, 18 N. W. 611, 621, 53 Mich. 185.

The phrase "law of the land" was taken, with some modifications, from a part of the twenty-ninth chapter of Magna Charta, which provided that no freeman should be taken or imprisoned, or be disseised of his freehold, etc., but by the lawful judgment of his peers, or by the law of the land. Its meaning seems to be that no member of the state shall be disfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him on trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that

some one else has a superior title to the property he possesses, before either of them may be taken from him. It cannot be done by mere legislation. *Lavin v. Emigrant Industrial Sav. Bank* (U. S.) 1 Fed. 641, 660. See, also, *Phillips v. Lewis*, 8 Tenn. Cas. 231, 235; *Ex parte Grace*, 12 Iowa, 208, 214, 79 Am. Dec. 529; *Campbell v. Campbell*, 63 Ill. 462; *Citizens' Horse Ry. Co. v. City of Belleville*, 47 Ill. App. 388, 407; *Hoke v. Henderson*, 15 N. C. 1, 16, 25 Am. Dec. 677; *State v. Cutshall*, 15 S. E. 261, 263, 110 N. C. 538, 16 L. R. A. 130.

Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and the usages of common law, would be a protection to him or his property. *Goldie v. Goldie*, 79 N. Y. Supp. 268, 269, 77 App. Div. 12; *People v. Essex County Sup'rs*, 70 N. Y. 228, 234; *Larson v. Dickey*, 58 N. W. 167, 171, 39 Neb. 463, 42 Am. St. Rep. 595; *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 239.

What is due process of law is usually a traditional or historical question, and it is held that a proceeding recognized as due process of law under the common law must be considered as due process of law within the meaning of the Constitution. *C. N. Nelson Lumber Co. v. McKinnon*, 63 N. W. 630, 631, 61 Minn. 219.

"Due process of law" does not necessarily mean a legal proceeding according to the course of the common law. *Kansas City v. Duncan*, 37 S. W. 513, 515, 135 Mo. 571; *Happy v. Mosher*, 48 N. Y. 313, 317; *Gilchrist v. Schmidding*, 12 Kan. 263, 272; *City of Indianapolis v. Holt*, 57 N. E. 966, 970, 155 Ind. 222; *Bartlett v. Wilson*, 59 Vt. 23, 8 Atl. 321, 331.

**As exercise of governmental power according to settled maxims.**

"Due process of law" is not capable of precise definition. That of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz.: "Due process of law," in each particular case, means an exertion of the power of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs." *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N. W. 624, 628, 41 L. R. A. 481, 53 Am. St. Rep. 557; *Cummings v. Hyatt*, 74 N. W. 411, 414, 54 Neb. 35; *Baltimore Belt R. Co. v. Baltzell*, 23 Atl. 74, 75 Md. 94; *State v. State Board of Medical Examiners*, 26 N. W. 123, 124, 34 Minn. 387; *Meffert v. State Board of Medical Registration and Ex-*

amination, 72 Pac. 247, 251, 66 Kan. 710; *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289; *Bertholf v. O'Reilly*, 74 N. Y. 509, 519, 30 Am. Rep. 323; *In re Union El. R. Co. of Brooklyn*, 20 N. Y. St. Rep. 498, 504; *People v. Clipperly*, 3 N. Y. Cr. R. 385, 399; *Id.*, 37 Hun. 319, 322; *Gulf, C. & S. F. Ry. Co. v. Ellis (Tex.)* 18 S. W. 723, 724, 17 L. R. A. 286; *Beyman v. Black*, 47 Tex. 558, 571; *In re Lowrie*, 9 Pac. 489, 498, 8 Colo. 499, 54 Am. Rep. 558; *Denver & R. G. Ry. Co. v. Outcalt*, 31 Pac. 177, 179, 2 Colo. App. 395; *Ex parte Ab Fook*, 49 Cal. 402, 404; *Lent v. Tillson*, 14 Pac. 71, 78, 72 Cal. 404; *Bartlett v. Wilson*, 8 Atl. 321, 331, 59 Vt. 23; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Youst v. Willis*, 49 Pac. 1014, 1015, 5 Okl. 413.

#### As general public laws.

Webster gave a definition of the meaning of the words "law of the land" and "due process of law" in his argument in *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629, which has received the sanction of the courts. He said: "By the 'law of the land' is clearly intended the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. It means that every citizen shall hold his life, liberty, and property under the protection of the general rules which govern society." *Brooks v. Tayntor*, 40 N. Y. Supp. 445, 449, 17 Misc. Rep. 534; *In re Fuller's Estate*, 70 N. Y. Supp. 1050, 1051, 34 Misc. Rep. 750; *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289; *Quimby v. Hazen*, 54 Vt. 132, 139, 140; *State v. Statem*, 46 Tenn. (6 Cold.) 233, 234; *Knox v. State*, 68 Tenn. (9 Baxt.) 202, 207; *Risser v. Hoyt*, 18 N. W. 611, 620, 53 Mich. 185; *State v. Walruff (U. S.)* 28 Fed. 178, 191; *State of Kansas v. Bradley (U. S.)* 26 Fed. 289, 291; *In re Cook (U. S.)* 49 Fed. 833, 839; *Meyers v. Shields (U. S.)* 61 Fed. 713, 717; *Hoover v. McChesney (U. S.)* 81 Fed. 472, 481; *In re Rosser (U. S.)* 101 Fed. 562, 567, 41 C. C. A. 497; *Ex parte Wall*, 2 Sup. Ct. 569, 570, 107 U. S. 265, 27 L. Ed. 552; *Barber Asphalt Pav. Co. v. Ridge*, 68 S. W. 1043, 1045, 169 Mo. 376; *Jones v. Yore*, 43 S. W. 384, 385, 142 Mo. 38; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Mathews v. St. Louis & S. F. Ry. Co.*, 24 S. W. 591, 598, 121 Mo. 298, 25 L. R. A. 161; *Gilmer v. Bird*, 15 Fla. 410, 421; *Salt Lake City Water & Electrical Power Co. v. City of Salt Lake City*, 67 Pac. 791, 794, 24 Utah, 282; *In re Higbee*, 5 Pac. 693, 695, 4 Utah, 19; *In re Lowrie*, 9 Pac. 489, 498, 8 Colo. 499, 54 Am. Rep. 558; *In re Roberts*, 45 Pac. 942, 943, 4 Kan. App. 292; *Pryor v. Downey*, 50 Cal. 888, 400, 19 Am. Rep. 656; *Rowan v. State*, 80 Wis. 129, 146, 11 Am. Rep. 559; *Bardwell v. Collins*, 46 N. W. 315, 317, 44 Minn.

97, 9 L. R. A. 152, 20 Am. St. Rep. 547; *Griffin v. Mixon*, 38 Miss. 424, 458; *Johnson v. Holland*, 43 S. W. 71, 72, 17 Tex. Civ. App. 210; *Grigsby v. Peak*, 57 Tex. 142, 148; *Mutual Life Ins. Co. of New York v. Blodgett*, 27 S. W. 286, 288, 8 Tex. Civ. App. 45; *In re Ross*, 38 La. Ann. 523, 524; *Ferry v. Campbell*, 81 N. W. 604, 605, 110 Iowa, 290, 50 L. R. A. 92; *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus*, 33 N. E. 432, 488, 133 Ind. 625. It means that one shall hold his life, liberty and property under the general rules which govern society. *Cleveland, C., C. & St. L. Ry. Co. v. Backus*, 133 Ind. 513, 531, 33 N. E. 421, 18 L. R. A. 729. It is not enough that the law may be general in its application. *Knox v. State*, 68 Tenn. (9 Baxt.) 202, 207.

The "law of the land," in the sense of the Constitution, means any law which embraces all persons who are or may come into like situation and circumstances. *Davis v. State*, 71 Tenn. (3 Lea) 376, 379; *Town of Alexandria v. Dearmon*, 34 Tenn. (2 Sneed) 104, 122; *State v. Rauscher*, 69 Tenn. (1 Lea) 96, 97.

The phrase "law of the land" in the state Constitution imports a general public law, equally binding upon every member of the community. *Pope v. Phifer*, 50 Tenn. (3 Heisk.) 682, 701; *State v. Burnett*, 53 Tenn. (6 Heisk.) 186, 189; *Wally's Heirs v. Kennedy*, 10 Tenn. (2 Yerg.) 554, 555, 24 Am. Dec. 511; *Jones' Heirs v. Perry*, 18 Tenn. (10 Yerg.) 59, 71, 30 Am. Dec. 430; *State Bank v. Cooper*, 10 Tenn. (2 Yerg.) 599, 605, 24 Am. Dec. 517; *Viemeister v. White*, 84 N. Y. Supp. 712, 715, 88 App. Div. 44; *Durkee v. City of Janesville*, 28 Wis. 464, 470, 9 Am. Rep. 500. And which embraces all persons who are or may come into like situation and circumstances. *Dibrell v. Morris' Heirs*, 15 S. W. 87, 92, 89 Tenn. (5 Pickle) 497, 12 L. R. A. 70; *Henley v. State*, 41 S. W. 352, 359, 98 Tenn. 665, 39 L. R. A. 126; *Budd v. State*, 22 Tenn. (3 Humph.) 483, 490, 39 Am. Dec. 189; *Maney v. State*, 74 Tenn. (6 Lea) 218, 221; *Hatcher v. State*, 80 Tenn. (12 Lea) 368, 371; *Sutton v. State*, 96 Tenn. (12 Pickle) 696, 703, 36 S. W. 697, 33 L. R. A. 589; *Henley v. State*, 98 Tenn. 665, 698, 41 S. W. 352, 354, 1104, 39 L. R. A. 126; *Breyer v. State*, 50 S. W. 769, 770, 102 Tenn. 103; *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 238. And not partial or private laws affecting the rights of private individuals or classes of individuals. *Janes v. Reynolds' Adm'rs*, 2 Tex. 250, 251. See, also, *Millett v. People*, 7 N. E. 631, 633, 117 Ill. 294, 57 Am. Rep. 869; *Elden v. People*, 43 N. E. 1108, 1109, 161 Ill. 296, 32 L. R. A. 659, 52 Am. St. Rep. 365; *Frorer v. People*, 31 N. E. 395, 398, 141 Ill. 171, 16 L. R. A. 492; *Braceville Coal Co. v. People*, 35 N. E. 62, 63, 147 Ill. 66, 22 L. R. A. 340, 37 Am. St. Rep. 206; *Bailey v. People*, 60 N. E. 98, 99,

190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116; *Harding v. People*, 43 N. E. 624, 625, 160 Ill. 459, 32 L. R. A. 445, 52 Am. St. Rep. 344; *Eames v. Savage*, 77 Me. 212, 221, 52 Am. Rep. 751; *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 238; *Talcott v. Pine Grove* (U. S.) 23 Fed. Cas. 652, 668; *Attorney General v. Jochim*, 58 N. W. 611, 614, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606; *Sears v. Cottrell*, 5 Mich. 251, 254. When applied to special or class legislation it means, in addition, that "the classification must be natural and reasonable, not arbitrary and capricious." *Sutton v. State*, 96 Tenn. (12 Pickle) 696, 710, 36 S. W. 697, 33 L. R. A. 589; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 705, 43 S. W. 115, 53 L. R. A. 921; *Harbison v. Knoxville Iron Co.*, 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 816, 76 Am. St. Rep. 682; *State v. Hogan*, 58 N. E. 572, 573, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626. An enactment which deprives one class of persons of the right to acquire and enjoy property, or to contract with relation thereto, in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property, or contract with relation to it, is not comprehended within the true meaning of the words "due process of law." *Bailey v. People*, 60 N. E. 98, 99, 190 Ill. 28, 54 L. R. A. 838, 83 Am. St. Rep. 116.

Whether a statute is the "law of the land," within the meaning of that term as used in the Bill of Rights, depends upon two propositions: (1) That the Legislature had the power to pass it; (2) that it is a general and public law, equally binding upon every member of the community. *Sheppard v. Johnson*, 21 Tenn. (2 Humph.) 285.

The word "law," as used in the constitutional provisions relating to due process of law, is something more than mere will exerted as an act or power. It must not be under a special rule for a particular person or a particular case. *Hurtado v. People of California*, 4 Sup. Ct. 111, 121, 110 U. S. 516, 28 L. Ed. 232.

Due process of law is secured if the laws operate on all alike. *Duncan v. State of Missouri*, 152 U. S. 377, 382, 14 Sup. Ct. 570, 571, 38 L. Ed. 485; *Florida Cent. & P. R. Co. v. Reynolds*, 22 Sup. Ct. 176, 179, 183 U. S. 471, 46 L. Ed. 283; *Connolly v. United Sewer Pipe Co.*, 22 Sup. Ct. 431, 439, 184 U. S. 540, 46 L. Ed. 679; *Caldwell v. Texas*, 11 Sup. Ct. 224, 228, 137 U. S. 692, 34 L. Ed. 816; *Philbrook v. Newman* (U. S.) 85 Fed. 139, 142; *Cantini v. Tillman* (U. S.) 54 Fed. 969, 975; *Sears v. Cottrell*, 5 Mich. 251, 252, 254.

"Due process of law" has never been held to mean more than the process which is due alike to all persons in the administration of the law to which they are subject. The requirements of due process of law forbid the

arbitrary punishment of any man on account of race, color, religious or political opinions, or on suspicion, or without trial in the due course prescribed by law for all persons accused. In *re McKee*, 57 Pac. 23, 25, 19 Utah, 231.

The phrases "due process of law" and "law of the land," as used in Magna Charta did not mean merciful or just laws, but did mean equal and general laws, fixed and certain. *Eames v. Savage*, 77 Me. 212, 221, 52 Am. Rep. 751 (citing *Broom's Com. Law*, 228).

Due process of law is denied when any particular person of a class or of the community is singled out for the imposition of restraints or burdens not imposed upon or to be borne by all of the class or the community at large, unless the imposition or restraint be based upon existing conditions that differentiate the particular individuals of the class to be affected from the body of the community. *State v. Ashbrook*, 55 S. W. 627, 632, 154 Mo. 375, 48 L. R. A. 265, 77 Am. St. Rep. 765. See, also, *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789.

In holding that special burdens are often necessary for the general benefit, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other projects, and are not without due process of law, "due process of law" was held to mean affecting all alike who were of the same class or similarly situated. *Oury v. Goodwin* (Ariz.) 26 Pac. 376, 381.

**As form or course of proceeding known to common law or created by statute.**

The phrase "due process of law" has received very broad and liberal interpretations. Fundamental principles of judicial procedure, whether in civil or criminal cases, as they existed and were recognized in the courts of England and the American colonies prior to the adoption of the federal and state Constitutions, are intended to be preserved by this guaranty of due process of law, and, while the forms may be changed, essential guaranties cannot be taken away, even by attempted legislative enactments. *State v. Height*, 91 N. W. 935, 936, 117 Iowa, 650, 59 L. R. A. 437, 94 Am. St. Rep. 323.

"Due process of law" means such general legal forms and course of proceedings as were either known to the common law, or as were generally recognized in this country at the time of the adoption of the Constitution. *Gibson v. Mason*, 5 Nev. 283, 301. This language must be taken with the important limitation that the forms and solemnities required must be such as were essentially in existence at the time of forming the Constitution as a part of the ordinary means of administering justice. *Risser v. Hoyt*, 18 N. W. 611, 621, 58 Mich. 185.

Due process of law is the manner of proceeding which has always been recognized as constitutional in England and in this country in the particular class of cases to which the one in question belongs, the person subjected to it being afforded every reasonable opportunity to defend himself of which the nature of the case will admit. *Light v. Canadian County Bank*, 37 Pac. 1075, 1077, 2 Okl. 543.

Due process of law is the mode of proceeding in the civil courts prescribed by the lawmaking power, which is process by the common law and process by the statute law. *People v. Quant* (N. Y.) 12 How. Prac. 83, 89.

A perfectly satisfactory definition of "due process" may perhaps not be easily stated. Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law. The state is not tied down by any provision of the federal Constitution to the practice and procedure which existed at the common law. *Brown v. New Jersey*, 20 Sup. Ct. 77, 78, 175 U. S. 172, 44 L. Ed. 119.

It is evident that the term "due process of law," within the meaning of the Constitution of the United States, has a broader meaning than the process prescribed by act of the Legislature. Such a construction would render the constitutional guaranty mere nonsense, for it would then mean that no state should deprive a person of life, liberty, or property unless the state should choose to do so. The words, however, do not forbid a state to interfere with the rules and forms known to common law in judicial proceedings, not affecting the ultimate rights of the party, but are intended to guaranty the real and substantial right to life, liberty, and property, as the ultimate result, and probably to prohibit any arbitrary and oppressive proceeding by which the individual is deprived of either. *In re Ziebold* (U. S.) 23 Fed. 791, 794.

To the Legislature belongs the exclusive authority and power to prescribe the mode, means, and conditions on which proceedings affecting parties and property are to be commenced and carried on within its territory. *Kansas City v. Duncan*, 37 S. W. 513, 515, 135 Mo. 571.

The Legislature may regulate the mode of pleading and conducting a trial, but, under pretense of doing so, it cannot deprive parties of substantial rights. *Wright v. Cradlebaugh*, 3 Nev. 341, 349.

"Due process of law" means process according to the law of the land, which process in the states is regulated by the law of the

states. *Cox v. Gilmer* (U. S.) 88 Fed. 343, 348, 349.

A law which is enacted by the Legislature in the exercise of its constitutional powers, and which affords a hearing before it condemns, and renders judgment after trial, is not in violation of the constitutional provision that no citizen shall be deprived of life, liberty, or property except by due course of the law of the land. *Union Cent. Life Ins. Co. v. Chowning*, 26 S. W. 982, 984, 86 Tex. 654, 24 L. R. A. 504; *Id.*, 28 S. W. 117, 120, 8 Tex. Civ. App. 455.

**As course of legal proceedings according to established rules and principles.**

"Due process of law" means a course of legal proceedings according to the rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565; *Kennard v. Louisiana*, 92 U. S. 480, 481, 23 L. Ed. 478; *Hurtado v. California*, 110 U. S. 516, 536, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 1109, 38 L. Ed. 896; *Rees v. City of Watertown*, 86 U. S. (19 Wall.) 107, 122, 22 L. Ed. 72; *In re Ah Lee* (U. S.) 5 Fed. 899, 906; *Burton v. Platter* (U. S.) 53 Fed. 901, 904, 4 C. C. A. 95; *Ex parte Murray* (U. S.) 35 Fed. 496, 497; *Ex parte Stricker* (U. S.) 109 Fed. 145, 150; *Dewey v. City of Des Moines*, 70 N. W. 605, 609, 101 Iowa, 416; *Church v. Town of South Kingston*, 48 Atl. 3, 4, 22 R. I. 381, 53 L. R. A. 739; *Reynolds v. Randall*, 12 R. I. 525, 526; *Burke v. Mechanics' Sav. Bank*, 12 R. I. 513, 516; *Carr v. Brown*, 20 R. I. 215, 218, 38 Atl. 9, 10, 38 L. R. A. 294, 295, 78 Am. St. Rep. 855; *Gunn v. Union R. Co.*, 49 Atl. 999, 1004, 23 R. I. 289; *In re Killan's Estate*, 65 N. E. 561, 564, 172 N. Y. 547, 63 L. R. A. 95; *Westervelt v. Gregg*, 12 N. Y. (2 Kern.) 202, 209, 62 Am. Dec. 160; *People v. Lenbischer*, 54 N. Y. Supp. 869, 875, 84 App. Div. 577; *Rockwell v. Nearing*, 35 N. Y. 302, 306; *Campbell v. Evans*, 45 N. Y. 356, 359; *Stuart v. Palmer*, 74 N. Y. 183, 191, 30 Am. Rep. 289; *Wynehauser v. People* (N. Y.) 2 Parker, Cr. R. 421; *Kemper-Thomas Paper Co. v. Shyer*, 67 S. W. 856, 859, 108 Tenn. 444, 58 L. R. A. 173; *McGavock v. City of Omaha*, 58 N. W. 543, 546, 40 Neb. 64; *South Platte Land Co. v. Buffalo County Com'rs*, 7 Neb. 253, 258; *Caldwell v. Armour* (Del.) 43 Atl. 517, 519, 1 Pennewill, 545; *Loeber v. Schroeder*, 25 Atl. 340, 341, 76 Md. 347; *District of Columbia v. Humphries*, 12 App. D. C. 122, 128; *City of Louisville v. Cochran*, 82 Ky. 15, 22; *Jelly v. Dils*, 27 W. Va. 267, 274; *Peerce v. Kitzmiller*, 19 W. Va. 564, 565; *White v. Crump*, 19 W. Va. 583, 595; *Foule v. Mann*, 3 N. W. 814, 815, 53 Iowa, 42; *State v. Height*, 91 N. W. 935, 936, 117 Iowa, 650, 59 L. R. A. 437, 94 Am.

St. Rep. 323; *Ex parte Macdonald*, 76 Ala. 603, 606; *Mead v. Larkin*, 66 Ala. 87, 88; *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594, 599; *Caldwell v. Village of Carthage*, 31 N. E. 602, 605, 49 Ohio St. 334; *Foule v. Mann*, 3 N. W. 814, 815, 53 Iowa, 42; *Board of Education v. Bakewell*, 10 N. E. 378, 382, 122 Ill. 339; *Reynolds v. Baker*, 46 Tenn. (6 Cold.) 221, 228; *State v. Staten*, 46 Tenn. (6 Cold.) 233, 234; *State v. Whisner*, 10 Pac. 852, 857, 35 Kan. 271; *Gulf, C. & S. F. Ry. Co. v. Ellis (Tex.)* 18 S. W. 723, 724, 17 L. R. A. 286.

Due process of law cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. *Taylor v. Porter (N. Y.)* 4 Hill, 140, 146, 40 Am. Dec. 274; *Embury v. Conner*, 3 N. Y. (3 Comst.) 511, 517, 53 Am. Dec. 325; *Burch v. Newbury*, 10 N. Y. (6 Seld.) 374, 385; *People v. City of Brooklyn (N. Y.)* 9 Barb. 535, 552; *Williams v. Village of Port Chester*, 76 N. Y. Supp. 631, 635, 72 App. Div. 505; *People v. Toynbee (N. Y.)* 20 Barb. 168, 198; *Carr v. Brown*, 38 Atl. 9, 10, 20 R. I. 215, 38 L. R. A. 294, 78 Am. St. Rep. 855; *Lavin v. Emigrant Industrial Sav. Bank (U. S.)* 1 Fed. 641, 653; *Risser v. Hoyt*, 18 N. W. 611, 621, 53 Mich. 185.

By "due process of law" is meant that which follows the general rule established in our system of jurisprudence for the security of private rights, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and, wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. *Hagar v. Reclamation Dist. No. 108*, 4 Sup. Ct. 663, 667, 111 U. S. 701, 28 L. Ed. 569; *Marchant v. Pennsylvania R. Co.*, 14 Sup. Ct. 894, 896, 153 U. S. 380, 38 L. Ed. 751; *Alexander v. Gordon (U. S.)* 101 Fed. 91, 96, 41 C. C. A. 228; *Burton v. Platter (U. S.)* 53 Fed. 901, 904, 4 C. C. A. 95; *San Mateo County v. Southern Pac. R. Co. (U. S.)* 13 Fed. 722, 752; *State v. Hogan*, 58 N. E. 572, 573, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626.

The legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates, and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process or proceedings adapted to the case. *Dent v. West Virginia*, 9 Sup. Ct. 231, 129 U. S. 114, 32 L. Ed. 623 (cited in *Bittenhaus v. Johnston*, 66 N. W. 805, 807, 92 Wis. 583, 32 L. R. A. 380). See, also, *Davis v. St. Louis County Com'rs*, 67 N. W. 997, 998, 65 Minn. 310, 33 L. R. A. 432, 60 Am. St. Rep. 475.

It is the right of every person, before he can be deprived of his property, to have a trial according to law; to have the same character of trial given by the same established rules of evidence and procedure as are applied in other cases under similar conditions. *San Jose Ranch Co. v. San Jose Land & Water Co.*, 58 Pac. 824, 825, 126 Cal. 322.

Due process of law consists in the observance of those safeguards which time and experience have shown are necessary to protect the citizen in the enjoyment of life, liberty, and property. A method of procedure based upon long-established usage is ordinarily due process of law. *People v. Adirondack Ry. Co.*, 54 N. E. 689, 693, 160 N. Y. 225.

Due process of law does not require a plenary suit and trial by jury in all cases where personal or property rights are involved. It is in all cases that kind of procedure which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts. Thus the removal of an officer for cause after investigation by the government by lawful administrative process is due process of law. *Attorney General v. Jochim*, 58 N. W. 611, 614, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606.

Due process of law ordinarily implies and includes a complaint, a defendant, a judge, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding. *Huber v. Rely*, 53 Pa. (3 P. F. Smith) 112, 117; *Kallock v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 239.

#### As observance of matter of form.

The term "due process of law" relates primarily to the remedy or means of redress where property rights are invaded, rather than to matters of substantive law. *Board of Directors of Alfalfa Irr. Dist. v. Collins*, 64 N. W. 1086, 1090, 46 Neb. 411.

"Due course of law" means an observance of the form prescribed by law for a particular proceeding. *Simms v. Slacum*, 7 U. S. (3 Cranch) 300, 306, 2 L. Ed. 446; *In re Hatch*, 43 N. Y. Super. Ct. (11 Jones & S.) 89, 91.

It is undoubtedly the correct doctrine that when a person is on trial for his life or his liberty, and is denied any of his constitutional rights, he has been tried without due process of law; but "due process of law," in its legal sense, does not mean mere form. *State v. Hammer*, 89 N. W. 1083, 1085, 116 Iowa, 284.

#### As law in regular course of administration.

Chancellor Kent says: "The 'law of the land,' as used originally in Magna Charta, is understood to mean due process of law—that



is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of 'due process of law' is that it means law in its regular course of administration through courts of justice." *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 395 (quoting 2 Kent, Comm. 13); *People v. Tonybee* (N. Y.) 12 How. Prac. 238, 253; *Happy v. Mosher*, 48 N. Y. 313, 317; *People v. Leubischer*, 54 N. Y. Supp. 869, 876, 34 App. Div. 577; *People v. Sickles*, 51 N. E. 288, 290, 156 N. Y. 541; *Happy v. Mosher*, 48 N. Y. 313; *In re McDonald*, 2 N. Y. Cr. R. 82, 94; *Walker v. Sauvinet*, 92 U. S. 90, 93, 23 L. Ed. 678; *Leeper v. Texas*, 139 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. Ed. 225; *Caldwell v. Texas*, 137 U. S. 692, 697, 11 Sup. Ct. 224, 34 L. Ed. 816; *Smith v. Bivens* (U. S.) 56 Fed. 352, 356; *Cantini v. Tillman* (U. S.) 54 Fed. 969, 975; *Ex parte Ulrich* (U. S.) 42 Fed. 587, 589; *In re Ah Lee* (U. S.) 5 Fed. 899, 905; *Baker v. Kelley*, 11 Minn. 480, 498 (Gil. 358, 375); *Beaupre v. Hoerr*, 13 Minn. 366, 368 (Gil. 339, 341); *State v. Becht*, 23 Minn. 411, 413; *Elkenberry v. Edwards*, 25 N. W. 832, 833, 67 Iowa, 619, 56 Am. Rep. 360; *Ex parte Grace*, 12 Iowa, 208, 214, 79 Am. Dec. 529; *McGavock v. City of Omaha*, 58 N. W. 543, 548, 40 Neb. 64; *Kansas Pac. Ry. Co. v. Dunmeyer*, 19 Kan. 539, 542; *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 241; *In re McKee*, 57 Pac. 23, 25, 19 Utah, 231; *Ex parte Macdonald*, 76 Ala. 603, 606; *Blair v. Ridgely*, 41 Mo. 63, 119, 97 Am. Dec. 248; *Clark v. Mitchell*, 64 Mo. 564, 577; *Jones v. Yore*, 43 S. W. 384, 385, 142 Mo. 38; *Kansas City v. Duncan*, 37 S. W. 513, 515, 135 Mo. 571; *Hulett v. Missouri, K. & T. Ry. Co.*, 46 S. W. 951, 952, 145 Mo. 35; *Garnett v. Jennings* (Ky.) 44 S. W. 382, 383; *State v. Wilson*, 28 S. E. 554, 557, 121 N. C. 425; *Newland v. Marsh*, 19 Ill. (9 Peck) 376, 382; *Fetter v. Wilt*, 46 Pa. (10 Wright) 457, 460; *Bartlett v. Wilson*, 8 Atl. 321, 323, 59 Vt. 23; *Rison v. Farr*, 24 Ark. 161, 175, 87 Am. Dec. 52. It ordinarily means a settled course of judicial proceeding, but also embraces any process not in conflict with any provision of the Constitution which is conformable to "the settled usages and modes of proceeding which existed in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition, by having been acted on by them after the settlement of the country." *State v. Starling*, 15 Rich. Law, 120, 129.

Due process of law is the application of the law as it exists in the fair and regular course of administrative procedure. *Slaughterhouse Cases*, 83 U. S. (16 Wall.) 36, 127, 21 L. Ed. 394.

#### As legislative enactment.

The phrase "law of the land," as used in the Constitution, has a historical origin.

It was borrowed from Magna Charta, and has been repeatedly decided to mean the same as "due process of law." The phrases "due process of law" and "the law of the land" have never received a perfectly satisfactory definition. One or the other of them occurs in all or nearly all of the Constitutions of the several states and in the Constitution of the United States, and it is well settled that the provisions in which they occur were intended to operate as limitations on the legislative power of the several states and of the United States. It follows, if the provision is a limitation on the legislative power, that a legislative enactment is not necessarily the law of the land, even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily due process of law. It is also settled that these provisions secure to every citizen, except in the matter of taxation, a judicial trial, before he can be deprived of life, liberty, or property. *State v. Beswick*, 13 R. I. 211, 218, 43 Am. Rep. 26.

"The law of the land," as used in the Constitution, has long had an interpretation which is well understood and practically adhered to. It does not mean an act of the Legislature. If such was the true construction, this branch of the government could at any time take away life, liberty, property, and privilege without a trial by jury. The words are substantially the same as those found in chapter 29 of Magna Charta, from which they have been borrowed and incorporated in the federal Constitution and most of the Constitutions of the individual states. Lord Coke, in commenting on this chapter, says: "No man shall be disseized, etc., unless it be by the lawful judgment; that is, a verdict of equals, or by the law of the land; that is (to speak once for all), by the due course and process of law." Coke, 2 Inst. 46. Blackstone says (1 Comm. 44): "And first, it [the law] is a rule—not a transient, sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Chancellor Kent says (Lecture 24, p. 9, vol. 2): "It may be received as a self-evident proposition, universally understood and acknowledged throughout this country, that no person can be taken or imprisoned, or disseized of his freehold or liberties or estate, or exiled, or condemned, or deprived of life, liberty, or property, unless 'by the law of the land or the judgment of his peers.' The words 'by the law of the land,' as used in Magna Charta in reference to this subject, are understood to mean 'due process of law'; that is, by indictment or presentment of good and lawful men." Judge Story, in 3 Comm. Const. § 1783, says: "The clause 'by law of the land,' in effect, affirms the right of trial according to the process and proceedings of the common law." *Dartmouth College v. Woodward*, 17

U. S. (4 Wheat.) 518, 4 L. Ed. 629. By the process and proceedings of the common law, the accused has the right to know the charge in the whole form and substance against him, to contest it, and, if not proved to the satisfaction of a jury, to demand an acquittal. *Inhabitants of Saco v. Wentworth*, 37 Me. 165, 171, 58 Am. Dec. 786. See, also, *Westervelt v. Gregg*, 12 N. Y. (2 Kern.) 202, 212, 62 Am. Dec. 160.

Everything that takes the form of an enactment is not to be deemed the law of the land, or due course or process of law. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 519, 4 L. Ed. 629; *In re Opinion of the Justices*, 33 Atl. 1076, 1078; 66 N. H. 629; *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789. "Due process of law," as used in the constitutional provision which declares that a person shall not be deprived of life, liberty, or property without due process of law, is not merely the act of the Legislature. *Baker v. Kelley*, 11 Minn. 480, 486 (Gil. 353, 359, 375). If there were so, then decrees and forfeitures in all possible forms and amounts, confiscating the property of one person or class of persons, or a particular description of property, upon some view of public policy where it could not be said to be taken for a public use, would be the law of the land. *Salt Creek Val. Turnpike Co. v. Parks*, 35 N. E. 304, 307, 50 Ohio St. 568, 28 L. R. A. 769.

"Due process of law" does not mean a statute passed for the purpose of working a wrong. *Trover v. People*, 31 N. E. 395, 398, 141 Ill. 171, 16 L. R. A. 492; *Taylor v. Porter* (N. Y.) 4 Hill, 140, 145, 40 Am. Dec. 274; *McFadden v. Longham*, 58 Tex. 579, 585.

"Law of the land" means "due process of law." It does not mean merely an act of the Legislature, for that would abrogate all restriction on legislative power. *Craig v. Kline*, 65 Pa. (15 P. F. Smith) 390, 413, 3 Am. Rep. 636 (citing 2 Kent, Comm. 13). See, also, *People v. Toynbee* (N. Y.) 20 Barb. 168, 198; *Hoke v. Henderson*, 15 N. C. 1, 15, 25 Am. Dec. 677. Everything which may pass under the form of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another—legislative judgments, decrees, and forfeitures in all possible forms—would be the law of the land. Such a strange construction would render the constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country. *Mathews v. St. Louis & S. F. Ry. Co.*, 24 S. W. 591, 598, 121 Mo. 298, 25 L. R. A. 161.

Mr. Justice Bronson, in *Taylor v. Porter* (N. Y.) 4 Hill, 140, 145, 40 Am. Dec. 274,

said: "The words 'by the law of the land,' as used in the state Constitution, do not mean a statute passed for the purpose of working a wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into nonsense. The people would be made to say to the two Houses: 'You shall be vested with the legislative power of the state, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it.'" See, also, *Phillips v. Lewis*, 3 Tenn. Cas. 230, 231, 233, and *Lavin v. Emigrant Industrial Sav. Bank* (U. S.) 1 Fed. 641, 660.

The provision in the Constitution is a restraint on the legislative as well as on the executive and judicial powers of a government, and cannot be so construed as to leave Congress free to make any process due process by law by its mere will. *Murray v. Hoboken Land & Improvement Co.*, 59 U. S. (18 How.) 272, 276, 15 L. Ed. 372.

Such an act as the Legislature may, in the uncontrolled exercise of its powers, think fit to pass, is in no sense the process of law designated by the Constitution. *Westervelt v. Gregg*, 12 N. Y. (2 Kern.) 202, 209, 62 Am. Dec. 160.

A state cannot make anything due process of law, within the meaning of the constitutional prohibition, which by its own legislation it chooses to declare such. To say by legislative enactment that the title to A's property should become vested in B. would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision. *Davidson v. City of New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616.

"Due process of law" does not mean legislative enactment, but condemnation by judicial decree. The Legislature cannot usurp the right and the power of the courts to determine every question concerning life, liberty, or property. *Davidson v. City of New York*, 25 N. Y. Super. Ct. (2 Rob.) 230, 238.

To say that the "law of the land" or "due process of law" may mean the very act of the Legislature which deprives the citizen of his rights, privileges, or property leads to a simple absurdity. The Constitution would then mean that no person shall be deprived of his property or rights unless the Legislature shall pass a law to effectuate the wrong, and this would be throwing the restraint entirely away. The true interpretation of this constitutional phrase is that, where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away, but where they are held contrary to the existing law, or are forfeited by its violation,

then they may be taken from him, not by an act of the Legislature, but in the due administration of the law itself, before the judicial tribunals of the state. *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 394; *Williams v. Village of Port Chester*, 76 N. Y. Supp. 631, 635, 72 App. Div. 505; *Clark v. Mitchell*, 64 Mo. 564, 576; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443; *Meyers v. Shields* (U. S.) 61 Fed. 713, 717; *Baker v. Kelley*, 11 Minn. 480, 498 (Gil. 358, 375).

The cause or occasion of depriving the citizen of his supposed rights must be found in the law as it is, or at least it cannot be created by a legislative act which aims at their destruction. Where rights of property are deemed to exist, the Legislature cannot say they shall exist no longer; nor will it make any difference, although a process and a tribunal are appointed to secure sentence. If this is the law of the land, and due process of law, within the meaning of the Constitution, then the Legislature is omnipotent. It may under the same interpretation pass a law to take away liberty or life, without a pre-existing cause, and appoint judicial and executive agencies to execute this law. Property is placed by the Constitution in the same category with liberty and life. *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 394; *Clark v. Mitchell*, 64 Mo. 564, 576; *State v. Julow*, 31 S. W. 781, 782, 129 Mo. 163, 29 L. R. A. 257, 50 Am. St. Rep. 443.

"To give the clause of the Constitution which guaranties that 'no person shall be deprived of life, liberty, or property without due process of law,' therefore, any value, it must be understood to mean that no person shall be deprived by any form of legislation or governmental action of either life, liberty, or property, except as the consequence of some judicial proceeding, appropriately and legally conducted. It shows that a law which by its own inherent force extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the Constitution." *Williams v. Village of Port Chester*, 76 N. Y. Supp. 631, 635, 72 App. Div. 505 (quoting *Wynehamer v. People*, 13 N. Y. [3 Kern.] 378, 394).

"Law of the land" does not mean acts of assembly in regard to private rights, franchises, and interests, which are the subject of property and individual dominion, but refers to the law of the individual case, as established in a fair and open trial, or an opportunity given for one in court, and by due course and process of law. Hence it is held that an act of the Legislature whereby a man's property is swept away from him without a hearing, trial, or judgment, or the opportunity of making known his rights or producing his evidence, is not the law of the

land. *Brown v. Hummel*, 6 Pa. (6 Barr) 86, 91, 47 Am. Dec. 431.

To entitle an act to recognition as the law of the land on the particular subject of which it treats, so as to be within Const. art. 1, § 8, which declares that no man shall be deprived of his life, liberty, or property but by the "law of the land," three things are indispensable, namely: (1) It must have been passed with due form and ceremony; (2) it must embrace equally all persons who are now, or may hereafter be, in like condition, and, if class legislation, it must, in addition, be natural and reasonable in its classification; (3) it must conform to all other requirements of the Constitution. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941.

"Due course of law," within the meaning of Const. 1867, art. 11, § 8, continuing in force all ordinances relating to Baltimore City not inconsistent with that article until they were changed in due course of law, obviously means that the ordinances were to remain effective by virtue of the constitutional mandate, and the power that they conferred was to subsist, until repealed by the municipality, or until overridden or superseded by subsequent legislative enactment. *Hooper v. New*, 37 Atl. 424, 428, 85 Md. 565.

"It may be impossible, it certainly would be presumptuous, to attempt to frame a definition of 'due process of law' which shall embrace all, and only all, cases which a just mind will perceive to be included in it; but if an enactment of the Legislature which purports simply to strip a man of his right to protect his property be such process, then the provision is not of sufficient value to warrant its insertion in the organic law." *Moore v. State*, 43 N. J. Law (14 Vroom) 203, 208, 39 Am. Rep. 558.

#### **As laws consistent with constitutional provisions.**

"Due process of law," as used in Const. U. S. Amend. 5, providing that no person shall be deprived of life, liberty, or property without due process of law, "means that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law." As used in the fourteenth amendment, providing that no state shall deprive any person of life, liberty, or property without due process of law, it refers "to that law of the land in each state which derives its authority from the inherent and reserve powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil

and political institutions." In re Kemmler, 10 Sup. Ct. 930, 933, 136 U. S. 436, 34 L. Ed. 519.

Courts are authorized to interfere and declare a statute unconstitutional or not the law of the land, if it conflicts with the constitutional rights of the individuals, and does not relate to or is not an appropriate measure for the promotion of the comfort, safety, and welfare of society. Booth v. People, 57 N. E. 798, 799, 186 Ill. 43, 50 L. R. A. 762, 78 Am. St. Rep. 229.

"Due course of law" relates primarily to the protection of the individual against unlawful acts of executive or judicial officers, and is not by itself a limitation on the power of legislation. "Due course of law" was originally synonymous with "law of the land"; but the establishment of governments under written constitutions, without altering the meaning of the words, gave an effect to their operation which was not felt in England nor in Connecticut until 1818, when the written constitution placed limitations on the exercise of legislative powers. A law inconsistent with such limitation is not law. Hence an act warranted by a law inconsistent with such limitation is done without due course of law, and so in determining the validity of an act claimed to be obnoxious to this ancient guaranty we may have not only the original question, is the act clearly warranted by any law? but also the additional question, is the law authorizing the act itself inconsistent with the limitations contained in the fundamental law? But this difference is only apparent. Under a written constitution the substantial question is the same as it was before such constitution was known, is the act authorized by the law of the land? It is authorized if warranted by any specific law, unless such law is a mere color of law by reason of its inconsistency with the fundamental law. In re Clark, 31 Atl. 522, 526, 65 Conn. 17, 28 L. R. A. 242.

When first adopted in Magna Charta, the phrase "the law of the land" had reference to the common and statute law then existing in England; and when embodied in our Constitution it referred to the same common law as previously modified, and so far as suited to the wants and conditions of our people in a new country. At present "the law of the land" embraces the same body of laws as still further modified; those parts validly cut off being now excluded, and those validly added being now included. Every valid statute of the state now in existence, whenever enacted, is the present "law of the land" in respect to the subject-matter of that statute; and every existing enactment, passed with due form and ceremony, and not in conflict with some provision of the state or federal Constitution, is

a valid statute. Harbison v. Knoxville Iron Co., 53 S. W. 955, 957, 103 Tenn. 421, 56 L. R. A. 316, 76 Am. St. Rep. 682 (citing Dent v. West Virginia, 129 U. S. 124, 9 Sup. Ct. 234, 32 L. Ed. 626).

#### As laws of each state.

Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state. Walker v. Sauvinet, 92 U. S. 90, 93, 23 L. Ed. 678 (cited in Bittenhaus v. Johnston, 86 N. W. 805, 807, 92 Wis. 588, 32 L. R. A. 380); State v. Moore (Del.) 46 Atl. 669, 675, 2 Pennewill, 299; In re Maxwell, 57 Pac. 412, 414, 19 Utah, 495.

The "law of the land" necessarily means the law of the state where the offense is committed and the trial takes place. The prohibition of the federal Constitution cannot mean that a state must observe the due process of the law of some other jurisdiction over which it has no control. In re McKee, 57 Pac. 23, 25, 27, 19 Utah, 231.

The phrase "due process of law" is found both in the fifth and fourteenth amendments of the Constitution of the United States. In the fifth amendment the provision is only a limitation of the power of general government. It has no application to the legislation of the several states. But in the fourteenth amendment the provision is extended in terms to the states. Gunn v. Union R. Co., 49 Atl. 999, 1004, 23 R. I. 289.

The power of a state to deal with crime within its borders is not limited by the fourteenth amendment, except that no state can deprive particular persons or classes of equal and impartial justice under the law. The question as to whether the statutes of the Legislature have been duly enacted in accordance with the requirements of the state Constitution is not a federal question; neither is the sufficiency of the indictment drawn under the state law, nor the degree of the offense charged, nor the admissibility of testimony, nor the alleged disqualification of a juror because he was not a freeholder. Consequently the Supreme Court of the United States cannot review such questions under an allegation that the decision of the state court in such respects deprived the defendant of his life and liberty without "due process of law." Leeper v. Texas, 139 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. Ed. 225.

#### Judicial proceeding implied.

"Due process of law" means ordinary judicial proceedings in court. Stewart v. Polk County Sup'rs, 30 Iowa, 9, 28, 1 Am. Rep. 238.

"Due process of law" means a course of legal proceedings which secures to every

person a judicial trial before he can be deprived of life, liberty, or property. *Peerce v. Kitzmiller*, 19 W. Va. 584, 585; *White v. Crump*, 19 W. Va. 583, 595.

"Due process of law" is equivalent to "law of the land," and means being brought into court to answer according to law. It means that no person shall be deprived by any form of governmental action of either life, liberty, or property except as a consequence of some judicial proceeding properly and legally conducted. *Lowry v. Rainwater*, 70 Mo. 152, 156, 35 Am. Rep. 420. See, also, *Jordan v. Hyatt* (N. Y.) 3 Barb. 275, 281; *Parsons v. Russell*, 11 Mich. 113, 121, 83 Am. Dec. 728; *Appeal of Ervine*, 16 Pa. (4 Harris) 256, 263, 55 Am. Dec. 499.

The words "due process of law" do not necessarily imply a regular proceeding in a court of justice or after the manner of such courts. *Davidson v. City of New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *Baltimore Belt R. Co. v. Baltzell*, 23 Atl. 74, 75 Md. 94; *In re Ross*, 38 La. Ann. 523, 524; *Eames v. Savage*, 77 Me. 212, 221, 52 Am. Rep. 751. Private right and the enjoyment of property may be interfered with by legislative or executive as well as the judicial department of the government. Thus the power to grant and revoke licenses to practice medicine does not come within the scope of judicial power. *State v. State Board of Medical Examiners*, 26 N. W. 123, 124, 34 Minn. 387. Administrative process, which has been regarded as necessary to govern and sanction by long usage, is as much due process as any other. *Welfer v. Bunbury*, 30 Mich. 201, 210; *Attorney General v. Jochim*, 58 N. W. 611, 614, 99 Mich. 358, 23 L. R. A. 690, 41 Am. St. Rep. 606. Many illustrations may be given to cases where the law, either common or statute, justifies an act under particular circumstances which would be unlawful except under such circumstances. An abatement of nuisance by a private person, although attended with an interference with, or even the destruction of, the property of another; the levy of distress for rent, at common law and under statutes; the distress of goods for taxes; the taking up and disposing of estrays. Thus, also, a statute authorizing the chairman of the board of county commissioners to order the removal to the county of their legal settlement of poor persons who have applied for public support in another county, and are likely to become chargeable thereon for support, and who after warning to depart are unable or have refused to do so, is not invalid as being without due process of law. *Lovell v. Seebach*, 48 N. W. 23, 24, 45 Minn. 465, 11 L. R. A. 687.

The phrase "due process of law" does not necessarily mean a judicial process. "The nation from whom we inherit the phrase 'due process of law,'" said this court, speaking

by Mr. Justice Miller, "has never relied on the courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance of an unlawful taxation." *McMillen v. Anderson*, 95 U. S. 37, 41, 24 L. Ed. 335. The power to tax belongs exclusively to the legislative branch of the government, and the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate to the nature of the case. The assessment cannot be said to deprive the owner of his property without due process of law. *Palmer v. McMahon*, 10 Sup. Ct. 324, 327, 133 U. S. 660, 33 L. Ed. 772.

Due process of law does not always require judicial hearing. It does in matters of purely judicial nature, but not in matters of taxation, or matters purely administrative. *State v. Sponangle*, 32 S. E. 283, 284, 45 W. Va. 415, 43 L. R. A. 727.

The words "law of the land" do not imply the necessity of judicial action in every case in which the property of the citizens may be taken for the public use. On the contrary, a legislative act for that purpose, when clearly within the limits of legislative authority, is of itself law of the land. *Pittsburgh, C. & St. L. Ry. Co. v. Backus*, 33 N. E. 432, 438, 133 Ind. 625.

Due process of law does not necessarily imply a hearing by one whose property is taken or damaged for public use according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriated for the purpose, and adequate to secure the end and object sought to be obtained. *Chicago, B. & Q. R. Co. v. State*, 66 N. W. 624, 628, 47 Neb. 549, 41 L. R. A. 481, 53 Am. St. Rep. 557.

The term "due process of law" includes all the steps essential to deprive a person of life, liberty, or property. It includes all the forms and acts essential to its application and to give effect to it. The means that may be employed to accomplish the purpose of the law is the process. In other words, process is the mode by which the purpose of the law may be effected, and this mode, as to similar subjects under similar circumstances, must be the same to all persons. Judicial action is usually required to determine property rights against its owner, but in some cases administrative or executive action is sufficient. *Jenkins v. Ballantyne*, 30 Pac. 760, 8 Utah, 245, 16 L. R. A. 689.

In *Gilchrist v. Schmidling*, 12 Kan. 263, 271, it is said that it is settled beyond all controversy that "due process of law" for transferring property from one person to another, before any injury has been suffered by the owner of the property, does not nec-

essarily mean a judicial proceeding or a judicial determination. The distraining of cattle damage feasant, the taking up of estrays, the sale of property, real or personal, for taxes, the exercise of the power of eminent domain, or the exercise of any police power by police officers, is as much due process of law as any judicial determination can be. Nor does "due process of law" mean a judicial proceeding according to the course of the common law; nor must there be a personal notice to the party whose property is in question. See, also, *Davidson v. New Orleans*, 96 U. S. 97, 102, 24 L. Ed. 616; *In re Ebenhack*, 17 Kan. 618, 620; *Weimer v. Bunbury*, 30 Mich. 201, 210; *In re Petrie*, 40 Pac. 118, 120, 1 Kan. App. 184.

#### Jury trial implied.

It has been repeatedly declared that the phrase "due process of law," within the provision of the Constitution restraining the depriving of a person of his liberty without due process of law, does not of itself require a trial by jury in states where the usage and statutes are otherwise. *Montana v. St. Louis Mining & Milling Co.*, 152 U. S. 160, 171, 14 Sup. Ct. 506, 38 L. Ed. 398; *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. Ed. 232; *Walker v. Sauvinet*, 92 U. S. 90, 93, 23 L. Ed. 678; *In re Dowdell*, 47 N. E. 1033, 1034, 169 Mass. 387, 61 Am. St. Rep. 290; *Garnett v. Jennings*, 44 S. W. 382, 383, 19 Ky. Law Rep. 1712; *State v. Wilson*, 28 S. E. 554, 557, 121 N. C. 425; *Attorney General v. Jochim*, 58 N. W. 611, 614, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606; *Cummins v. Cummins (Del.)* 31 Atl. 816, 819, 1 Marv. 423; *McInerney v. City of Denver*, 29 Pac. 516, 519, 17 Colo. 302; *Fant v. Buchanan (Miss.)* 17 South. 871.

"Due process of law" always proceeds upon inquiry, and renders judgment only after trial. It applies to all cases where property is sought to be taken or interfered with. These principles underlie the whole system of taxation. *Hennessey v. Volkening*, 22 N. Y. Supp. 528, 529, 30 Abb. N. C. 100.

"Whatever may be the meaning of the terms 'law of the land,' or 'due course of the law of the land,' they have never been held to enjoin in all cases a trial by jury as a requisite indispensable to the validity of the judgment." *James v. Reynolds' Adm'rs*, 2 Tex. 250, 251.

"Due process of law" does not necessarily mean a trial by jury. It simply means a day in court, according to the practice provided for such cases, involving, of course, notice, and an opportunity to be heard before judgment is pronounced. *Delaney v. Police Court of Kansas City*, 67 S. W. 589, 591, 167 Mo. 667.

"Due process of law" carries with it the right of trial by jury, when trial by jury has

been the usual course of administration in the particular class of cases, through courts of justice to which the one in question belongs. *Light v. Canadian County Bank*, 37 Pac. 1075, 1077, 2 Okl. 543.

The guaranty of due process of law does not require that a trial shall be before a jury. Its effect is not to give the right of trial by jury in cases in which it did not exist when the Constitution was adopted, but only to perpetuate such rights in all cases in which it was a part of the usual course of administration of justice through the courts at all such times. *Rider-Wallis Co. v. Fogo*, 78 N. W. 767, 769, 102 Wis. 536.

Trial by jury is not in all cases an essential element of "due process of law." It is only in cases in which it had been theretofore used that the Constitution makes it a necessary element in such due process, and hence it follows that cases within the jurisdiction of the equity courts, though they often involve the title and final disposition of property, are notwithstanding "due process of law within" the meaning of the Constitution. Hence, also, those proceedings affecting the possession of personal property in actions at law which existed prior to the adoption of the Constitution, and the subsequent proceedings which have taken their place, as, for instance, creditors' bills and proceedings to reach property of judgment creditors in supplementary proceedings, are not supposed to be obnoxious to the Constitution, though no jury trial is provided. *In re Curry's Estate (N. Y.)* 25 Hun, 321, 323.

A proceeding in equity should undoubtedly be classed as "due process of law," and a right of trial by jury is not essential. *McLane v. Leicht*, 29 N. W. 327, 330, 69 Iowa, 401; *Gibson v. Mason*, 5 Nev. 283, 301.

A trial before a court or referee in which witnesses may be examined, and in which the rights of the parties are as fully protected as in any other proceedings in chancery, is "due process of law." *Eikenburg v. Edwards*, 25 N. W. 832, 833, 67 Iowa, 619, 56 Am. Rep. 360.

The common-law principle in relation to triers of jurors not having been adopted in Massachusetts, but another mode, that of trial by the court, believed to be quite as effectual to secure impartial juries, having been provided by legislative authority, it became the law of the land of that commonwealth under the Constitution. *State v. Knight*, 43 Me. 11, 122, 125.

Within the principle that no person shall be deprived of life, liberty, or property except by due course of law, by the phrase "due course of law" is meant a proceeding which the adversary parties have a right to be confronted by the witnesses against them,

and to have the issues between them tried by a jury in a due and orderly manner as provided by law. *Nettles v. Somervell*, 25 S. W. 658, 660, 6 Tex. Civ. App. 627.

As the remedy of the landlord by distress was in existence at the time of the adoption of the Constitution, the statutes regulating the exercise of that right are not in violation of either the federal or state Constitution because of not requiring a jury trial. *Garnett v. Jennings* (Ky.) 44 S. W. 382, 383.

"It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are in dispute. The important right of personal liberty is generally determined by a single judge on a writ of habeas corpus, using affidavits or depositions for proofs where facts are to be established. Assessments for damages and benefits occasioned by public improvements are generally made by commissioners in a summary way. Conflicting claims of creditors amounting to thousands of dollars are often settled by the courts on affidavits or depositions alone, and the courts of chancery, bankruptcy, probate, and admiralty administer immense field of jurisdiction without trial by jury. In all cases that kind of procedure is "due process of law" which is suitable and proper to the nature of the case and sanctioned by the established usages of the courts. *Ex parte Wall*, 2 Sup. Ct. 569, 589, 107 U. S. 265, 27 L. Ed. 552.

**Same—In criminal cases and informations in insanity.**

"Due process of law," within the meaning of the Constitution, is that which affords to every citizen the equal protection of the laws, and, in case of accusation of crime, the right of trial by jury before one of the state's duly constituted tribunals having jurisdiction of the crime, under a procedure which the state prescribes. *In re Buchanan*, 40 N. E. 883, 885, 146 N. Y. 264.

"Due process of law" is quite uniformly held to give to all persons on trial upon criminal charges the right of jury trial, but it has perhaps been as uniformly decided that trial by jury was not included in "due process of law" as applicable to violation of municipal by-laws, proper, which relate to acts and omissions that are not embraced in the general municipal legislation of the state and punishable by fine. Among these are municipal regulations concerning markets, streets, waterworks, parks, and various other matters regarding which local conditions and interests demand different regulations than are called for in rural communities. *In re Cox*, 89 N. W. 440, 129 Mich. 635. See, also, *McInerney v. City of Denver*, 29 Pac. 516, 519, 17 Colo. 302.

What is "due process of law" has not been clearly defined, but the practice of summary commitments has prevailed ever since the Revised Statutes were adopted, and long before the adoption of the Constitution containing the provisions in regard to due process of law; and so a procedure in the case of a witness has been recognized for a sufficient length of time to bring it within the category of "due process of law." *In re McAdam*, 7 N. Y. Supp. 454, 456, 54 Hun, 637.

"Due process of law," in establishing the insanity of a person, has long been declared to be by inquiry through a jury. *In re Bryant* (D. C.) 3 Mackey, 489, 493.

**Same—In condemnation and taxation proceedings.**

The owner of property to be condemned for public use has no constitutional right to have his compensation assessed by a jury. *State v. Heppenheimer*, 23 Atl. 664, 665, 54 N. J. Law (25 Vroom) 268; *Long Island Water-Supply Co. v. City of Brooklyn*, 17 Sup. Ct. 718, 722, 166 U. S. 685, 41 L. Ed. 1165.

It is not to be claimed that trial by jury is necessarily implied in the phrase "due course of law" or "due process of law." Within the meaning of the Constitution there may be due course of law in the general system of procedure for the levy and collection of taxes, and under the Constitution of 1802 the value of the private property taken for public uses could be assessed by commissioners under due process of law. *Salt Creek Val. Turnpike Co. v. Parks*, 35 N. E. 304, 307, 50 Ohio St. 568, 28 L. R. A. 769.

The assessment or nonassessment of damages for the construction of drains by trustees of a town cannot be regarded as "due process of law," unless the right of appeal exists to a tribunal where such an assessment can be made by a constitutional jury. *Fleming v. Hull*, 35 N. W. 673, 675, 73 Iowa, 698.

Taxes were not, either in England or in this country, collected by the intervention of a jury, nor was it even recognized by the citizens to demand such course of procedure. On the contrary, it was almost the universal practice to collect them when delinquent by some summary process, such as the seizure of the property of the individual and exposing it for sale. The citizen not being entitled to claim a jury in such a case prior to the adoption of the Constitution, a mode of collecting taxes without the intervention of a jury, adopted thereafter, is "due process of law." *Gibson v. Mason*, 5 Nev. 283, 301.

It is now universally conceded that this prohibitory clause in the Constitution does not apply to summary proceedings of states to collect the revenue essential to their existence, operating equally on all citizens. *Bagley v. Castile*, 42 Ark. 77, 84.

**Competent tribunal required.**

The term "due process of law," when applied to judicial proceedings, requires, to give such proceedings validity, that there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit. *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565; *Caldwell v. Armour* (Del.) 43 Atl. 517, 519, 1 Pennewill, 545; *In re Ah Lee* (U. S.) 5 Fed. 899, 906; *Kemper-Thomas Paper Co. v. Shyer*, 67 S. W. 856, 859, 108 Tenn. 444, 58 L. R. A. 173.

The term "in due course of law" means by authority of law, by competent legal authority; an act done in due form by a competent legal tribunal. *Simms v. Slacum*, 7 U. S. (3 Cranch) 300, 306, 2 L. Ed. 446.

It is essential to due process of law that there shall not only be notice of the time and place for the hearing, but, what is more important, that there shall be a tribunal clothed with power, by methods and rules prescribed by law, to hear and determine a question involved. *Charles v. City of Marion* (U. S.) 98 Fed. 166; *Moss v. Whitzel* (U. S.) 108 Fed. 579, 582.

"Due process of law" means lawful judicial proceedings in a court of competent jurisdiction. *In re Curry* (N. Y.) 1 Civ. Proc. R. 319, 326, 25 Hun, 321, 323.

The term "law of the land," within the rule that no person shall be deprived of his property except by the law of the land, means by the judgment of a court of competent jurisdiction, in which he is a party and afforded an opportunity to defend his rights. *Bailey v. City of Raleigh*, 41 S. E. 281, 130 N. C. 209, 58 L. R. A. 178.

"Due process of law," as used in a statute making it the duty of the Attorney General of the state to enforce the provisions of the act by due process of law is equivalent to the phrase "in any court of competent jurisdiction" appearing in other statutes, and if it does not otherwise indicate any particular tribunal. Its meaning here is wholly different from the meaning of the same phrase as used in the federal Constitution and in several of the state constitutions, where it has the same significance as have the words "by the law of the land" appearing in the Tennessee Constitution and Magna Charta. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941.

Under the Constitution, the property and rights of every man are put in judicial protection, so that he cannot be deprived of them except by the law of the land, and by the "law of the land" something very different from the act of officers without jurisdiction, in conjunction with a legislative confirmation,

is meant. *Maxwell v. Goetschins*, 40 N. J. Law (11 Vroom) 383, 391, 29 Am. Rep. 242.

The manner in which the hearing required by the term "due process of law" shall be had is largely in the power of the Legislature, the only limit to it being that a special tribunal cannot be created to adjudicate upon a particular case, but it must be heard either by the ordinary courts of justice, or by a tribunal generally created to hear cases of that nature. *In re City of New York*, 47 N. Y. Supp. 965, 966, 22 App. Div. 124. The hearing must be before the court or other tribunal lawfully constituted and organized and clothed with authority to act and decide the questions involved in the proceeding. *Brooks v. Tayntor*, 40 N. Y. Supp. 445, 449, 17 Misc. Rep. 534. Thus Gen. Laws, c. 79, §§ 18-20, declare that, on complaint to the appellate division of the Supreme Court of neglect to care for a pauper by a town to which he is chargeable, such court shall appoint a commission, which, after a hearing, shall report; and, whenever it appears by such report that the pauper is not suitably cared for, the court or justice shall order suitable accommodations to be provided at the expense of the town. Held that, since such act did not vest the commission with judicial powers or provide for a judicial trial at which witnesses under oath might be summoned and a judgment entered, a hearing by it was not due process of law, and hence such proceedings were void. *Church v. Town of South Kingstown*, 48 Atl. 3, 4, 22 R. I. 381, 53 L. R. A. 739.

"The phrase 'general law of the land,' within the rule that the writ of prohibition lies to prohibit the court, judge, or other tribunal from proceeding contrary to the general law of the land, means nothing more than passing upon personal or property rights without a hearing. It embraces cases where a petition, pleading, or objection is duly served or filed in accordance with the settled law of practice, as court, judge, or other tribunal having jurisdiction, and whose duty it is to hear and determine the matter, is proceeding to a determination without a hearing. That, I take it, would be an excess of jurisdiction, and I do not understand that the phrase 'contrary to the general law of the land,' as thus used by the courts, means anything more than an excess of jurisdiction. *People v. Fitzgerald*, 76 N. Y. Supp. 865, 868, 73 App. Div. 339.

**As notice and opportunity to be heard.**

"Due process of law" implies that whenever, in a judicial proceeding, a judgment is rendered by a court of justice affecting the liberty or condemning the property of another person, he is entitled to have reasonable notice of such procedure, trial, or contest. *Mead v. Larkin*, 60 Ala. 87, 88; *Jones v.*



Yore, 43 S. W. 384, 385, 142 Mo. 38; Scudder v. Jones, 32 N. E. 221, 223, 134 Ind. 547.

The essential elements of "due process of law" are notice and opportunity to defend. *Simon v. Craft*, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165; *Ex parte Stricker* (U. S.) 109 Fed. 145, 150; *In re Dolph*, 28 Pac. 470, 471, 17 Colo. 35. "Due process of law" requires notice and hearing before judgment. *Irwin v. Pierro*, 47 N. W. 154, 44 Minn. 490; *Davis v. St. Louis County Com'rs*, 67 N. W. 997, 998, 65 Minn. 310, 33 L. R. A. 432, 60 Am. St. Rep. 475; *Jones v. Yore*, 43 S. W. 384, 385, 142 Mo. 38; *Dasey v. Skinner*, 11 N. Y. Supp. 821, 823, 57 Hun. 593.

An opportunity of defense is an essential element in the conception of "due process of law." *Health Department v. Trinity Church*, 17 N. Y. Supp. 510, 512. See, also, *Holden v. Hardy*, 18 Sup. Ct. 383, 169 U. S. 368, 42 L. Ed. 780; *In re Gannon*, 18 Atl. 159, 160, 16 R. I. 537, 5 L. R. A. 359, 27 Am. St. Rep. 759; *Loeber v. Schroeder*, 25 Atl. 340, 341, 76 Md. 347.

"Due process of law" requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce, or protect his rights. A hearing or an opportunity to be heard is absolutely essential, and a necessity of notice of the time and place of such hearing is conclusively implied. *Stuart v. Palmer*, 74 N. Y. 183, 189, 30 Am. Rep. 289; *Martin v. Central Vermont R. Co.*, 3 N. Y. Supp. 82-84, 50 Hun. 347; *In re Union Elevated R. Co. of Brooklyn*, 19 N. E. 664, 668, 12 N. Y. 61, 2 L. R. A. 359; *In re City of New York*, 47 N. Y. Supp. 965, 966, 22 App. Div. 124; *People v. St. Saviour's Sanitarium*, 56 N. Y. Supp. 431, 436, 34 App. Div. 363; *Goldie v. Goldie*, 79 N. Y. Supp. 268, 269, 77 App. Div. 12; *Welmer v. Bunbury*, 30 Mich. 201, 214; *People v. Saginaw County Sup'rs*, 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 155, 156, 24 Am. Rep. 535; *Davidson v. New Orleans*, 96 U. S. 97, 101, 24 L. Ed. 616; *Spencer v. Merchant*, 125 U. S. 345, 355, 8 Sup. Ct. 921, 31 L. Ed. 763; *State v. Billings*, 57 N. W. 794, 55 Minn. 467, 43 Am. St. Rep. 525; *City of Philadelphia v. Miller*, 49 Pa. (13 Wright) 440; *Dietz v. City of Neenah*, 64 N. W. 299, 301, 91 Wis. 422; *Branson v. Gee*, 36 Pac. 527, 528, 25 Or. 462, 24 L. R. A. 355; *Ex parte Ah Fook*, 49 Cal. 402, 404; *Violet v. City of Alexandria*, 23 S. E. 909, 911, 92 Va. 561, 31 L. R. A. 382, 33 Am. St. Rep. 825; *Parish v. East Coast Cedar Co.*, 45 S. E. 768, 770, 133 N. C. 478; *Stone v. Little Yellow Drainage Dist.*, 95 N. W. 405, 407, 118 Wis. 388. Such proceedings are "due" because they observe all the securities for private rights which are applicable to particular cases. *Carolina & N. W. R. Co. v. Pennearden Lumber & Mfg. Co.*, 44 S. E. 358, 361, 132 N. C. 644 (citing *Civil Rights Cases*, 3 Sup. Ct. 18, 27, 109 U. S. 3, 27 L. Ed. 835).

"Due process of law" means notice. Notice precedes trial, trial leads to judgment, and judgment is the sentence of the court. *City of Philadelphia v. Pepper*, 8 Atl. 241, 243, 115 Pa. 291.

"Due process of law" means that the person entitled to due process of law shall receive a reasonable opportunity to have his grievance redressed. *Stillwater & M. St. Ry. Co. v. Slade*, 55 N. Y. Supp. 966, 968, 36 App. Div. 587.

"Law of the land," as used in the Constitution, requires a hearing before the condemnation of property, and judgment before dispossession. *Ieck v. Anderson*, 57 Cal. 251, 253, 40 Am. Rep. 115.

"The rule of justice which forbids the taking of property except according to the 'law of the land' means that there shall be no taking, no condemnation, before hearing." *First Nat. Bank v. Swan*, 23 Pac. 743, 745, 3 Wyo. 356.

"Due process of law" requires that the party shall be properly brought into court, and that he shall have an opportunity, when there, to prove any fact which, according to the Constitution and the usages of the common law, would be a protection to him or his property. *People v. Essex County Sup'rs*, 70 N. Y. 228, 234; *Brooks v. Tayntor*, 40 N. Y. Supp. 445, 449, 17 Misc. Rep. 534; *Wright v. Cradlebaugh*, 3 Nev. 341, 349; *State v. Cuthall*, 15 S. E. 261, 263, 110 N. C. 538, 16 L. R. A. 130.

The numerous attempted definitions of "due process of law" to be found in the books, when summed up, amount at least to but different expressions of the principle that every one is entitled to have notice of any proceeding by which his life, liberty, or property may be affected, and to be admitted to make a defense in a proceeding which, following the forms of law, is adapted to the nature of the case, and is in conformity with natural and inherent justice. *Hood River Lumbering Co. v. Wasco County*, 57 Pac. 1017, 1019, 35 Or. 498.

"Due process of law" means the same as the "law of the land," and, as a general rule, involves an opportunity before a proper tribunal, under established procedure, to make contest in defending or enforcing a legal right. *Simmons v. Western Union Tel. Co.*, 41 S. E. 521, 522, 63 S. C. 525, 57 L. R. A. 607 (citing *Murray v. Hoboken Land & Improvement Co.*, 59 U. S. [18 How.] 272, 15 L. Ed. 372; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 572); *In re Ogles* (U. S.) 93 Fed. 428, 431.

The phrases "law of the land" and "due process of law," as used in constitutions, are similar in meaning. They both imply a judgment by an authorized tribunal after an opportunity for a hearing. There must be some sort of a tribunal, some opportunity for

a hearing, and some sort of an adjudication. These requirements, at least, are ingrained in the fundamental law. The Legislature cannot make that "due process of law" or the "law of the land" which is not that in the constitutional sense. *Bennett v. Davis*, 37 Atl. 864, 865, 90 Me. 102 (citing *Inhabitants of Saco v. Wentworth*, 37 Me. 185, 58 Am. Dec. 786; *Dunn v. Burleigh*, 62 Me. 24; *City of Portland v. City of Bangor*, 65 Me. 120, 20 Am. Rep. 681).

The principle that property shall not be taken without due process of law includes notice to the owner, but is intended for his benefit, and not for the benefit of third parties. *People v. Turner*, 2 N. Y. Supp. 253, 255, 49 Hun, 466.

"Due process of law" signifies a right to be heard in one's defense, so that, where a contempt committed out of court is punished without giving the offender a hearing, such punishment deprives him of his liberty without due process of law. *McClatchy v. Superior Court of Sacramento County*, 51 Pac. 696, 699, 119 Cal. 413, 39 L. R. A. 691.

"Due process of law" necessarily implies and includes the right to answer and to contest a charge. *Babcock v. City of Buffalo* (N. Y.) *Sheld.* 317; 340.

The question whether a proceeding is "due process of law," within the meaning of the Constitution, is independent of the question whether it was by a motion or ordinary action, provided the form sanctioned by the state law gives notice and an opportunity to be heard. *Iowa Cent. Ry. Co. v. Iowa*, 16 Sup. Ct. 344, 345, 160 U. S. 389, 40 L. Ed. 467.

"Due process of law" requires that a hearing or an opportunity to be heard be given by means of due notice by such boards or officers in respect to their action which affects individual property rights and requires the exercise of judgment and discretion of a judicial nature. It has no application to the Legislature. That which is within the legislative province the Legislature may do without notice to any one, and taxation is within that province. *In re Curren*, 64 N. Y. Supp. 917, 921, 25 Misc. Rep. 432.

Under the provision of the Constitution that no person shall be deprived of life, liberty, or property without "due process of law," no one can be deprived of his property without an opportunity to be heard; but an act making debts due for labor preferred claims against the property of the employer, when seized by creditors, or when his business has been placed in the hands of a receiver or trustee, and which requires such claims to be presented under oath to the officer or court holding such property, is not void under such constitutional provision. *Henning v. Staed*, 40 S. W. 95, 96, 138 Mo. 430.

#### Same—In assessments for local improvements.

It is essential to the validity of an assessment for public improvements that the property owner, before he is required to pay it, shall have notice and an opportunity to be heard in the courts. A statute allowing such assessments without due notice is unconstitutional as being without "due process of law." *Gatch v. City of Des Moines*, 18 N. W. 310, 812, 63 Iowa, 718; *McGavock v. City of Omaha*, 58 N. W. 543, 546, 40 Neb. 64; *Scudder v. Jones*, 32 N. E. 221, 223, 134 Ind. 547; *Ulman v. City of Baltimore*, 20 Atl. 141, 142, 72 Md. 587, 11 L. R. A. 224; *People v. Mosier*, 8 N. Y. Supp. 621, 56 Hun, 64; *People v. Henlon*, 19 N. Y. Supp. 488, 491, 64 Hun, 471; *Violet v. City of Alexandria*, 23 S. E. 909, 911, 92 Va. 561, 31 L. R. A. 382, 53 Am. St. Rep. 825. An act relating to taking lands for public improvements, and requiring the city council, before making any improvement, to post near the land affected, and to publish, notice of the intention to make the improvement and of its character, constitute "due process of law." *Wulzen v. Board of Sup'rs of City and County of San Francisco*, 35 Pac. 353, 354, 101 Cal. 15, 40 Am. St. Rep. 17.

In *Davidson v. City of New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616, it was said that whenever, by the laws of a state or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirmation or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without "due process of law." So in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 708, 4 Sup. Ct. 663, 28 L. Ed. 569; *Lent v. Tillson*, 11 Sup. Ct. 825, 829, 140 U. S. 816, 35 L. Ed. 419; *Lent v. Tillson*, 14 Pac. 71, 78, 72 Cal. 404.

A state statute authorizing assessments for local improvements, and attempting to make a property owner who is a nonresident of the state personally liable for such assessments, is, as to such personal liability, a taking of property without "due process of law." *Dewey v. City of Des Moines*, 19 Sup. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

#### Same—In condemnation proceedings.

It is not necessary for the Legislature in the exercise of the right of eminent domain, either directly or indirectly, through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to

intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty, without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the Legislature shall in its discretion prescribe. Therefore the constitutional provision which declares that no citizen shall be deprived of his property without "due process of law" has no application to proceedings for the condemnation of property under the exercise of the right of eminent domain. *People v. Smith*, 21 N. Y. 595, 599.

The property of a citizen cannot be taken by the power of eminent domain without some notice to the owner, or some opportunity being afforded him at some stage of the proceedings, to be heard as to the compensation to be awarded him. *Branson v. Gee*, 36 Pac. 527, 528, 25 Or. 462, 24 L. R. A. 355; *People v. Adirondack Ry. Co.*, 54 N. E. 689, 693, 160 N. Y. 225.

In condemnation proceedings it is not essential that the assessment of damages be made by a jury to constitute "due process of law." Such award may be made by commissioners, at least where there is provision for a review of their proceedings in the courts. There is no denial of due process of law in making the findings of fact, whether by commissioners or jury, final as to such fact, and leaving open to the court simply the inquiry as to whether there was any erroneous basis adopted by the triors in their appraisal, or other errors in their proceedings. *Long Island Water Supply Co. v. City of Brooklyn*, 17 Sup. Ct. 718, 722, 166 U. S. 685, 41 L. Ed. 1165.

The constitutional requirement of "due process of law" in the taking of private property for public use will be satisfied if there be (1) authority from the sovereign power for the taking; (2) the ascertainment of compensation under legislative direction, and by an impartial tribunal, after the owner shall have had reasonable opportunity to be heard before it, and after it shall have judicially investigated the matters pertinent to its inquiry; and (3) a right afforded to the owner to present his claims for adjudication in the ordinary courts of justice. The owner of property to be condemned for public use has no constitutional right to have his compensation assessed by a jury. *State v. Heppenheimer*, 23 Atl. 664, 665, 54 N. J. Law (25 Vroom) 268.

The necessity of taking private property for public use is a question for legislative determination, and the provisions of the Code relating to such taking are not, because

they fail to provide for a special tribunal to pass upon such a necessity, violative of the constitutional inhibition against taking the property of a citizen without due process of law. *Savannah, F. & W. Ry. Co. v. Postal Tel. Cable Co.*, 42 S. E. 1, 2, 115 Ga. 554. See, also, *In re Village of Middleton*, 82 N. Y. 196, 201; *People v. Adirondack Ry. Co.*, 54 N. E. 689, 693, 160 N. Y. 225.

The exercise of the right of eminent domain is "due process of law" if the established conditions of its exercise are observed. The fact that the exercise of the power will benefit a railway corporation which has agreed to pay the expense attending it does not affect it. *Barr v. City of New Brunswick* (U. S.) 67 Fed. 402, 403.

The requirement of "due process of law" in proceedings for the condemnation of private property for public purposes is not violated by permitting the actual taking possession of property pending condemnation proceedings, if adequate provision is made for payment of just compensation when the amount is determined. Nor is a person deprived of his property without due process of law because the condemnation proceedings were had before a common-law jury presided over and controlled by a judge rather than a jury of inquest, or that the question of necessity for taking the property, and the amount of the compensation, were both submitted to the same jury. *Backus v. Fort St. Union Depot Co.*, 18 Sup. Ct. 445, 450, 169 U. S. 557, 42 L. Ed. 853.

#### Same—In criminal proceedings.

"Due process of law," as used in Const. art. 1, § 6, providing that no person shall be deprived of life, liberty, or property without "due process of law," means an ordinary judicial proceeding; in a criminal case an arraignment, formal complaint, confronting the witnesses, and trial and regular conviction and judgment. *Wynehamer v. People*, 13 N. Y. (3 Kern.) 378, 446, 454.

In Mr. Cooley's recent work on the *Principles of Constitutional Law* (page 224), we find the following language: "When life and liberty are in question, there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment, before the punishment can be inflicted. But the states will prescribe their own modes of proceeding and trial. The accusation may be by grand jury, or without one, the trial by jury or by court, and whatever is established will be 'due process of law,' so that it be general and impartial in operation, and disregard no provision of federal or state Constitution. In general, however, an accused person will be entitled to the judgment of his peers, unless that mode

of trial is expressly dispensed with by law." *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 238, 239.

"Due process of law" is a general expression, and is equivalent to "the law of the land." It permits the deprivation of life, liberty, or property according to law, and not otherwise. "Due process of law" in relation to the punishment of an offense, requires a law describing the offense. The offense must be described in an accusation. The accused must be given his day in court. His trial must proceed according to established procedure, consisting of rules of pleading and practice. The admission of evidence for or against him must be according to established rules, and he must be convicted by the judgment of a competent court, and the punishment authorized by law. The definition of the offense, and the authority of every step in the trial, must be founded on the law of the land. The law defining these things may be charged by competent authority, constitutional authority or common law; so that the change in the Constitution to the effect that in all criminal cases except capital cases, the jury shall consist of eight jurors, does not deprive a person of his liberty without "due process of law." *State v. Bates*, 47 Pac. 78, 79, 14 Utah, 293, 43 L. R. A. 33.

"Due process of law" requires that the accused plead or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him before his trial can rightfully proceed; and the record of his conviction should show distinctly, and not by inference merely, that every step involved in due process of law and essential to a valid trial was taken in the trial court, otherwise the judgment will be erroneous. *Crahn v. United States*, 16 Sup. Ct. 952, 953, 162 U. S. 625, 40 L. Ed. 1097.

A prisoner in a prosecution for murder is not deprived of a trial by "due process of law" because the solicitor was represented by other counsel with the court's assent. *State v. Conly*, 41 S. E. 534, 130 N. C. 683.

The provisions of the liquor law that offenses against it shall be entered for trial in the first term, that a continuance shall not be allowed without cause shown, and that a nolle prosequi or discontinuance shall not be entered without cause, and only with consent of the court, does not prevent a trial by due process of law, and in accordance with the law of the land. *State v. Hodgson*, 28 Atl. 1089, 1094, 66 Vt. 134.

A general statute authorizing a simplified form of indictment for murder is not unconstitutional as depriving a person, convicted for life, of "due process of law." *Caldwell v. Texas*, 11 Sup. Ct. 224, 226, 137 U. S. 692, 34 L. Ed. 816. Thus Const. art. 3, § 8, in allowing an information to be filed with leave of court, without preliminary examina-

tion, affords due process of law. *State v. Brett*, 40 Pac. 873, 876, 16 Mont. 360.

Proof of a former conviction, in pursuance of Pen. Code, § 688, providing for an increased penalty for the commission of a felony after a former conviction, is not objectionable as not being due process of law. *People v. Sickles*, 51 N. E. 288, 290, 156 N. Y. 541.

When a state court of competent jurisdiction, in due form, has convicted the defendant of a crime, the verdict and judgment are conclusive evidence of the fact that it is, according to the laws of the state, a crime to do the thing that was done, and the question is whether or not it be a crime at common law; and it is "due process of law," under the fourteenth amendment to the federal Constitution, if the state court deprives the defendant of his liberty by imprisonment until a lawful sentence upon such conviction. *In re King* (U. S.) 46 Fed. 905, 907.

The provisions of the liquor law that offenses against it shall enter for trial in the first term, that a continuance shall not be allowed without cause shown, that a nolle prosequi or discontinuance shall not be entered without cause, and only with the consent of the court, does not prevent a trial by "due process of law" and in accordance with the "law of the land." *State v. Hodgson*, 28 Atl. 1089, 1094, 66 Vt. 134.

The expression "law of the land," in the Rhode Island Constitution, is held to include the right to contest the charge and be discharged unless it is proven; therefore it is held that an act of the Legislature of that state which authorized a criminal prosecution upon a complaint against no person in particular, and not containing a charge of the substantive facts necessary to constitute the offense, was not in accordance with the law of the land or due process of law. *Greene v. Briggs* (U. S.) 10 Fed. Cas. 1135.

Cr. Proc. Act, § 68, distinguishes two degrees of murder, and provides that upon a plea of guilty the court shall proceed, by examination of the witnesses, to determine the degree of the prisoner's crime, and to pass sentence accordingly. It was held that, when such proceeding was held in strict accordance with the Constitution and the laws of the state, it was due process of law. *Hallinger v. Davis*, 13 Sup. Ct. 105, 107, 146 U. S. 314, 36 L. Ed. 986.

A state law authorizing a prosecuting attorney, in preliminary proceedings had to determine whether or not there is probable cause to charge a party with a certain offense, to compel the attendance of witnesses before him, by subpoena and attachment, and to punish them for disobedience to his writs,

is unconstitutional as depriving those who are summoned, and refuse to obey, of their liberty without due process of law. Undoubtedly the Legislature has authority to delegate a part of the judicial power to ministerial offices, as, for example, coroners and county commissioners, but such a proceeding as is contemplated in the statute is an attempt to unite the executive and judicial branches of the government, and thereby create a kind of despotism. *In re Ziebold* (U. S.) 23 Fed. 791, 794.

When a prisoner sentenced to death carries his case to an appellate court, "due process of law" does not require that he shall be personally present thereon when it pronounces its judgment, since in case of affirmance it pronounces no new sentence, but merely directs that the sentence already imposed be carried into execution. *Schwab v. Berggren*, 12 Sup. Ct. 525, 528, 143 U. S. 442, 36 L. Ed. 218; *Fielden v. People of Illinois*, 12 Sup. Ct. 528, 530, 143 U. S. 452, 36 L. Ed. 224.

#### Same—In tax proceedings.

"Due process of law" is the prosecution of a suit according to the prescribed and well-settled rules of practice, for the purpose of establishing some right or determining the title to or the value of property; and that no person can be deprived of his property against his will without it is entirely proper in judicial proceedings, but has always been held entirely inapplicable in ordinary tax proceedings. *In re Tax Sale*, 23 N. W. 189, 190, 54 Mich. 417.

Whenever, by the laws of a state or by state authority, a tax assessment or servitude or other burden is imposed upon property for public use, whether it be for the whole state or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge, thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate in the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without "due process of law." *Davidson v. City of New Orleans*, 96 U. S. 97, 104, 24 L. Ed. 616.

It has frequently been held by the Supreme Court, when asked to review tax proceedings in state courts, that "due process of law" is afforded litigants if they have an opportunity to question the validity or the amount of an assessment or charge before the amount is determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered. *Gallup v. Schmidt*, 22 Sup. Ct. 162, 164, 183 U. S. 300, 46 L. Ed. 207.

If the method for levying taxes is one that in its intended and normal workings will result in equal and uniform taxation as between all its citizens, and the right of hearing upon alleged errors is preserved, such method is "due process of law." The fact that a statute authorized the assessors to double the appraised value of the taxable estate which they may be able to find belonging to a taxpayer who fails to return his taxable estate does not render it void or unconstitutional. *Bartlett v. Wilson*, 8 Atl. 321, 331, 59 Vt. 23.

Proceedings to raise revenue by levying and collecting taxes are not necessarily judicial, and due process of law, as applied to them, does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Thus an act requiring notice of the time and place of meeting of a board of equalization in no less than five public places, and for the hearing of claims of any inequalities in the assessments, and for the correction of errors, and also requiring a notice of sale, such notices constitute due process of law. *Baldwin v. Ely*, 28 N. W. 392, 399, 66 Wis. 171.

What is "due process of law" in proceedings for the collection of taxes is left by the Constitution largely to the legislative discretion. The machinery may be simple and the proceeding summary, but it must be a proceeding which is to be, and not which has been, taken. The citizen must have an opportunity to comply with the requirements of the law, and the state, and not the citizen, must be the actor. If, because of the negligence of its agents, the state shall fail to divest the citizen of his title by a sale for taxes, it may begin anew and collect the amount to which it is entitled; but, having proceeded and failed, it cannot by a mere legislative declaration accomplish what it failed to do by the proceeding which it had provided, and validate tax titles which were void under the law in force at the time the tax title was acquired. *Dingey v. Paxton*, 60 Miss. 1038, 1057, 1058.

As a general rule, confiscation of property without a judicial hearing after due notice is not due process of law, so that a statute, imposing an inheritance tax, which does not give the representative or heir notice or opportunity for him to be heard as to the fixing of the appraisement of the estate of such taxation, deprives him of his property without due process of law. *Ferry v. Campbell*, 81 N. W. 604, 605, 110 Iowa, 290, 50 L. R. A. 92.

An assessment made in the exercise of the taxing power of the state, in accord with the law, by proceedings wherein are provi-

sions for an appeal or other means or correcting any error, illegality, or want of authority, is not in conflict with the provision of the Constitution against deprivation of property without due process of law. *Yeomans v. Riddle*, 50 N. W. 886, 890, 84 Iowa, 147.

In discussing the validity of a tax law providing that if an owner fails to enter his lands for taxation they shall be forfeited to the state, it was contended that such law deprived the owner of his property without "due process of law"; but the court said: "We know of no reason why a forfeiture of title to land for sufficient cause, by statute or constitutional legislation, is not by due process of law. It certainly is not for arbitrary exercise of the powers of government which *Magna Charta* intended to prevent when it declared that no person should be deprived of life, liberty, or property except by the judgment of his peers or the law of the land. The contention that the constitutional provisions re-enacting those of the Great Charter require something in the nature of process and judicial proceedings before divesting title seems inconsistent with accustomed methods of enforcing revenue laws, which are themselves as old as *Magna Charta*. The objection appears to be not to the right of the state to provide by legislation that a certain act or omission shall work a forfeiture or incur a penalty; it is to declaring the forfeiture complete by the act, without any subsequent legal procedure; but if the act in its very commission involves the forfeiture, nothing remains but to ascertain the fact of its commission, and that can as well be done in a subsequent suit involving the title as by a proceeding brought by the state to enforce the forfeiture." *Read v. Dingess* (U. S.) 60 Fed. 21, 27, 8 C. C. A. 389. See, also, *State v. Sponaugle*, 32 S. E. 283, 284, 45 W. Va. 415, 43 L. R. A. 727.

Under the constitutional provision that no person shall be deprived of life, liberty, or property without "due process of law," notice of a tax sale was indispensable in order that the title of defendant's property might be transferred to another. To say otherwise would be to hold in effect that the Legislature has the power to take the property of one person and give it to another. *Roth v. Gabbert*, 27 S. W. 528, 530, 123 Mo. 21. See, also, *Newton v. Raper*, 50 N. E. 749, 750, 150 Ind. 630.

After quoting the definition of "due process of law" in *Davidson v. City of New Orleans*, 96 U. S. 97, 24 L. Ed. 616, and *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 708, 4 Sup. Ct. 663, 28 L. Ed. 569, it was held that a statute providing for the construction of sewers, and levying of assessments therefor according to area, and regardless of improvements and a petition of a

majority of the property owners, and providing that during the progress of the work all persons interested shall have opportunity to object to the materials used, and the manner in which the work is done, or any supposed violation of the contract, was not due process of law, since, the levying of assessments being a mere mathematical computation, it was unnecessary to provide an opportunity for lot owners to be heard on the assessment. *Gillette v. City of Denver* (U. S.) 21 Fed. 822, 823.

#### Same—Nature and sufficiency of notice in general.

While it is practically impossible, and certainly unwise, to attempt to give a concise and comprehensive definition of "due process of law" and "law of the land," it is certain that notice to the parties to be affected of the claim against them, and an opportunity to be heard upon it, are essential elements of every proceeding in a court of justice which can be said to constitute due process of law or to be in accord with the law of the land. The basic principle of English jurisprudence is that no man shall be deprived of life, liberty, or property without due process of law—without a course of legal proceedings according to those rules and forms which have been established for the protection of private rights. Such a course must be appropriate to the case and just to the party affected. It must give him notice of the charge or claim against him, and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him, and of the relief sought for from the court if the claim is sustained; and the opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses produced to sustain the claim, and produce witnesses to refute it if a question of fact is in issue; and, if a question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. Judicial orders or judgments affecting the life or property of citizens, in the absence of such a notice and opportunity to be heard to the party affected, are violative of the fundamental principles of our laws, and cannot be sustained. In *re Rosser* (U. S.) 101 Fed. 562, 567, 41 C. C. A. 497.

"Due process of law" means that those general rules established in our system of jurisprudence for the security of private rights must be observed. Where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice, and an opportunity to be heard; so, also, where title or possession

of property is involved. But where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. Respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or some of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared not to be due process of law. *Baldwin v. Ely*, 28 N. W. 392, 399, 66 Wis. 171.

While the phrase "due process of law," as applied in this country, is more or less controlled by its application to the facts and conditions of the particular case, yet in its universality it implies the right of the person to be affected by a judicial proceeding against him to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense; to be heard by testimony or otherwise; and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, there is not due process of law. *Holden v. Hardy*, 167 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780; *Zeigler v. South & N. A. R. Co.*, 58 Ala. 594, 599; *Moss v. Whitzel* (U. S.) 108 Fed. 579, 582; *Ex parte Murray* (U. S.) 35 Fed. 496, 497; *Meyers v. Shields* (U. S.) 61 Fed. 713, 717; *Mead v. Larkin*, 66 Ala. 87, 88; *Wilburn v. McCalley*, 63 Ala. 436, 443; *McGavock v. City of Omaha*, 58 N. W. 543, 546, 40 Neb. 64; *Union Pacific Ry. Co. v. De Busk*, 20 Pac. 752, 755, 12 Colo. 294, 3 L. R. A. 350, 13 Am. St. Rep. 221; *Avant v. Flynn*, 49 N. W. 15, 18, 2 S. D. 153.

"Due process of law" means giving a man notice of the charge or claim against him, and opportunity to be heard respecting the justice of the order or judgment. The notice must be such that he may be advised upon it of the nature of the claim against him, and of the relief sought from the court if the claim is sustained. Opportunity to be heard must be such that he may, if he chooses, cross-examine the witnesses to sustain the claim, and to produce witnesses to refute it if question of fact is the issue; and, if the question of law is presented, the opportunity to be heard must be such that his counsel may, if they desire, argue the justice and propriety of the judgment or order proposed. In *re Rosser* (U. S.) 101 Fed. 562, 566, 41 C. C. A. 497.

Many definitions of "due process of law" have been attempted, but it is believed they

all come to this: that a party shall have his day in court—trial—which means the right of each party, plaintiff or defendant, to introduce evidence to establish his right to recover on the one hand, and to establish his defense on the part of the other; after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them, is not due process of law. Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial. *Jensen v. Union Pac. Ry. Co.*, 21 Pac. 994, 995, 6 Utah, 253, 4 L. R. A. 724.

"Due process of law" means by due course of legal proceedings in accordance with established principles and maxims; yet what constitutes due process of law may differ with different cases. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the necessity for general rules is not such as to preclude the legislature from establishing special rules for particular classes of cases, provided these particular cases range themselves under some general rule of legislative power. And hence there are a number of classes of cases where the property of the citizen may be taken without the actual service of ordinary process upon him, or without his ever actually having his day in court. Proceedings in admiralty and in attachments against the property of nonresident debtors are an illustration. *Youst v. Willis*, 49 Pac. 1014, 1015, 5 Okl. 413.

To give a judicial proceeding any validity if it involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state, or his voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565; *Brooks v. Dun* (U. S.) 51 Fed. 138, 144; *Ex parte Stricker* (U. S.) 109 Fed. 145, 150; *Caldwell v. Armour* (Del.) 43 Atl. 517, 519, 1 Pennewill, 545; *Kemper-Thomas Paper Co. v. Shyer* (Tenn.) 67 S. W. 856, 859, 58 L. R. A. 173; *South Platte Land Co. v. Buffalo County Com'rs*, 7 Neb. 253, 258.

"Due process of law," as used in Const. art. 1, § 7, providing that no person shall be deprived of life, liberty, or property without due process of law, should be construed as intending to protect the citizens in the enjoyment of life, liberty, or property, and prohibit interference therewith, except in accordance with such provisions of law as the Legislature may enact to protect society and secure the right guaranteed by the Constitution. The word "process" cannot mean that no judgment can be authorized except on summons, or some writ of that nature, technically known "as process first issued"; for it is not doubted but that judgments may be entered

on confession, by submission to arbitration, by warrant of attorney, and perhaps in other ways without service of process. *Davidson v. Farrell*, 8 Minn. 258, 262 (Gil. 225, 229). This clause in the Constitution does not prohibit the Legislature from establishing a general rule of practice by which notice of the institution of the action may be given by an attorney or party. *Gilmer v. Bird*, 15 Fla. 410, 421; *City of Brooklyn v. Franz*, 33 N. Y. Supp. 869, 87 Hun, 54. "Due process of law" implies notice and hearing, or an opportunity to be heard. Where such is not required or provided for in the act, such act is unconstitutional, even though notice of the fact of the thing to be done was given. *In re Jensen*, 59 N. Y. Supp. 653, 655, 28 Misc. Rep. 378.

It is not enough that the parties may by chance have notice, or that they may as a matter of favor have a hearing. The law must require a notice to them, and give them the right to a hearing, and an opportunity to be heard. *San Mateo County v. Southern Pac. R. Co.* (U. S.) 13 Fed. 722, 752. But see *Avant v. Flynn*, 49 N. W. 15, 18, 2 S. D. 153. If the owner or his agent or representative be present at the time the addition of omitted property is made to the roll and knows thereof, such knowledge is equivalent to personal notice and an addition so made cannot be considered as depriving the owner of his property without due process of law. Code Civ. Proc. § 720, which authorizes a judge by order to permit the judgment creditor to institute supplemental proceedings on a judgment against a debtor of the judgment debtor, is not unconstitutional as taking property without "due process of law." Though it does not provide notice of such proceeding to the judgment debtor, he, having been a party to the action and judgment, must be held to be fully aware of the legal effect of it. *High v. Bank of Commerce*, 30 Pac. 556, 95 Cal. 386, 29 Am. St. Rep. 121. See, also, *Ex parte Murray* (U. S.) 35 Fed. 496, 497.

Due process of law does not require that there must be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is offered him to defend. *Happy v. Mosher*, 48 N. Y. 313, 317; *In re Union Elevated R. Co. of Brooklyn*, 19 N. E. 664, 668, 112 N. Y. 61, 2 L. R. A. 359; *City of Indianapolis v. Holt* (Ind.) 57 N. E. 966, 970; *Gilchrist v. Schmidling*, 12 Kan. 263, 272; *Kansas City v. Duncan*, 37 S. W. 518, 515, 135 Mo. 571.

No court of justice in this country can acquire jurisdiction over a person, or a right to render a judgment in personam against him, without a service upon him in person of a summons in the action, unless he enters his

voluntary appearance therein. Nothing else is "due process of law." *Moredock v. Kirby* (U. S.) 118 Fed. 180, 183.

If the mode of service provided by statute is, under the circumstances, reasonable and appropriate to the case, it is "due process of law," and, as to citizens and residents of the state, will give jurisdiction of the person and support a personal judgment against them, although they were not served in person. *Town of Hinckley v. Kettle River R. Co.*, 72 N. W. 835, 836, 70 Minn. 105.

"Due process of law," when applied to judicial proceedings which are not in the nature of proceedings in rem, requires that the defendant should be brought within the jurisdiction, either by service of process within the time, or by his voluntary appearance. *Wilson v. American Palace Car Co.* (N. J.) 55 Atl. 997, 998.

"Due course or process of law," with respect to actions on a foreign judgment necessarily involves reasonable notice to the defendant of the institution and nature of the action, unless waived, or, if he be a nonresident, by personal service within the jurisdiction, and a fair opportunity to be heard before a tribunal of competent jurisdiction. *Fisher v. Fielding*, 34 Atl. 714, 67 Conn. 91, 32 L. R. A. 236, 52 Am. St. Rep. 270.

#### Same—Notice by publication.

Although the Legislature may at its pleasure provide new remedies or change old ones, the power is nevertheless subject to the condition that it cannot remove certain ancient landmarks which have always been recognized and observed in judicial proceedings. Hence it becomes important, in determining what kind of notice would constitute due process of law in judicial proceedings affecting a man's property, to ascertain what notice has always been required and deemed essential—necessary to actions or proceedings of that kind—according to that system of jurisprudence of which ours is a derivative. In an action in personam of a strictly judicial character, proceeding according to the course of the common law, service of process by publication in a newspaper upon resident defendants who are persons within the state and can be found therein is not due process of law, and a statute authorizing such service in actions to foreclose mortgages is unconstitutional and void. *Bardwell v. Collins*, 46 N. W. 315, 317, 44 Minn. 97, 9 L. R. A. 152, 20 Am. St. Rep. 547.

A service of summons by publication against a nonresident, not accompanied by an attachment of property, is void as being without due process of law. *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565.

Shannon's Code, § 5298, providing that in nonresident attachment proceedings based on



attachment of property and service by publication, when the property attached is not sufficient to satisfy the recovery, execution may issue for the residue as in other cases, is, in so far as it attempts to authorize a personal judgment and an execution against a nonserved, nonappearing nonresident for any amount after the appropriation of his impounded property, repugnant to the "due process of law" clause of the fourteenth amendment to the federal Constitution. *Kemper-Thomas Paper Co. v. Shyer*, 67 S. W. 856, 859, 108 Tenn. 444, 58 L. R. A. 173.

Where a defendant is a nonresident at the time of proceedings for divorce, and is not served with process within the state, and does not appear, a decree for alimony, based solely on publication or service out of the state, is a decree fixing personal liability or obligations without "due process of law," and therefore void under the federal Constitution. *Elmendorf v. Elmendorf*, 44 Atl. 164, 165, 68 N. J. Eq. 118.

In New York laws relating to the operation and construction of steam railways within cities, providing for the procurement of the consent of the local authorities and owners of one-half in value of the property on the line of the proposed road, and authorizing the grant of such right of way on determination of the necessity of such railway without the consent of such property owners, though the statute made no provision for personal notice to each person interested, constructive notice by publication in a newspaper and by posting notices along the proposed road is sufficient, and constitutes due process of law. *In re Union El. R. Co. of Brooklyn*, 19 N. E. 664, 667, 112 N. Y. 61, 2 L. R. A. 359.

Conceding that Act May 1, 1897, § 16 (Laws 1897, p. 141), authorizes a finding respecting title to land before an initial registration, as against residents of the state notified only by publication, it does not invalidate the act as authorizing the taking of property without due process of law, as sections 11, 19, 20, and 21 provide for personal service in certain contingencies, and empower a court to direct further notice than that of publication. *People v. Simon*, 52 N. E. 910, 914, 176 Ill. 165, 44 L. R. A. 801, 68 Am. St. Rep. 175.

Where a city charter provided, in relation to assessments for local improvements, that an estimate of the expenses of such improvements to be assessed and charged to the lot should be made and filed for the inspection of the parties interested before such work should be done; that such work should be let to the lowest bidder, upon notice published in the official paper of the city; that, upon the determination of the amount chargeable upon the abutting lands, notice should be given in such official paper of the letting of the contract for the performances of the

work, the filing of such statement, and the proposed issue of bonds, unless the lot owners respectively should elect to pay, etc.—such provisions were not void as being without "due process of law." *Meggett v. City of Eau Claire*, 51 N. W. 569, 569, 81 Wis. 326.

#### Same—Notice by statute.

Proceedings to raise a public revenue by levying and collecting taxes are not necessarily judicial. "Due process of law," as applied to that subject, does not imply or require the right of such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient. In the *Railroad Tax Cases* (U. S.) 13 Fed. 752, Mr. Justice Field says due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment, and to show any errors in valuation committed by the officers. Notice to him will be deemed sufficient if the time and place of hearing are designated by statute. *Hubbard v. Goss*, 62 N. E. 36, 38, 157 Ind. 485. See, also, *Pittsburgh, C. & St. L. Ry. Co. v. Backus*, 38 N. E. 432, 438, 133 Ind. 625; *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 6 Sup. Ct. 57, 60, 115 U. S. 321, 29 L. Ed. 414.

Code 1873, § 478, authorizing a personal judgment against a property owner for the amount of the special assessment for street improvement, is not unconstitutional as depriving him of his property without due process of law, though he is a nonresident of the state and has no actual notice of the proceedings, since the law under which the proceedings was had was a public statute of which all persons interested were bound to take notice. *Dewey v. City of Des Moines*, 70 N. W. 605, 609, 101 Iowa, 416.

#### Same—Notice by substituted service.

A proceeding in a personal action against absent defendants by substituted services through a curator ad hoc, unaccompanied by any seizure of property, is not due process of law, and the judgment and sale thereunder are absolute nullities. *Hobson v. Peake*, 10 South. 762, 763, 44 La. Ann. 383.

The provision of Code, § 3354, that, in a suit on an attachment bond, service of notice on the resident surety is service on his nonresident principal, is not unconstitutional as depriving the latter of his property without "due process of law," for, by voluntarily seeking an extraordinary statutory remedy in another state, the plaintiff subjects himself to the statutory liability implied thereby.

*Continental Nat. Bank v. Folsom*, 8 S. E. 269, 274, 78 Ga. 449.

Where no notice is given to a party of an action against him except by service upon his debtor on attachment of the debt, he is deprived of his property without due process of law. *Martin v. Central Vermont R. Co.*, 3 N. Y. Supp. 82, 83, 50 Hun, 347.

An act which authorizes a service of process on any agent or clerk, where the corporation, company, or individual has an office or agency in any county other than that in which the chief officer or principal resides, is invalid as to citizens of other states, the service not being due process of law. *Brooks v. Dun* (U. S.) 51 Fed. 138, 144.

#### Indictment or information necessary.

The words "law of the land," as used originally in Magna Charta, are understood to mean "due process of law"—that is, by indictment or presentment of good and lawful men—and this, says Lord Coke, is the true sense and exposition of these words. *Rison v. Farr*, 24 Ark. 161, 175, 87 Am. Dec. 52; *Bartlett v. Wilson*, 8 Atl. 321, 323, 59 Vt. 23; *Lavin v. Emigrant Industrial Sav. Bank* (U. S.) 1 Fed. 641, 660; *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 507; *Taylor v. Porter* (N. Y.) 4 Hill, 140, 145, 40 Am. Dec. 274; *People v. Tonybeen* (N. Y.) 12 How. Prac. 238, 253; *Rowan v. State*, 30 Wis. 129, 146, 11 Am. Rep. 559.

The words "without due process of law" mean that no one shall be condemned to lose his liberty unless by the presentment or indictment of a grand jury, and a regular trial according to the course of the common law. *Cooper v. Schultz* (N. Y.) 32 How. Prac. 107, 123.

The words "due process of law," in the fourteenth amendment of the Constitution of the United States, do not necessarily require an indictment by a grand jury in a prosecution by the state for murder. *Hurtado v. People of California*, 4 Sup. Ct. 111, 113, 110 U. S. 516, 28 L. Ed. 232; *McNulty v. Same*, 13 Sup. Ct. 959, 960, 149 U. S. 645, 37 L. Ed. 882; *In re Dolph*, 28 Pac. 470, 471, 17 Colo. 35; *Kalloch v. Superior Court of City and County of San Francisco*, 56 Cal. 229, 241.

"Due process of law," in relation to one charged with a criminal offense, means compliance by the government with all the fundamental requisites, such as that the party shall be charged with the crime in the way provided by the Constitution and the laws of the United States. Thus, where a crime must be prosecuted by presentment or indictment, a prosecution by information is "without due process of law." *Ex parte McClusky* (U. S.) 40 Fed. 71, 74.

Due process of law means a proceeding "by indictment or presentment of good and lawful men, where such deeds be done, in due manner, or by writ original, of the common law." *Dale County v. Gunter*, 46 Ala. 116, 141.

#### As applicable to police regulations.

Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all, under like circumstances, in the enjoyment of their rights, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the state to protect the lives, liberty, and property of its citizens, and to promote health, peace, morals, education, and good order. *In re Kemmler*, 10 Sup. Ct. 930, 933, 136 U. S. 436, 34 L. Ed. 519.

"Due process of law," in legislative proceedings, requires no more than conformity to rules and methods of safe government, and the omission to exercise powers inhibited by the Constitution or delegated to the other great departments of government. A legitimate exercise by the government of its police powers does not constitute a deprivation of property "without due process of law." *People v. Rosenberg*, 22 N. Y. Supp. 56, 58, 67 Hun, 52; *Bittenhaus v. Johnston*, 66 N. W. 805, 807, 92 Wis. 588, 32 L. R. A. 380; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 123; *Bertholf v. O'Reilly*, 74 N. Y. 509, 519, 30 Am. Rep. 323; *Jenkins v. Ballantyne*, 30 Pac. 760, 8 Utah, 245, 16 L. R. A. 689.

The provisions of Gen. St. S. C. 1882, c. 40, that the entire expenses of the Railroad Commission, which is thereby created and invested with general supervision of all railroads in the state, shall be borne by the several corporations owning and operating railroads within the state, does not deprive the railroad companies of their property without "due process of law," as the business of such corporations is affected with a public use and subject to legislative regulation. *Charlotte, C. & A. R. Co. v. Gibbes*, 12 Sup. Ct. 255, 142 U. S. 386, 35 L. Ed. 1061 (followed in *People of New York v. Squire*, 12 Sup. Ct. 880, 884, 145 U. S. 175, 36 L. Ed. 666).

Act Kan. Feb. 19, 1881, prohibits the sale and manufacture of intoxicating liquors within that state except for medical, scientific, and mechanical purposes, and punishes the manufacture and sale thereof, except for the excepted purposes, as a misdemeanor, and declares all places where such liquors are manufactured, sold, bartered, or given away in violation of this law to be common nuisances, and provides for their abatement. The defendant, who had been engaged in the

business of brewing beer prior to the passage of this act, and had made extensive improvements peculiarly adapted to such business, was arrested for selling beer prior to the enactment of the act. It was held that the act did not deprive defendant of his life, liberty, or property without "due process of law." *Mugler v. Kansas*, 8 Sup. Ct. 273, 298, 123 U. S. 623, 31 L. Ed. 205.

In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, different considerations from those which exist in regard to controversies between man and man must prevail. There is nothing in the Constitution of the state of Texas which requires, as a preliminary to the exercise of the right to condemn horses affected with the glanders, a judicial trial of the issue as to the necessity of such summary action, and the ascertainment and awarding of damages resulting therefrom. It is an exercise of the inherent power of the government, and the manner in which the power is to be exercised by summary process offends no provision of the state or federal Constitution. *Chambers v. Gilbert*, 42 S. W. 630, 631, 17 Tex. Civ. App. 106.

#### **Manner and mode of arrest as affecting.**

The "due process of law" granted by the Constitution of the United States is complied with when the party is regularly indicted by the proper grand jury in the state court, has a trial according to the forms and modes prescribed for such trial, and when in that trial he is deprived of no rights to which he is lawfully entitled. Mere irregularities in the manner in which he may be brought into custody are not sufficient to prevent his being tried for the crime with which he is charged in a regular indictment. He may be arrested for a very heinous offense by persons without any warrant, and without any previous complaint, and brought before a proper officer, and this in a sense may be said to be without "due process of law"; but it would hardly be claimed that after the case had been investigated, and the defendant held by the proper authorities to answer for his crime, he could plead that he was first arrested without due process of law. *Ker v. People of Illinois*, 7 Sup. Ct. 225, 227, 119 U. S. 436, 30 L. Ed. 421.

"Due process of law," within the provisions of the fourteenth amendment of the Constitution, declaring that no state shall deprive a person of his liberty or property without due process of law, relates to legal process in the state; so that where a person was indicted by a grand jury for willful murder, and by the usual and regular process which has existed in the state from

time immemorial for the arrest of persons indicted for crime by the grand jury, he is held by due process of law, though the method by which he was brought into the state by private parties did not constitute due process of law in the state to which he had fled. *In re Mahon* (U. S.) 34 Fed. 525, 530.

Rev. St. c. 38, div. 6, § 4, authorizing arrest without warrant in certain cases, does not conflict with the Constitution, which provides that no person shall be deprived of his life, liberty, or property without due process of law. *North v. People*, 28 N. E. 966, 972, 139 Ill. 81.

If a person be imprisoned by virtue of process, there being error in the proceeding resulting in that process, yet if the law is valid under which the proceeding is had, such imprisonment is not without due process of law. The bench warrant and indictment by virtue of which the relator is imprisoned must necessarily then be void; not merely irregular and voidable, but absolutely void, or the relator is not imprisoned without due process of law. *People v. Sheriff of Chautauqua County* (N. Y.) 11 Civ. Proc. R. 172, 178, 179.

#### **Payment of compensation for property taken implied.**

As applied to the appropriation of private property for public uses under the power of eminent domain, "due process of law" does not mean mere legislative enactments, nor simply compliance with the forms of law, nor even constitutional provision, if they be inconsistent with previous established legal rights. Such a construction would render the restriction absolutely nugatory, and turn this part of the Constitution mere nonsense. Under this provision of the Constitution no state can lawfully appropriate private property for the public benefit to public uses without compensation to the owner, and any attempt to do so, whether direct or indirect, whether authorized by the Constitution of the state or by legislative enactment, is wanting for that due process of law required by the amendment. *Scott v. City of Toledo* (U. S.) 36 Fed. 385, 393, 1 L. R. A. 688; *Forster v. Scott*, 32 N. E. 976, 977, 136 N. Y. 577, 18 L. R. A. 543.

Due process of law forbids that one man's property or right to property shall be taken for the benefit of another, or for the benefit of the state, without compensation. *Holden v. Hardy*, 18 Sup. Ct. 383, 387, 169 U. S. 368, 42 L. Ed. 780.

"Due process of law," as applied to judicial proceedings instituted for the taking of private property for public use, means such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceedings

against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. *Chicago, B. & Q. R. Co. v. City of Chicago*, 17 Sup. Ct. 581, 584, 166 U. S. 226, 41 L. Ed. 979.

There is no "due process of law," no matter what form of procedure, judicial or otherwise, may be prescribed, if the plain purpose and inevitable result of the legislative enactment is the spoliation of private property for the benefit of the public without compensation. It is a mistake to say that the form of law alone constitutes the process. Thus an act forbidding the manufacture of intoxicating liquors by persons whose property had been employed in such manufacture prior to the passage of the act is void as depriving him of his property without due process of law. *Kansas v. Wallruff*. (U. S.) 26 Fed. 178, 179.

#### **Taking or transfer of property by legislative act alone.**

The mere fiat of the Legislature transferring the property of one person to another is not "due process of law," within the meaning of that provision in the Constitution of the United States. *Culbertson v. Ccleman*, 2 N. W. 124, 128, 47 Wis. 193.

An act declaring property of a state normal university, which was a private institution, to be state property, is unconstitutional as depriving the corporation of its property without due process of law. *Board of Education v. Bakewell*, 10 N. E. 378, 382, 122 Ill. 339.

A legislative act which authorizes an officer, without notice to the owner, or even the semblance of a judicial investigation, to seize and destroy the property of a citizen, is taking property without due process of law. *Lowry v. Rainwater*, 70 Mo. 152, 156, 35 Am. Rep. 420.

Const. art. 7, § 7, declaring that no person shall be deprived of property without "due process of law," refers to the transfer of property from one person to another, and not to the taking of private property for public use. It means that the Legislature shall not have the power to take the property of one person and give it to another by mere enactment, but that to effect such a change there must be a suit or proceeding in some court or before some magistrate, and a judgment thereon according to due course of law. *Jordan v. Hyatt* (N. Y.) 3 Barb. 275, 281.

By "law of the land" is meant due process of law, and a legislative act which undertakes to deprive one person, against his consent of a vested estate, and to vest it in another for his private use, is not "due pro-

cess of law" or the "law of the land." *Reynolds v. Baker*, 46 Tenn. (6 Cold.) 221, 228.

An act of the Legislature which provides for an involuntary transfer of property from one person to another without consent of the owner, although compensation may be made, is without due process of law. In *Cooley's Constitutional Limitations* it is laid down as an elementary principle that a party cannot by his misconduct so forfeit a right that it can be taken from him without judicial prosecution when such a forfeiture shall be declared in due form. Forfeiture of the right of property cannot be adjudged by legislative acts, and confiscation without a judicial hearing after notice would be void as being without due process of law. *Gilman v. Tucker*, 28 N. E. 1040, 1042, 128 N. Y. 190, 13 L. R. A. 304, 26 Am. St. Rep. 464.

"Due process of law" has reference solely to taking a man's property by virtue of the legal process, the "law of the land," and against his will. Hence a statute giving a mortgagee the right to foreclose mortgages, containing a power of sale, by advertisement, upon default being made in the conditions of the mortgage therein, does not deprive the mortgagor of his property without due process of law, since the statute is founded upon his agreement, and seeks to carry out the agreement in accordance with, and not against, his will. *Robinson v. McKinney*, 29 N. W. 658, 4 Dak. 290.

#### **Right of appeal implied.**

"Due course of law," as used in Const. art. 1, § 13, providing that all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, applies to a defendant as well as a plaintiff in a cause tried in a district court, and means a trial according to the settled rules of law in that court, and a further hearing in the Supreme Court if either party to the litigation desires it after a final judgment in the trial court. "A law which practically takes away from either party to the litigation the right to a fair and impartial trial in the courts provided by the Constitution for the determination of a given controversy denies a remedy by due course of law. But a party's right to appeal to this court cannot be made to depend on his ability to give a bond which will within itself secure to the party successful in the court below full satisfaction of his judgment." *Dillingham v. Putman* (Tex.) 14 S. W. 303, 304.

The term "due process of law" has often been defined as such an exercise of the powers of government as is sanctioned by the settled maxims of the law, and under such safeguards for the protection of individual rights, and those safeguards prescribed for

the class of cases to which the one question belongs. It has never been construed as the right to be heard in the court of last resort, or even according to the course of common law, but is satisfied by a proceeding applicable to such subject-matter, and conformable to such general rules as affect all persons alike. The provisions of a statute denying the right of appeal from judgments of justices of the peace where the amount claimed does not exceed \$20 does not deprive a person of due process of law. *Chicago, B. & Q. R. Co. v. Headrick*, 68 N. W. 489, 490, 49 Neb. 286.

#### Property or rights protected.

It is clear that the right to make contracts and have them enforced as others may is one of the rights secured to every citizen by the phrase "due process of law." *State v. Loomis*, 22 S. W. 350, 351, 115 Mo. 307, 21 L. R. A. 789.

A clerk appointed under the act of 1806 has an estate in his office, and although the Legislature may destroy the office, and by consequence the estate in it, yet the act of 1832 which continues the office, but transfers the estate in it to another, is unconstitutional and void, since it deprives him of his right of property "contrary to the law of the land." *Hoke v. Henderson*, 15 N. C. 1, 15, 25 Am. Dec. 677.

The principle that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his own defense extends to the right to acquire property and enter into contracts with respect to property, but this right of contract is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. A valued policy statute which applies only to future contracts cannot be said to deprive an insurance company of its property without due process of law by raising a conclusive presumption as to the value of the property in action on such policies. *Orient Ins. Co. v. Daggs*, 19 Sup. Ct. 281, 283, 172 U. S. 557, 43 L. Ed. 552.

If property can be taken without a forensic trial and judgment, there is no security for life or liberty. None of these things can be taken away by mere legislation. *Taylor v. Porter* (N. Y.) 4 Hill, 140, 146, 40 Am. Dec. 274; *People v. City of Brooklyn* (N. Y.) 9 Barb. 535, 552.

A statute which confers the exclusive privilege of carrying on a banking business on corporations as provided by the act is unconstitutional, in that it deprives private bankers of their business and property without due process of law. *State v. Scougal*, 51 N. W. 858, 865, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756.

#### DUE PROOF.

"Due proof" required before the issuing of summons in summary process by a justice of the peace means more than the affidavit of the party. *Stanley v. Horner*, 24 N. J. Law (4 Zab.) 511, 513; *Mitchell v. Morris Canal & Banking Co.*, 31 N. J. Law (2 Vroom) 99, 107.

The phrase "due proof," in Rev. St. pt. 3, c. 7, tit. 3, art. 1, relative to taking depositions, and providing that due proof must be made by affidavit that the testimony of the witness whose evidence was sought is material and necessary, means legal proof, and legal proof consists of facts and circumstances from which the judge can satisfy his conscience as to the materiality of the testimony to be given by the witness. Swearing in the words of the statute is swearing to a mere conclusion, and therefore is not sufficient. *Byrne v. Mulligan*, 41 N. Y. Super. Ct. (9 Jones & S.) 515, 516.

Act March 20, 1810, § 14, provides that any justice of the peace shall have jurisdiction for any sum exceeding \$1,000 if the parties appear before him for that purpose; but if it afterwards appear by "due proof" that the judgment was confessed for the purpose of defrauding creditors, the justice shall transmit a transcript to the prothonotary of the proper county, who shall file the same for adjudication in the court of common pleas. Held, that proof by affidavit is sufficient within the statute. *Minick v. Tharp*, 5 Pa. Dist. Ct. R. 44, 45.

The term "due proof," as used in a contract of accident insurance requiring the insured to make due proof of his claim, does not require any particular form of proof which the assurer might arbitrarily demand, but such a statement of facts, reasonably verified, as, if established, would prima facie require payment of the claim. Thus the assigning one cause to an insurer through the agent or by acknowledgment does not prevent the insured from afterwards assigning another cause. *Jarvis v. Northwestern Mut. Relief Ass'n*, 78 N. W. 1089, 102 Wis. 546, 72 Am. St. Rep. 895.

#### DUE PUBLICATION.

The phrase "after due publication of the ordinance," in an admission of defendant, in an action for maintaining a nuisance in violation of a city ordinance by the sale of hop ale, that the plaintiff in error had made sales of hop ale in the city after the passage and due publication of a certain ordinance prohibiting such sales, was construed to mean after the expiration of the time requisite to make the publication of the ordinance effective. *Laugel v. City of Bushnell*, 63 N. E. 1068, 1089, 197 Ill. 20, 58 L. R. A. 266.

**DUE REGARD.**

The phrase "due regard," as used in Act March 22, 1867, providing that, when an application is made to any court of quarter sessions for license to sell intoxicating drinks, it shall be lawful for the court to hear petitions in addition to that of the applications in favor of and remonstrances against the application of such license, and in all cases to refuse the same whenever in the opinion of the court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public, means a proper, suitable regard, such as is required by the circumstances of the case. These circumstances include the knowledge possessed by the court, facts whereof judicial notice should be taken, the testimony of witnesses, the opportunities of petitioners and remonstrants for knowing the things about which they volunteer information, their bias, prejudice, interest, and like matters. A due regard for the petitioners and remonstrants, their characters being equally good, does not require that the court should be governed by the opinion of the majority absolutely. In *re Beaver County Licenses* (Pa.) 3 Montg. Co. Law Rep'r, 64.

**DUE RETURN.**

"Due return" of process means a proper return made in proper time. *Waugh v. Brittain*, 49 N. C. 470.

"Due return," as used in Act 1777, providing that the sheriff shall execute all process and make due return thereof, means the bringing the process into court with such indorsement on it as the law requires him to make. Whether the indorsement be true or false, if it be such an one as the law requires, it is a true return. But it is a "due return" if the indorsement be such as is authorized by law, whether it be true or false. *Harman v. Childress*, 11 Tenn. (3 Yerg.) 327, 329.

**DUE RIGHTS.**

A reservation of all "due rights" under a mortgage and decree of sale, provided the stipulated payments should not be regularly made, means that which law or justice requires to be done. The plain meaning of the clause is that, if the payments are not made as stipulated, the decree should stand in full force and all the rights under it remain unimpaired, and the whole mortgage debt as secured by the decree should remain due and payable. *Ryerson v. Boorman*, 8 N. J. Eq. (4 Halst. Ch.) 701, 703.

**DUE SECURITY.**

The rule that trustees cannot loan a trust fund without obtaining "due security"

does not necessarily mean that they cannot loan the funds on personal security, though that is the meaning given to the rule in England. *Gray v. Fox*, 1 N. J. Eq. (Saxt.) 259, 263, 22 Am. Dec. 508.

**DUE SERVICE.**

"Due service," as applied to the service of process, means a service in the manner provided by the statutes. *Steam Stone-Cutter Co. v. Sears* (U. S.) 9 Fed. 8.

An admission of the "due service" of a notice implies not only that it was properly served, but that it was served in time to save the parties' legal right. *Harmon v. Van Ness*, 67 N. Y. Supp. 561, 563, 58 App. Div. 160.

In *Woolsey v. Abbett*, 48 Atl. 949, 65 N. J. Law, 253, it was held, with reference to an admission of notice required by law to be of 10 days, that "due service" means service made in the proper time and proper manner. *Vail v. American Fire Ins. Co.*, 50 Atl. 671, 672, 67 N. J. Law, 66; *Same v. Pennsylvania Fire Ins. Co.*, Id.

**DUE TIME.**

"Due time," as used in Code Civ. Proc. § 23, providing that if any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or if he fail in such action otherwise than on the merits, the plaintiff may commence a new action within one year after the reversal or failure, means before the action has been barred by any statute of limitations. It does not mean a time within which the action may be prosecuted—a time not too soon nor too late—and mean only such time. *Seaton v. Hixon*, 12 Pac. 22, 24, 35 Kan. 663.

**DUEBILL.**

A duebill is, in legal effect, a promissory note, and as such assignable, and, where for a money demand, negotiable. *Marrigan v. Page*, 23 Tenn. (4 Humph.) 247.

In *Ex parte Burton* (Md.) 8 Gill, 1, 13, a duebill was regarded as equivalent to a written acknowledgment of the indebtedness to a certain extent. In *Wilderman v. Rogers*, 66 Md. 127, 6 Atl. 588, a duebill was held to be within the statute authorizing a married woman to be sued on any note, bill of exchange, single bill, bond, contract, or agreement which she may have executed jointly with her husband. The court said that while it may not be a formal, negotiable note, containing terms of express promise to pay, any note, the legal import of which is the promise or obligation to pay, is sufficient to gratify the terms of the statute, thus implying that the legal import of a duebill is a promise or obligation to pay. *Feeser v. Feeser*, 50 Atl. 406, 407, 93 Md. 716.

Both promissory notes and duebills are held to import a promise to pay, but in one class the promise is verbally expressed, while in the other class the promise is usually implied, and no day for performance specifically mentioned. The common as well as the statutory signification of the word "due" in a duebill, when not qualified by a time clause, is that the money or property in the duebill mentioned is due at the time of executing the instrument. *Lee v. Balcom*, 11 Pac. 74, 76, 9 Colo. 216.

A writing in the nature of a duebill is not a promissory note such as is classed with specialties in the statute of limitations. *Currer v. Lockwood*, 40 Conn. 349, 350, 16 Am. Rep. 40.

## DUEL

A "duel" is defined to be a combat between two persons, fought with deadly weapons, by agreement. The use of weapons of some kind seems to be a necessary ingredient of the offense, since it is held that challenging to fight a fair fight with fists and hands, and not to use any deadly weapon, is not a "challenge to fight a duel," within Code, § 1012, providing that any person challenging to fight a duel shall be guilty of a misdemeanor. *State v. Fritz*, 45 S. E. 957, 133 N. C. 725.

Any agreement to fight with loaded pistols, and actually fighting in pursuance thereof, is a "duel," and a challenge, preparation of pistols, attending of friends in the early morning, and the conduct of the respective parties, is sufficient to show such fact. *State v. Herriott* (S. C.) 1 McMul. 126, 130.

A "duel" is defined by the statute as killing by fight in single combat. *Bassett v. State* (Fla.) 33 South. 262, 265.

The word "duel," as used in a life insurance policy providing that it should be void if insured was killed in a duel, was used in its ordinary signification, and with the meaning that is ordinarily attached to the term—that is, a combat with deadly weapons between two persons by some prearrangement and understanding, and perhaps with some formality—and so the word is doubtless understood when found in our laws placing disabilities on those who may engage in a duel. *Davis v. Modern Woodmen of America*, 73 S. W. 923, 924, 98 Mo. App. 713.

## DUES.

See "Public Dues."

According to *Bouvier's Law Dictionary*, the word "dues" may signify what ought to be paid—what may be demanded. As used in Const. Kan. art. 12, § 2, providing

that dues from corporations shall be secured by individual liability of the stockholders, it is a comprehensive term, which includes all contractual liabilities of the corporation; but under the rule of equitable construction applicable to constitutional provisions, such term cannot be construed, as against the stockholder, to include a contract which was ultra vires, although under the local rule the corporation itself may be estopped, by receiving the benefit of the contract, from pleading in defense to an action thereon. Judge Story, in the case of *Carver v. Braintree Mfg. Co.*, 5 Fed. Cas. 235, observed that the word "dues" is broader than the word "debts." *Ward v. Joslin* (U. S.) 105 Fed. 224, 227, 44 C. C. A. 456.

### Assessment distinguished.

"Dues," as used in reference to payments by a member to a beneficial association, means money owing to the subordinate conclave of the order or association, and not that owing to the supreme conclave of the order, the money owing the latter being designated by the term "assessment." *Warwick v. Supreme Conclave Knights of Damon*, 32 S. E. 951, 955, 107 Ga. 115.

### Damages for torts.

"The term 'due' is of extended import. Among other definitions, Latham gives the singular: Owed; capable of being justly demanded; that which may be justly claimed. Worcester: That which any one has a right to demand. Webster: That ought to be paid or done to or for another, justly claimed as a right or property; fulfilling obligation; that which belongs or may be claimed as a right; whatever custom, law, or morality requires to be done; right; just title or claim. Bouvier defines it as what ought to be paid; what may be demanded. It seems natural to say that, when one is injured by the negligence of another, reparation is due." As used in Const. art. 13, § 2, providing that "dues" from corporations shall be secured by such individual liability of the stockholders, and other means as may be prescribed by law, etc., it includes not only debts arising on contract, but demands from liquidated damages arising from tort. *Rider v. Fritchey*, 30 N. E. 692, 694, 49 Ohio St. 285, 15 L. R. A. 513, 516.

"Dues" is a word of general significance, and includes all contractual obligations. Whether or not the term is broad enough to include liabilities for torts seems to be a rather unsettled question. *Whitman v. National Bank of Oxford*, 20 Sup. Ct. 477, 478, 176 U. S. 559, 44 L. Ed. 587.

As used in Const. art. 12, § 4, providing that "dues from corporations shall be secured by such individual liability of the stockholders \* \* \* as may be prescribed by law," "dues" includes a demand against the

stockholders for damages for personal injuries. *Flenniken v. Marshall*, 20 S. E. 788, 790, 43 S. C. 80, 28 L. R. A. 402.

#### Future claims.

"Dues," as used in an assignment of sums of money now due and becoming due, to secure a party for labor and materials performed and furnished on account of a house, and promising to pay such party all dues on account thereof, embraces sums to become due, there being at the time of the execution of the instrument only one sum then due. *Woods v. Murphy*, 58 N. E. 1027, 1028, 177 Mass. 369.

The words "due or dues" and "accrue," in their relation to the idea of the payment of dues for insurance, has more than one signification, and expresses two different ideas. At times it signifies a simple indebtedness, without reference to the time of payment, as "debitum in presenti, solvendum in futuro." At other times the word "due" or "dues" is used to show that the day of payment of a debt is passed. *Wiggin v. Knights of Pythias* (U. S.) 31 Fed. 122, 125.

#### Interest.

"Debts, dues, and demands," as the terms are used in a discharge of all debts, dues, and demands, include a special promise to pay the interest upon an assigned note. *Howel v. Seaman* (Conn.) 1 Root, 383.

#### Ultra vires obligations.

Const. Kan. art. 12, § 2, provides as follows: "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law." In pursuance of this provision, Laws Kan. 1885, c. 23, § 44, provided that if any corporations created under this or any general statute, except certain corporations, be dissolved, leaving debts unpaid, suits may be brought against any persons who were stockholders at the time of such dissolution. Section 45 provided that, if any stockholder pay more than his due proportion of any debt of the corporation, he may compel contribution from the other stockholders by action. Section 46 provided that no stockholder shall be liable to pay debts of a corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him. Thus, the word "due" in the Constitution appears to have been regarded as equivalent to "debts," or that which is owed. Mr. Justice Story, in *United States v. State Bank of North Carolina* (U. S.) 6 Pet. 29, 36, 8 L. Ed. 308, 310, said, in construing a statute there referred to: "The whole difficulty arises from the different senses in which the word 'due' is used. It is sometimes used to express a mere state of indebtedment, and then is

equivalent to 'owe' or 'own,' and it is sometimes used to express the fact that the debt has become payable." In *Whitman v. National Bank of Oxford*, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587, it was said that the word "due" is one of general signification, and includes all contracted obligations. And under such Constitution the obligations which a corporation had no right to incur, because ultra vires, are not dues from the corporation, although the corporation may be estopped from denying the validity of such obligations. *Ward v. Joslin*, 22 Sup. Ct. 807, 810, 186 U. S. 142, 46 L. Ed. 1093.

#### DULAIN.

"Dulain" is the name of an explosive compound. *Lafin & Rand Powder Co. v. Burkhardt*, 97 U. S. 110, 111, 24 L. Ed. 978.

#### DULY.

"Duly" means: In a due, fit, or becoming manner; properly or regularly. *Bank of British Columbia of Victoria v. City of Port Townsend*, 47 Pac. 896, 897, 16 Wash. 450; *Robertson v. Perkins*, 9 Sup. Ct. 279, 280, 129 U. S. 233, 32 L. Ed. 686; *Gibson v. People* (N. Y.) 5 Hun, 542, 543; *People v. Walker* (N. Y.) 23 Barb. 304; *Burns v. People* (N. Y.) 59 Barb. 531, 543; *Fryatt v. Lindo* (N. Y.) 3 Edw. Ch. 239, 240. In due time or proper manner; in accordance with what is right, required, or suitable; fittingly, becomingly, regularly. *Citizens' State Bank v. Morse*, 57 Pac. 115, 116, 60 Kan. 526; *Beale v. Commonwealth*, 25 Pa. (1 Casey) 11, 21.

"Duly," in legal parlance, means according to law. *Brownell v. Town of Greenwich*, 114 N. Y. 518, 527, 22 N. E. 24, 26, 4 L. R. A. 685; *Youngs v. Perry*, 59 N. Y. Supp. 19, 21, 42 App. Div. 247. It does not relate to form only, but includes substance also. *Brownell v. Town of Greenwich*, 22 N. E. 24-26, 114 N. Y. 518, 4 L. R. A. 685; *People v. Town Clerk of Bainbridge*, 56 N. Y. Supp. 64, 66, 26 Misc. Rep. 220; *Robertson v. Perkins*, 9 Sup. Ct. 279, 280, 129 U. S. 233, 32 L. Ed. 686.

"Duly," as used in a pleading without a statement of the special facts on which it is predicated, has, in general, no effect, for the term is not only indefinite, but affirms matters of law instead of fact. *Hanson v. Langan*, 9 N. Y. Supp. 625.

The words "duly," "wrongfully," and "unlawfully," when used in connection with issuable facts, while they do not vitiate a pleading, are surplusage, and had better be omitted. *Miles v. McDermott*, 31 Cal. 270, 271.

The word "duly," as used in an averment that plaintiff is duly incorporated, imports



but a conclusion. It can relate alone to the formalities observed or nonobserved, as the case may be, in the creation of the corporation. The essential fact that plaintiff is incorporated is sufficiently alleged without the use of the word "duly." *Bury v. J. E. Mitchell Co.* (Tex.) 74 S. W. 341.

The words "duly," "wrongfully," and "unlawfully," when used in a pleading in an action for tort, do not supply the place of words or allegations showing that the acts complained of were illegal. There may be some relations where "wrongfully," "unlawfully," and similar adverbs have some significance, but the ordinary rule is that, for the purpose of pleading, they are utterly valueless. *Going v. Dinwiddie*, 25 Pac. 129, 86 Cal. 638.

A petition to enforce an assessment for a street improvement, averring that the city council "duly passed and published" an ordinance, and that written notice thereof was caused by the city to be "duly served," etc., contains, in the absence of a motion to make more definite, and as against a general demurrer, a sufficient averment of the valid passage and publication of the resolution, etc., and the proper service of a valid notice. *Jessing v. City of Columbus*, 1 Ohio Cir. Ct. R. 90, 1 O. C. D. 54, 58.

An allegation, in a complaint for work done for printing a delinquent tax list, that the defendants "duly contracted" with plaintiff to publish and print the delinquent tax list for defendant according to law, sufficiently implied that the newspaper in which the publication was made was of the size, quality, etc., required by the statute, and that the plaintiff was the lowest bidder, as required by the statute. *Folsom v. Chisago County*, 9 N. W. 881, 28 Minn. 324.

Land was conveyed in trust for the use of a society "not yet fully organized, with covenant by the grantees to convey the same to the trustees as soon as the same shall be duly elected." Held, that the word "duly" referred to the creation of a body corporate of the trustees chosen. *Centenary M. E. Church v. Parker*, 12 Atl. 142, 145, 43 N. J. Eq. (16 Stew.) 317.

#### DULY ADJUDGED.

The expression "duly adjudged" means "adjudged according to law"—that is, according to the statute governing the subject—and implies the existence of every fact essential to perfect regularity of procedure, and to confer jurisdiction both of the subject-matter and of the parties affected by the judgment. *Brownell v. Greenwich*, 24 N. Y. St. Rep. 6.

#### DULY ALLOWED.

Gen. St. 1878, c. 77, § 2, authorizes the recovery of damages for the negligent killing

of an intestate, and, by an amendment of 1891, provides that any demand for the support of the deceased and funeral expenses "duly allowed by the probate court" shall be first deducted from the recovery. Held, that the words "duly allowed by the probate court," found in the amendment, must be construed as having reference merely to the matter of the administration of the fund after a recovery. It cannot mean that the demands must be first allowed by the probate court before there can be any recovery for them in the action. The person liable in the action is not a party to the probate proceedings, and a determination of that court is not binding on him, or even evidence against him as to the existence or amount of such demands. *Sykora v. J. I. Case Threshing Mach. Co.*, 60 N. W. 1008, 1009, 59 Minn. 130.

#### DULY APPOINTED.

An allegation in a complaint alleging that the plaintiff was "duly appointed" to a certain office would imply that everything had been done which was necessary to a legal appointment. *Llethbridge v. City of New York*, 15 N. Y. Supp. 562.

In an indictment charging disobedience of the superintendent of a drawbridge, an averment that the superintendent was "duly and legally appointed" means that the legal requirements of the appointment were all complied with, and it was not necessary to state other facts, such as by whom he was appointed. *Commonwealth v. Chase*, 127 Mass. 7, 13.

An allegation that plaintiff was "duly appointed" receiver was sufficient, without pleading any judgment or proceeding on which such appointment could be made, to authorize proof on the trial of all the facts conferring the jurisdiction necessary to validate the appointment. *Rockwell v. Merwin*, 45 N. Y. 166, 167.

#### DULY ASSIGNED.

The term "duly assigned" has no fixed or precise meaning; a bond may be "duly assigned" for one purpose and not for another. It may be assigned conditionally, and for the purpose of being canceled on a certain event, or to await some future appointment or direction of the assignor, or in trust for a third person or for the use of the assignor himself. *Allen v. Pancoast*, 20 N. J. Law (Spencer) 68, 74.

The words "duly assigned," in 1 Supp. Gen. St. Mass. p. 270, c. 197, providing that a policy of life insurance "duly assigned" to a married woman shall inure to her benefit, whether such transfer be made by her husband or some other person, as used in connection with a transfer by a husband to his

wife, necessarily imports that such a transfer can be duly—that is, legally—made. Appeal of Colburn, 51 Atl. 139, 140, 74 Conn. 463.

As used in Pub. St. 1873, c. 83, § 1, cl. 11, providing that any person duly mustered in the service of the United States as a part of the quota of any city or town during the Civil War, or duly assigned as a part of the quota thereof, shall be deemed to have acquired a settlement in such place, "duly assigned" means "assigned in such form that the town had the benefit of the assignment," and the statute does not "re-open in every case the question of fact whether an assignment of many years before was proper." City of Boston v. Inhabitants of Mt. Washington, 29 N. E. 60, 139 Mass. 15.

A complaint alleging that plaintiff "duly assigned" a promissory note to defendant should be construed as meaning that plaintiff did whatever was necessary to make over her right in the note and to transfer the property of the same to defendant; in other words, that she delivered the note to defendant, either actually or constructively. To "assign" is to make over a right to another, and an assignment is a transfer of property. Hoag v. Mendenhall, 19 Minn. 335, 336 (Gil. 289, 290).

#### DULY AWARDED.

The word "duly" means according to law, and it is to be so construed in a complaint alleging that a certain sum was "duly awarded" as costs and disbursements. Baxter v. Lancaster, 68 N. Y. Supp. 1092, 1093, 58 App. Div. 380.

#### DULY CERTIFIED.

The phrase "duly certified," as used in a statute giving certain effect to a copy of a mortgage duly certified, does not import a sealing. People v. Ransom (N. Y.) 2 Hill, 51, 54.

#### DULY COMMENCED.

"Duly commenced," as used in Rev. St. c. 177, § 8, providing that, if any action duly commenced within the time limited by law shall be abated or otherwise avoided or defeated for any matter, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, means the suing out, from a court competent to adjudicate upon the cause of action, a proper writ—that is, a writ adapted to the cause of action—with the intent to implead the defendant in such action. Service of the writ is not essential, but the plaintiff is bound to ordinary diligence to bring the defendant into court, and this im-

plies the seasonable delivery of the process for service to a proper officer of the precinct or jurisdiction in which the plaintiff has reasonable grounds to suppose the defendant resides or may be found or has property. Eaton v. Chapin, 7 R. I. 408, 410.

#### DULY COMMISSIONED AND SWORN.

Act Nov. 1766, c. 14, declaring that the clerk of the court should give a certificate that the two justices of the peace of the county before whom the acknowledgment of a deed was taken were "duly commissioned and sworn." Held, that a certificate reciting that the justices who took the acknowledgment were "legally authorized and assigned" was a substantial compliance with the act, the words used being substantially of the same meaning as the words "duly commissioned and sworn" used in the act. Hall v. Gitting's Lessee (Md.) 2 Har. & J. 380, 390.

#### DULY COMPLETED.

Where, in an action by a town against a property owner to recover for constructing a sidewalk, the complaint shows a substantial compliance with the provisions of the statute under which the work was done, an allegation that the work was "duly completed" is a sufficient averment that the work was completed in accordance with the specifications of the ordinance. Town of Auburn v. Eldridge, 77 Ind. 126, 128.

#### DULY CONVENED.

An allegation in a complaint that, at a meeting "duly convened" of the justices of the superior court, the defendant was removed from office, meant regularly convened, and would import proper notice. People v. Walker (N. Y.) 2 Abb. Prac. 421, 422.

#### DULY DIRECTED.

When the state speaks of a document to be transmitted by post "duly directed" to the person to whom it is to be sent, it can only contemplate a direction in the ordinary way, written on the outside. Birch v. Edwards, 5 Man. G. & S. 45, 50.

#### DULY ENACTED.

The phrase "duly enacted for that purpose," used in a statute providing that a street railway corporation may, with the consent of the corporate authorities of any city, given in and by an ordinance or ordinances duly enacted for the purpose, maintain and operate a street railway, have much significance, for they indicate the legislative intent that the municipal authorities shall know what they are doing when they make

a street railway grant, and were used for the very purpose of preventing such a grant by an ordinance which has not the grant for its expressed object. The words have an effect like that of the frequent requirement in state constitutions that the purpose of the bill shall be expressed in its title, and should be construed, as that requirement usually is, to be mandatory. *City of Detroit v. Detroit City R. Co.* (U. S.) 60 Fed. 161, 166.

#### DULY ENTERED INTO.

An allegation that a contract was "duly entered into" by a city is sufficient to authorize proof that the contract was entered into in accordance with an ordinance of the city. *Bank of British Columbia of Victoria v. City of Port Townsend*, 47 Pac. 896, 897, 16 Wash. 450.

#### DULY ESTABLISHED.

Where a complaint, in a suit to restrain the obstruction of a highway, alleges that the highway was "duly and legally established," a highway by dedication and public acceptance may be shown, inasmuch as the words "duly and legally established" are not limited in their signification to highways established under statutes and ordinances. *City of Hartford v. New York & N. E. R. Co.*, 22 Atl. 37, 59 Conn. 250.

#### DULY EXECUTED.

A will is "duly executed" when it is executed in accordance with the laws of the state. *Van Arsdale v. Van Arsdale*, 26 N. J. Law (2 Dutch.) 404, 423.

Where land situated in South Carolina was devised by a testatrix who resided in that state, with power of appointment in the devisee "by her last will and testament duly executed," a will duly executed in another state, but not in conformity with the law of South Carolina, was not a valid execution of the power. *Blount v. Walker*, 28 S. C. 545, 554, 6 S. E. 558.

#### DULY FILED.

A recital in the record that plaintiffs had "duly filed" their motion indicates that the motion was regularly and properly filed. *Citizens' State Bank v. Morse*, 57 Pac. 115, 116, 60 Kan. 526.

"Duly," when used with relation to the filing of a pleading, is synonymous with and means "properly and regularly," and indicates that the pleading was regularly and properly filed. *Morrison v. Wells*, 29 Pac. 601, 602, 48 Kan. 494.

The words "duly filed" mean something more than the mere act of filing, and, where

a town law requires propositions to be voted on at elections to be duly filed at least 20 days preceding such town meeting, the words "duly filed" require the petition to be filed 20 days prior to such town meeting. *People v. Town Clerk of Bainbridge*, 56 N. Y. Supp. 64, 66, 26 Misc. Rep. 220.

#### DULY FOUND.

Where a lease for years contained a proviso for re-entry in case the lessee should at any time during the term commit any act of bankruptcy, whereupon a commission or fiat in bankruptcy should issue against him, and under which he should be "duly found and declared a bankrupt," it meant that he should be duly found and declared a bankrupt, not only in mere form, but upon a proper foundation, namely, on a full and good petitioning creditor's debt and trading. This construction is necessary in order to give the word "duly" the weight to which it must be entitled. *Lloyd v. Ingleby*, 15 Mees. & W. 465, 469.

#### DULY GIVEN OR MADE.

Rev. St. § 2673, providing that in pleading a judgment of a court of special jurisdiction it shall not be necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been "duly given or made," is substantially complied with by alleging that plaintiff "recovered a judgment" against defendant, and that "such judgment was duly docketed." *Pierstoff v. Jorge*, 56 N. W. 735, 737, 86 Wis. 128, 39 Am. St. Rep. 881.

A statement that a judgment was "recovered, and duly entered and docketed," is not equivalent to the statement that it was "duly given and made," since this may all be true though the judgment was not recovered. *Batchelor v. Bacon*, 55 N. Y. Supp. 1045, 1047, 37 App. Div. 414.

An allegation that plaintiffs "recovered" judgment cannot be held equivalent to the statutory allegation that the judgment was "duly given or made." *Midland Ry. Co. v. Eller*, 83 N. E. 265, 266, 7 Ind. App. 216 (citing *Hopper v. Lucas*, 86 Ind. 43).

Gen. St. 1878, c. 66, § 108, providing that a judgment or determination may be stated in a pleading to have been "duly given or made," does not refer to the regularity of the judgment or its freedom from error, for that cannot be collaterally called in question, but it is equivalent to an allegation of facts showing jurisdiction. *Scanlan v. Murphy*, 53 N. W. 799, 800, 51 Minn. 536.

To say that a judgment was "duly given or made" is not equivalent to saying that it was "duly rendered." A judgment duly

made or given is a complete judgment properly entered in the judgment book, so that it may be pleaded in bar of another action. *Yeung v. Wright*, 52 Cal. 407, 410; *Harmon v. Comstock Horse & Cattle Co.*, 9 Mont. 243, 23 Pac. 470, 471.

#### DULY ISSUED.

An indictment reciting that defendant made an assault on a marshal, who was then and there in discharge of his duty in executing a warrant "duly issued," imports that the warrant was sealed, and that in all matters of form it answered the law. *Blake v. United States (U. S.)* 71 Fed. 286, 289, 18 C. C. A. 117.

#### DULY MADE.

The words "duly made," in an averment that defendant duly made a promissory note, implies a delivery. *Smith v. Waite*, 37 Pac. 232, 103 Cal. 372.

#### DULY ORGANIZED.

A statute authorizing cities to subscribe to the capital stock of any railroad company "duly organized" under some law of the state does not authorize a subscription to the stock of a mere contemplated corporation. *Rubey v. Shain*, 54 Mo. 207, 209.

"Duly organized," as used in a will directing testator's executors to grant and convey certain premises to the trustees of a Presbyterian church and congregation duly organized, means organized according to presbyterian law and usage, which law and usage makes it absolutely essential that such organization must be supervised and approved by presbytery, for they only can decide what constitutes the true organization of a Presbyterian church. *Appeal of Fidelity Ins., Trust & Safe-Deposit Co.*, 99 Pa. 443, 449.

#### DULY PRESENTED.

"Duly presented" means presented according to the custom of merchants. Per Lord Ellenborough, in *Patience v. Townley*, 2 Smith, J. P. (Eng.) 223, 224.

#### DULY PROSECUTED.

The term "duly prosecuted," in a statute providing that a pending suit constitutes notice by lis pendens if the suit is duly prosecuted and not collusive, means a full prosecution of the cause from its commencement to the final determination thereof. "In order that there may be said to have been a full prosecution of the suit, it must appear that there has been no such negligent intermission as may appear to be inexcusable and cannot be satisfactorily explained. The

ground upon which to place the invalidity of lis pendens for want of full prosecution is not, as in many cases seems to be supposed, negligence merely as such, but estoppel as warranted by such negligence, and from conduct upon the part of those seeking the enforcement of the lis pendens." *Tinsley v. Rice*, 31 S. E. 174, 176, 105 Ga. 285.

Where an action against an administrator for a debt of his decedent, brought within five years from his death, is prosecuted to judgment within 10 years from the death of said decedent, the suit is "duly prosecuted" within the meaning of the statute (Act Feb. 24, 1834), and the question of the due prosecution of the action cannot be left to a jury. To hold that the jury is to adjudge at its own discretion whether a suit against the administrator has been "duly prosecuted" would be to substitute a wavering, uncertain standard of duty, depending on the caprice or whim of each jury charged with the trial of such a cause, for what ought to be a definite, absolute rule applicable to all like cases. *Phillips v. Allegheny Val. R. Co.*, 107 Pa. 472, 481.

The construction given to the words "duly prosecuted," under the act of 1797 requiring an action to secure a lien for a debt upon a decedent's land to be commenced within 7 years and duly prosecuted, and extending the lien of such debt to 12 years from his death by bringing suit within the first 7 years after that event, is that, no matter at what time within the 7 years suit was brought, it continued the lien for 5 years after the determination of the 7, although judgment was not obtained within the 7. *Maus v. Hummel*, 11 Pa. (1 Jones) 228, 230.

#### DULY QUALIFIED.

A statement that a referee had been "duly qualified" should be understood to mean that he had been duly sworn. *Edwardson v. Garnhart*, 56 Mo. 81, 86.

#### DULY RECORDED.

When it is said that a mortgage has been "duly recorded," such phrase means recorded in compliance with the requirement of law. *Dunning v. Coleman*, 27 La. Ann. 47, 48.

An allegation that a mortgage was "duly recorded" did not necessarily imply that the recording was done within the time prescribed by law. *Martens v. Rawdon*, 78 Ind. 85, 86.

The act of the registrar in copying in his books a forged instrument, deposited with him as part of a criminal scheme, cannot very well be called "duly record

ing" a conveyance of land. *Marden v. Dorthy*, 54 N. E. 726, 731, 160 N. Y. 89, 46 L. R. A. 694.

#### DULY RENDERED.

A judgment is "duly rendered" when it is duly pronounced in order to be entered. To say that a judgment was "duly given or made" is not equivalent to saying that it was "duly rendered." A judgment duly given or made is a complete judgment properly entered in the judgment book, so that it may be pleaded in bar of another action. *Young v. Wright*, 52 Cal. 407, 410.

A complaint alleging that on the 16th day of March, 1877, in the Porter circuit court, the plaintiff's intestate, naming her, recovered a judgment, etc., sufficiently shows that the judgment was "duly rendered," and when and where. *Hansford v. Van Auken*, 79 Ind. 157, 161.

#### DULY SERVED.

The phrase "duly served," in a statute requiring process to be duly served, means service of personal notice. *Kirk v. United States* (U. S.) 124 Fed. 324, 337.

Within the rule that a judgment by default can only be taken when it appears that the defendant has been duly served with summons and has failed to answer the complaint, being "duly served with summons" implies that the defendant has been served with summons in the manner described by law in every particular, requiring him to appear in the court of the county where the judgment is taken. *White v. Johnson*, 40 Pac. 511, 513, 27 Or. 282, 50 Am. St. Rep. 728.

#### DULY SHOWN.

A city charter, providing that no clerk should be removed except for cause "duly shown," intended that removal should not be without a hearing given. *Thompson v. Troup*, 49 Atl. 907, 908, 74 Conn. 121.

#### DULY SUMMONED.

The averment of an indictment that the grand jury has been "duly summoned" means no less than that it has been properly summoned, and in a lawful manner, and for all lawful purposes, at that step in the administration of the law. *Keith v. Territory*, 57 Pac. 834, 8 Okl. 307.

"Duly" is not synonymous with the word "legally," and the one is not the equivalent of the other. Where a statute required a person to be "legally" summoned, an allegation that he had been "duly" summoned

did not show a compliance. *State v. Clancy*, 56 Vt. 698, 700.

#### DULY SWORN.

The words "sworn," "duly sworn," or "sworn according to law," used in a statute, record, or certificate of administration of an oath, refer to the oath required by the Constitution or laws in the cases specified, and include every necessary subscription to such oath. *Rev. St. Me. 1883*, p. 59, c. 1, § 6, subd. 20.

"Duly sworn" means a swearing according to law. Hence, where a record shows that the jury were duly sworn, it must be held to be a swearing according to the form of the statute. *Wilson v. Pugh*, 32 Miss. 193, 198.

*Rev. St. c. 1, § 8*, provides that, whenever the expression "duly sworn" or "sworn according to law" is used or applied to any officer who is required to take and subscribe the oath prescribed in the Constitution, it shall be construed to mean that such officer had taken and subscribed the same, as well as the oath faithfully and impartially to perform the duties of the office to which he had been elected and appointed; and, when applied to any person other than such officer, it shall be construed to mean that such person had taken an oath faithfully and impartially to perform the duties assigned to him in the case specified. In the case of an assessor, where the records of the town recite that he was duly sworn, it is not necessary that the oath administered should have been set out in full, but such record is sufficient to show that he had taken the oath which qualified him to act. *Bennett v. Treat*, 41 Me. 226, 227.

*Rev. St. c. 5, § 9*, requiring town officers to be "duly sworn," was satisfied by an oath in substance that the officers would "faithfully and impartially perform the duties assigned to them." *Patterson v. Creighton*, 42 Me. 367, 376.

In an indictment for violation of election laws, an averment that the defendant was "duly sworn" and took his oath means that he was sworn according to the law applicable to such case, and was sufficient without the averment of the form of the oath. *Burns v. People* (N. Y.) 59 Barb. 531, 543.

On a commissioner's return that witnesses had been "duly sworn," it will be considered that they had been sworn in such manner and form as to render the oath binding in conscience as well as obligatory in law. *Fryatt v. Lindo* (N. Y.) 3 Edw. Ch. 239, 240.

A return that witnesses before a commissioner were "duly sworn" means that

they knew the contents of their answers as written down, and were sworn to speak the truth according to the customary form of oath. *Sydnor v. Palmer*, 29 Wis. 226, 239.

A provision in court rules that a commissioner's return of proceedings before him should show that the witnesses were "duly sworn" meant that before examination they should be sworn to testify to the whole truth and nothing but the truth relating to the cause, and therefore a return that they had taken such oath was equivalent to a return that they had been duly sworn. *Bowman v. Van Kuren*, 29 Wis. 209, 214, 9 Am. Rep. 554.

In a statement in a record, after naming the jurors that they were duly impaneled, tried, and sworn, the declaration that they were "duly sworn" implies that the oath was administered with the requisite formality and solemnity; that the jurors in open court were required to hold up their hands and promise to perform the duties specified, there being an appropriate reference to the duty, such as "in the presence of the ever living God," or "so help me God." *Minich v. People*, 9 Pac. 4, 11, 8 Colo. 440.

#### DULY VERIFIED.

A requirement in an insurance policy, that the insured should procure and attach to the preliminary proofs of loss a "duly verified" certificate of a builder as to the actual cash value of the building immediately before the fire, does not require an attestation by affidavit. While the term "verify," applied to legal papers generally, means or implies an oath, it does not always or necessarily do so. *Summerfield v. Phoenix Assur. Co. (U. S.)* 65 Fed. 292, 296.

#### DUMB ANIMAL.

In statutes relating to or affecting animals, the words "animal" or "dumb animal" shall be held to include every living creature. *Ann. St. Ind. T.* 1899, § 1298; *Code N. C.* 1883, § 2490; *People v. Brunell (N. Y.)* 48 How. Prac. 435, 447.

As used in *Pascal*, Dig. arts. 2344, 2345, making it an offense for any person to willfully or wantonly kill any dumb animal, the property of another, the term "dumb animal" will be held to include a dog, which has an owner, who keeps the same for use or pleasure. *McDaniel v. State*, 5 Tex. App. 475, 479.

#### DUMP CART.

The phrase "dump cart," in a contract calling for a dump cart, means a two-wheeled cart, in the absence of any qualifying or

explanatory words. *Iverson v. Cirkel*, 56 Minn. 299, 303, 57 N. W. 800, 801.

#### DUN.

The word "dun," as referring to color, partakes of brown and black. *Cameron v. State*, 44 Tex. 652, 656 (citing *Webst. Dict.*).

#### DUNCE.

To say of a barrister generally that he is a dunce is actionable, the word "dunce" being commonly taken to mean a person of dull capacity who is not fit to be a lawyer. *Fitzgerald v. Redfield (N. Y.)* 51 Barb. 484, 491 (citing *Peard v. Johnes, Cro. Car.* 882).

#### DUNNAGE.

Ballast distinguished, see "Ballast."

"Dunnage" is material placed under the cargo to keep it from being wetted by water coming into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of "dunnage" is "fagots, boughs, or loose materials of any kind laid on the bottom of a ship to raise heavy goods above the bottom to prevent injury by water in the hold; also loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden speaks of "dunnage" as pieces of wood placed against the sides and bottom of the hold to preserve the cargo from the effects of leakage. *Great Western Ins. Co. v. Thwing (U. S.)* 18 Wall. 672, 674, 20 L. Ed. 607; *Thwing v. Great Western Ins. Co.*, 103 Mass. 401, 405, 4 Am. Rep. 567; *Richards v. Hansen (U. S.)* 1 Fed. 54, 56.

#### DUPLICATE.

A note secured by mortgage, given as the purchase price of mortgaged land, bore on its face the word "duplicate," and in an action thereon it was held that the word could not be regarded as performing a similar office to that in which it is generally employed in foreign bills of exchange, as indicating the execution of notes in part, and that the note in question was one of the parts; but it was held that the word created a latent ambiguity, which could be explained by evidence. *McCann v. Preston*, 28 Atl. 1102, 1108, 79 Md. 223.

"Duplicate," as used in Rev. St. § 1365, which requires that in order to establish a ditch or drain the majority of the resident owners must make an application in writing in duplicate to the supervisors of both such towns, etc., means a document which is essentially the same as the other instrument

It is defined to be a document which is the same in all other respects as some other instrument, from which it is indistinguishable in its essence and in its operation; an original instrument repeated; a document that resembles another in all essentials. *State v. Graffam*, 43 N. W. 727, 728, 74 Wis. 613.

**As copy.**

"Duplicate," as used in Rev. Laws, § 91, providing that in counties under township organization the county clerk shall make out a duplicate of the tax lists for each township, etc., means simply a copy of the original. *Radford v. Dixon County*, 45 N. W. 275, 276, 29 Neb. 113.

**Copy distinguished.**

An instrument is said to be executed "in duplicate" when there are two originals of the same tenor, so that a copy will not be a duplicate. *Grant v. Griffith*, 56 N. Y. Supp. 791, 793, 39 App. Div. 107.

Burrill defines a "duplicate" as an original instrument repeated, a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original. It is immaterial when a duplicate is executed. If it is in fact a duplicate, it adds no more to the obligation and rights of the parties to the agreement when it is executed at a subsequent date than when its execution is contemporaneous with that of the other duplicate. A duplicate is not a new agreement, but merely written evidence of the lost instrument, executed to take its place. *Bank of Gilby v. Farnsworth*, 7 N. D. 6, 11, 72 N. W. 901, 38 L. R. A. 843. See, also, *Missouri Pac. Ry. Co. v. Heidenheimer*, 17 S. W. 608, 610, 82 Tex. 195, 27 Am. St. Rep. 861. A duplicate is an original instrument repeated; a document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original. *Dakota Loan & Trust Co. v. Codrington County*, 68 N. W. 314, 316, 9 S. D. 159.

A duplicate is an original instrument, just as much so as the original article of which it is a duplicate. It must be executed by the same parties, and in the same manner and with the same formalities, and must contain the same matter as the original instrument, else it is not a duplicate. A certified copy of a record of articles of association is not a duplicate of such articles. When a law requires that a duplicate of a certificate of incorporation shall be filed in the office of the Secretary of State, it is no compliance with the requirement of such law to file in said office a certified copy of the record of such certificate. *Nelson v. Blakey*, 54 Ind. 29, 36.

The duplicate is not technically or really a copy of the original. It is "the double of

anything, an original repeated, a document the same as another, a transcript equivalent to the first or original writer, a counterpart." *And. Law Dict.* p. 386. Each duplicate is complete evidence of the intention of the parties. On an indictment for forgery of a school-teacher's pay certificate, the duplicate of the forged certificate is admissible without accounting for the original, since such certificates are required by statute to be made out in duplicate, one being called "the original," the other "the duplicate." *State v. Allen*, 56 S. C. 495, 505, 35 S. E. 204, 207.

A duplicate is the double of anything. It is either one of the two originals, both of which are executed by the same party or parties, and may be offered in evidence. *McCualg v. City Sav. Bank*, 111 Mich. 356, 358, 69 N. W. 500.

6 & 7 Vict. c. 18, § 100, provides that, whenever an objector to any list of voters desires to send the notice of his objection by mail, he shall deliver the same in "duplicate" to the postmaster, who shall examine the duplicates and return one to the sender, stamped with the stamp of such office. Under this statute it is held that a copy of such a purported duplicate, retained by the sender, to which his name was signed, but not by himself, though with his approval, was not a duplicate of the notice posted, which was signed by the sender himself, "duplicate" being defined by the court as a document which is essentially the same as some other instrument, it being a very different thing from an examined copy, although an examined copy may, in effect, be a duplicate under certain circumstances. *Toms v. Cuming*, 7 Man. & G. 83, 94. Nor is a copy similar in all respects to the notice left with the postmaster, except that it has no external address, a "duplicate" within the meaning of the act. *Birch v. Edwards*, 5 Man. G. & S. 45, 50.

**As substitute.**

Where a draft purchased from the drawer was lost by the holder, who applied for another, and the drawer issued a second one, across the face of which he wrote the word "duplicate," the true construction of the word "duplicate," in view of the circumstances, was that the draft was made as a substitute for, and to take the place of, the original, and no new liability was created thereby. *Benton v. Martin*, 40 N. Y. 345, 347.

**DUPLICATE OF TAXES.**

"Duplicate of taxes," as used in the tax laws, has a well-known and recognized meaning—that by which the tax lists for collection, etc., is usually known—and therefore its use in an indictment was sufficient under *Purd. Dig.* 379, pl. 18, declaring that, in an indictment for forging any instrument, it shall be sufficient to describe it by any name by which

the same may be usually known. *Commonwealth v. Beamish*, 81 Pa. (31 P. F. Smith) 889, 892.

### DUPLICATE TAXATION.

"By 'duplicate taxation,' which is not permissible under any constitution requiring equality and uniformity in taxation, is understood the requirement that one person, or any one subject to taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once." *City and County of San Francisco v. Fry*, 63 Cal. 470, 471; *Commonwealth v. New York, L. E. & W. R. Co.*, 24 Atl. 609, 611, 150 Pa. 234. The term is used in another sense, as where the same property is taxed to two different individuals. Such taxation is usually held to be valid. *State v. Rand*, 40 N. W. 835, 838, 39 Minn. 502.

### DUPLICITY.

Duplicity in an indictment is the joinder of two or more distinct offenses in one count. *Tucker v. State*, 6 Tex. App. 251, 253; *State v. Dorsett*, 21 Tex. 656; *Weathersby v. State*, 1 Tex. App. 643, 645; *Nicholas v. State*, 23 Tex. App. 317, 325, 5 S. W. 239, 240. The rule never applies to allegations of different phases of the same misdemeanor. *Schulze v. State* (Tex.) 56 S. W. 918. And where one felony is of considerable magnitude, and includes within itself other offenses of less magnitude, all may be charged in one count. And in all cases an offense may be set forth in a single count of an information, although such offense may include a smaller offense and attempt to commit the principal offense. *State v. Hodges*, 26 Pac. 676, 678, 45 Kan. 389; *State v. Gorham*, 55 N. H. 152, 163.

To constitute "duplicity," there must be joined in the same count separate and distinct crimes committed at different times. Where a person by one continuous act steals a horse, buggy, and harness, a count under the indictment for the larceny of the horse, buggy, and harness is not open to a charge of duplicity. *Waters v. People*, 104 Ill. 544, 547. An account charging the accused with stealing at the same time several sums of money belonging to different owners is not bad for duplicity, since the act charged constitutes but one offense. *State v. Warren*, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401.

Duplicity consists in alleging two independent claims in the same count of an information or indictment, and if these claims be distinct to the extent, at least, the different defenses may be interposed as to each, or different evidence may be necessary as to them, the accused has a right to object and

insist on their severance. An information which charges the killing of two or more persons by one act is not bad for duplicity. *Cornell v. State*, 80 N. W. 745, 746, 104 Wis. 527.

The word "duplicity," in the sense of the law of pleading, does not include a union of several facts, constituting together but one cause of action (*State v. Warren*, 77 Md. 121, 26 Atl. 500, 39 Am. St. Rep. 401; *Jackson v. Rundlet*, 13 Fed. Cas. 247); and hence where a plaintiff bases her claim on the ground that she has been unjustly deprived of her dwelling house by the negligent conduct of defendants, and details in several counts the circumstances constituting the injury, there is no duplicity. Even in an indictment the joinder of two or more distinct offenses in one count is not duplicity, where the acts imputed are component parts of the same offense. Mere diversity of facts set up in a count will not render it double, when all the facts taken together tend to the statement of one point or ground of recovery. *Mullin v. Blumenthal*, 42 Atl. 175, 177, 1 Pennewill (Del.) 476.

Duplicity, in a plea or replication, consists in its containing two distinct matters, either of which would be a bar to the action or an answer to the plea. *Kellogg v. Miller*, 6 Ark. (1 Eng.) 468, 472.

"Duplicity" is defined to be a joinder of different grounds of action to enforce a single right. *Devino v. Central Vt. R. Co.*, 63 Vt. 98, 102, 20 Atl. 953.

Duplicity in pleading consists in traversing distinct matters not necessary to one point. *Tucker v. Ladd* (N. Y.) 7 Cow. 450, 452.

### DURATION.

"Duration," as defined by Webster, means the power of enduring; continuance in time; the portion of time during which anything exists; and, in the statute limiting the session of legislative assemblies of the several territories of the United States to 60 days' duration, it means to an existence of 60 days, and that, whatever the time fixed by the legislative assembly for the session to begin, it could not continue to exist as a legally organized body longer than 60 days from such beginning—60 days of lawful session; 60 days of legal organized existence. *Cheyney v. Smith* (Ariz.) 23 Pac. 680, 685.

In Const. art. 11, § 7, providing that when the duration of any office is not provided for by the Constitution it may be declared by law, and, if not so declared, it shall be held during the pleasure of the authority making the appointment, "duration" is employed in its ordinary sense, signifying expanse, limit of time. When, therefore, the time of holding is not fixed, the tenure of the office is



at the pleasure of the appointing power. *People v. Hill*, 7 Cal. 97, 102.

Const. art. 11, § 7, provides that the "duration of any office" not fixed by this Constitution shall never exceed four years. This does not mean that the office shall cease to exist after the constitutional limit declared has expired, but the word "duration" evidently means the time which may be fixed by the constituting authority as the limit beyond which the incumbent's right by election or appointment to the office shall not extend. The constitutional inhibition operates as a total restraint to the creation of a term of office by election or appointment of longer duration than four years. So when, by an act of the Legislature, an office is created, and provision is made for filling it with a person who shall be invested with the right and authority to perform the function belonging to it for the period, for instance, of two years, the term thus prescribed is limited by a law of as binding obligation as the Constitution itself, provided it is in no sense repugnant to the organic law, and the incumbent's term is complete and at an end upon the expiration of the term prescribed for its duration; but notwithstanding the incumbent's term in such a case be at an end by lapse of time, it is not to be gainsaid that he may remain in the exercise of the duties of the office as its *locum tenens* until his successor is elected or appointed. *People v. Stratton*, 28 Cal. 382, 388.

## DURESS.

Duress consists in: (1) Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained or fraudulently made, unjustly harassing or oppressive. *Civ. Code Cal.* 1903, § 1569; *Rev. Codes N. D.* 1899, § 3845; *Civ. Code S. D.* 1903, § 1198; *Civ. Code Mont.* 1895, § 2114; *Bullard v. Smith*, 72 Pac. 761, 765, 28 Mont. 387. Thus where the evidence showed that, in order to prosecute the execution of articles of separation between husband and wife, the husband used such personal violence that the wife was in danger of her life, or felt herself to be, she would be held to have executed such articles "under duress." *Bueter v. Bueter*, 45 N. W. 208, 1 S. D. 94, 8 L. R. A. 562.

Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats, or bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his

free will. *Civ. Code Ga.* 1895, § 3538. See *McCoy v. State*, 3 S. E. 768, 769, 78 Ga. 490.

"Duress," as defined by law writers, means an actual or threatened violence or restraint of a man's person, contrary to law, to compel him to enter into a contract or to discharge one. *Noble v. Enos*, 19 Ind. 72, 78; *King v. Williams*, 21 N. W. 502, 65 Iowa, 167; *James v. Dalbey*, 78 N. W. 51, 53, 107 Iowa, 463; *McCormick Harvesting Mach. Co. v. Hamilton*, 41 N. W. 727, 729, 73 Wis. 486; *Peabody v. Tenney*, 30 Atl. 456, 457, 18 R. I. 498; *Plant v. Gunn* (U. S.) 19 Fed. Cas. 800, 802; *Cribbs v. Sowle*, 49 N. W. 587, 589, 87 Mich. 340, 24 Am. St. Rep. 166; *Stuber v. Weiden*, 24 N. W. 215, 216, 17 Neb. 582.

Duress exists where one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will. *City Nat. Bank v. Kusworm*, 64 N. W. 843, 845, 91 Wis. 166; *Wolff v. Bluhm*, 70 N. W. 73, 74, 95 Wis. 257, 60 Am. St. Rep. 115; *Batavian Bank v. North*, 90 N. W. 1016, 1019, 114 Wis. 637; *Phillips v. Henry*, 28 Atl. 477, 478, 160 Pa. 24, 40 Am. St. Rep. 706; *Peabody v. Tenney*, 30 Atl. 456, 457, 18 R. I. 498; *Newburyport Water Co. v. City of Newburyport* (U. S.) 103 Fed. 584, 594; *Hackley v. Headley*, 8 N. W. 511, 512, 45 Mich. 569. It may be defined as an unlawful restraint, intimidation, or compulsion of another to such an extent and degree as to induce such person to do or perform some act which he is not legally bound to do, contrary to his will and inclination. It is obvious that if the act is done contrary to the will and inclination of the injured party it cannot be in the exercise of his free will. His will is subjected to that of another, and he is compelled to submit to an illegal exaction because of the dominant power. *First Nat. Bank v. Sargent* (Neb.) 91 N. W. 595, 597, 59 L. R. A. 296.

By "duress," in its more extended sense, is meant that degree of severity, either threatened or impending or actually inflicted, which is sufficient to overcome the mind and will of a person of ordinary firmness. *Darling v. Hines*, 32 N. E. 109, 111, 5 Ind. App. 319; *James v. Dalbey*, 78 N. W. 51, 53, 107 Iowa, 463; *Pierce v. Brown* (U. S.) 7 Wall. 214, 19 L. Ed. 134; *Lafayette & I. R. Co. v. Pattison*, 41 Ind. 312, 320 (citing 2 Greenl. Ev. § 301; *Fellows v. School Dist. No. 8 in Fayette*, 39 Me. 559; *Brooks v. Berryhill*, 20 Ind. 97; *Foshay v. Ferguson* [N. Y.] 5 Hill, 154; *Ex parte Wells* [U. S.] 18 How. 307, 15 L. Ed. 421; *Inhabitants of Whitefield v. Longfellow*, 13 Me. [1 Shep.] 146; 2 Coke, Inst. 483; *Co. Litt.* 253; *Vin. Abr. tit. "Duress"* [B] pl. 23; *Bac. Abr. tit. "Duress"*; *Chit. Cont.* 168; *Eddy v. Herrin*,

17 Me. [5 Shep.] 338, 35 Am. Dec. 261; Tapley v. Tapley, 10 Minn. 448, 458 (Gil. 360, 368), 83 Am. Dec. 76; Johnson v. Roland (Tenn.) 2 Baxt. 203, 208; McCormick v. Dalton, 35 Pac. 1113, 1114, 53 Kan. 146; Landa v. Obert, 14 S. W. 297, 302, 78 Tex. 33; Davis v. Mississippi Cent. R. Co., 46 Miss. 552, 563; Edwards v. Bowden, 107 N. C. 58, 60, 12 S. E. 58; Simmons v. Trumbo, 9 W. Va. 358, 366.

What constitutes duress is matter of law; whether duress exists in a particular transaction is matter of fact. There is no legal standard of resistance which the person acted upon must come up to at his peril of being remediless for the wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is, was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Galusha v. Sherman, 81 N. W. 495, 498, 105 Wis. 263, 47 L. R. A. 417; Rochester Mach. Tool Works v. Weiss, 84 N. W. 866, 867, 108 Wis. 545. To constitute coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person and property of another, from which the latter has no other means of immediate relief than by making the payment. Radich v. Hutchins, 95 U. S. 210, 213, 24 L. Ed. 409; Lonergan v. Buford, 13 Sup. Ct. 684, 687, 148 U. S. 581, 37 L. Ed. 569. There must be something more than threat and peril of pecuniary loss. Sawyer v. Gruner, 60 N. Y. Super. Ct. 285, 288, 17 N. Y. Supp. 465; Dennerhy & Co. v. McNulta (U. S.) 86 Fed. 825, 829, 30 C. C. A. 422, 41 L. R. A. 609; Union Ins. Co. v. City of Allegheny, 101 Pa. 250, 252; Buford v. Lonergan, 22 Pac. 164, 166, 6 Utah, 301; Shuck v. Interstate Building & Loan Ass'n, 41 S. E. 28, 31, 63 S. C. 134.

Duress is an actual or threatened violence or illegal restraint of a man's person to compel him to enter into a contract or to do some act which, in the absence of such violence or restraint, might be valid or legally effective. Duress will not, however, always render the obligation contracted void, regardless of the fact of any participation in or knowledge of the circumstances upon the part of the obligee. For example, if one, being attacked by robbers, promises an innocent person a sum of money to deliver him out of their hands, the obligation, though contracted under the impression of the fear of death, is valid. Dimmitt v. Robbins, 12 S. W. 94, 96, 74 Tex. 441.

"Duress," under the decisions, means a condition of mind produced by improper external pressure or influence, that practically destroys the free agency of a party, and causes him to do an act or make a contract, not of his own volition, but under such wrongful external pressure. Whether such external pressure or influence is sufficient to destroy the free agency of a party is a question to be determined by the age, sex, intelligence, experience, and force of will of the party, the nature of the act, and all the attendant facts and circumstances. Pride v. Baker (Tenn.) 64 S. W. 329, 332 (citing Willard v. Willard, 65 Tenn. [6 Baxt.] 297, 32 Am. Rep. 529).

In order to constitute "duress" in its legal sense, it must appear that the party acted under some threatening of life or member, or of imprisonment, or some imprisonment or beating of the party acting, or of his wife, with the view to procure the execution of the deed or other instrument, and that the danger existing or threatened should affect the person, or goods or property. Rollings v. Cate, 48 Tenn. (1 Helsk.) 97, 98 (reaffirmed in Bogle v. Hammons, 49 Tenn. [2 Helsk.] 136, 141, 142, and cited in Loud v. Hamilton [Tenn.] 51 S. W. 140, 144, 45 L. R. A. 400).

Duress consists in restraint or imprisonment or intimidation, or any of those. Where defendant took advantage of plaintiff's impaired mental and physical condition, and persistently urged her to make a certain contract, and finally induced her to make it against her will, it was not error to charge that duress consists of restraint, imprisonment, or intimidation, or anything which tended to restrain plaintiff from acting freely and voluntarily in the matter, and that it made no difference what means were employed, provided they were calculated to and did restrain or coerce her to make such contract. Schoellhamer v. Rometsch, 38 Pac. 344, 347, 26 Or. 394.

Duress implies a constraint which overcomes the will of the person constrained, and this constraint may be the result of imprisonment or threats of imprisonment. Wolf v. Troxell's Estate, 94 Mich. 573, 576, 54 N. W. 383.

To make the defense of duress effective, it must have been so great as to take away the voluntary act and consent of the person urging it as a defense. It must have been of such a character as to incite a sense of fear on his part of some grievous wrong or personal violence, or great bodily injury, or unlawful imprisonment. Iowa Sav. Bank v. Frink, 92 N. W. 916, 919, 1 Neb. (Unof.) 14.

The terms "compulsion" and "duress" cannot be applied to the payment of money to procure a license to transact business in a

state, required by ordinance to be taken out, even though such ordinance is void; and therefore such payment cannot be recovered. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 277.

Money paid under protest does not make the payment a compulsory one, even though the party be under no legal obligation to pay. *Union Ins. Co. v. City of Allegheny*, 101 Pa. 250, 252.

Within a court rule providing that in an action on a written instrument, where a copy is filed with the declaration, the execution of such instrument shall be taken to be admitted, unless the defendant shall have filed an affidavit denying the signature or obligation of the instrument by reason of fraud, duress, or other sufficient legal cause, the words "fraud" and "duress" relate to the signature or signing of the instrument. *Vandergrift v. Hollis* (Del.) 6 Houst. 90, 102.

One purchasing liquor from an illegal combination of distillers which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and not by duress. *Dennehy v. McNulta* (U. S.) 86 Fed. 825, 829, 30 C. C. A. 422, 41 L. R. A. 609.

"Legal duress" implies that a party has been unlawfully constrained by another to perform an act under circumstances which prevent the exercise of free will. The act of the party compelling the unwilling obedience must be unlawful or wrongful, and there can be no duress of goods in law where the act done or threatened is nothing more than the party has a legal right to do. *Fuller v. Roberts*, 17 South. 359, 362, 35 Fla. 110.

#### **As defense to criminal prosecution.**

Duress consists in threats of bodily or other harm, amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will. This definition of "duress" relates, however, not to crime, but to contract. To render threats or menaces available as an excuse for a person charged with crime, they must be threats or menaces which sufficiently show that his or her life or member was endangered, or that he or she had reasonable cause to believe, and did actually believe, that his or her life or member was in danger. *McCoy v. State*, 3 S. E. 768, 769, 78 Ga. 490.

#### **As ground of equitable jurisdiction.**

Duress, when employed to procure a conveyance of property, is a species of fraud, and is not of itself a ground of equitable jurisdiction. And hence one, to maintain an action in equity to cancel a deed, must be in such possession as one who seeks to maintain the action on the grounds of fraud.

*Treadwell v. Torbert*, 32 South. 126, 133 Ala. 504.

#### **As of person or of property.**

At common law "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts where there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation of physical force. *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581.

"The principle upon which men are relieved from their contracts procured by 'duress' has been greatly extended in recent years. In the time of Lord Coke no one would have been permitted to avoid his contract for duress, unless the duress was such as not only to put him in fear of illegal imprisonment or great bodily harm, but went so far as to be something that a man of ordinary firmness would not be able to resist. No possible loss to his land or property would be sufficient to enable him to avoid a contract which he had made to prevent it. *Bac. Abr. tit. 'Duress' (a)*. But gradually and by slow degrees the strictness of that rule was abated, until finally it has come to be the rule of law in this country, although perhaps not in England, that where one has been presented with the contingency of serious loss or damage to his property or of a submission to an extortionate claim, if he pay the claim or make the contract which is extorted from him, it is not to be considered a voluntary act, and it may be set aside on the ground of duress. In the case of *Foshay v. Ferguson* (N. Y.) 5 Hill, 154, 158, it is said by Judge Bronson: 'I entertain no doubt that a contract procured by threats and the fear of battery or the destruction of property may be avoided on the ground of duress. There is nothing but the form of a contract in such a case, without the substance. It wants the voluntary assent of the party to be bound by it.' In the case of *Sasportas v. Jennings* (S.

C.) 1 Bay, 470, it was held that duress of goods will avoid a contract where unjust and unreasonable advantage is taken of a man's necessities of getting his goods back into his possession, and there is no other speedy means left of getting them back but by giving a bond, or where a man's necessities may be so great as not to admit of the ordinary process of law to afford him relief." *Van Dyke v. Wood*, 70 N. Y. Supp. 324, 327, 60 App. Div. 208.

Duress is any force which renders a contracting party not entirely free and at full liberty to make or refuse to make the contract, and this not only with respect to their persons, but in regard to their goods and chattels also. *Collins v. Westbury* (S. C.) 2 Bay, 211, 213, 1 Am. Dec. 643.

#### **Refusal to furnish financial backing.**

Where a person claimed to have a verbal contract for grading a mile of roadbed of a railway with another at a stated price per cubic yard, and such other person, desiring to abrogate the verbal contract, demanded of him the signing of a written contract for one-half mile only of the heaviest work of a grading at the same price per cubic yard, and on his refusal declared that he would stand good no more to the men working for him, and on account of such refusal he was unable to carry on the work unless the men were paid, the sense of a contract under such circumstances does not constitute duress. *McCormick v. Dalton* 85 Pac. 1113, 1114, 53 Kan. 146.

#### **Refusal to pay full claim or amount due.**

Duress is commonly said to be of either the person or the goods of the party. Duress of the person is either imprisonment or by death, or by an exhibition of force which cannot apparently be resisted. Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them in possession, but refuses to surrender them unless the exaction is submitted to. But where a party threatens nothing which he has not a legal right to perform, there is no duress. Hence, where a debtor refuses to pay the full amount of the claim, the acceptance of a less amount by the creditor because it means financial ruin to him not to have such amount that day does not constitute duress of goods. *Hackley v. Headley*, 8 N. W. 511, 512, 45 Mich. 569.

Duress of goods consists of seizing by force or withholding from the party entitled to it the possession of personal property, and extorting something as the condition for its release, or the demanding and taking personal property under color of legal authority which in fact is either void or for some rea-

son does not justify the demand. *Cooley, Torts*, 507. What shall constitute duress of goods as a question of fact is often difficult to determine, and in its determination we are constantly confronted by the maxim, "An injury cannot be done to a willing person," or if he is injured he cannot complain. The refusal of a purchaser to pay the contract price of mining property on the ground of false representation, and the acceptance by the seller of a less sum on account of financial embarrassment, does not constitute duress if the purchaser had done nothing unlawful to cause such financial embarrassment. *Adams v. Schiffer*, 17 Pac. 21, 30, 11 Colo. 15, 7 Am. St. Rep. 202.

#### **Refusal to remove mechanic's lien.**

The term "duress or compulsion" may be properly used to characterize an act of procuring a payment from the owner of property against his protest to remove a mechanic's lien, based upon an unfounded claim, in order to clear the title of record, so that the owner may consummate a loan upon the property which he has negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money. *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581.

#### **Refusal to surrender property.**

Duress of goods may exist when one is compelled to submit to an illegal exaction in order to obtain them from one who has them, but refuses to surrender them unless the exaction is endured. *Fuller v. Roberts*, 17 South. 359, 361, 35 Fla. 110.

Where parties contracted to buy certain cattle, and paid a large sum, leaving a small balance due, and could not get possession without completing the stipulated payment, though a part of the property had been transferred to another party, and unless he took possession the property would be at a great risk of loss for want of care during winter, just beginning, his payment of the balance was payment under duress. *Loneragan v. Buford*, 13 Sup. Ct. 684, 687, 148 U. S. 581, 37 L. Ed. 569.

Duress for which a person may avoid any contract or conveyance made, or recover back any money paid under its influence, exists where one, by the unlawful act of a beneficiary or his authorized agent, or by the act of some person with his knowledge, is constrained, under circumstances which deprive him of the exercise of his free will, to agree or to perform the act sought to be avoided. Duress involves illegality, and where one, having in his possession property of another, demands as a condition of its restoration the payment of a sum for which he is legally entitled to a lien from the owner, the owner cannot be said to have made

payment under duress. *In re Meyer* (U. S.) 106 Fed. 828, 831.

An instruction that if plaintiffs, in order to obtain possession of property mentioned in the contract, were compelled, when making the final payment, to pay for any property to which they were entitled, but which was not delivered to them, such payment was in law a payment under duress and might be recovered, was correct. *Buford v. Lonergan*, 22 Pac. 164, 166, 6 Utah, 801.

#### Threats in general.

"Threatened violence of a character under circumstances to impress a reasonable man with fear of it, depriving him of free will, and operating in restraint of liberty, inducing him by such restraint, unlawfully exercised, to do that which he would not otherwise willingly do, and could not be compelled in law to do, is duress." It does not depend on the probable or physical ability of the party complaining of duress to defend himself against the threatened imprisonment or other injury. The party threatened is not required to first submit to wager of battle, and be overcome, before the duress is complete. *Looper v. Phillips*, 1 Tenn. Cas. 269, 270.

To constitute duress by threats, they must be such as would naturally excite such a fear, grounded upon the reasonable belief that the person who threatens has at hand the means of carrying his threats into present execution, as would overcome the will of a person of ordinary courage. It is not sufficient merely that a party has entered into a contract under the influence of a threat. Where defendants testify that they would not have executed the note if plaintiff had not threatened to kill a third person who was at the time in a distant state, the consideration of the notes being a release of all claims of the payee against such third party for damages for breach of promise to marry, such circumstances do not amount to duress. *Barrett v. Mahnken*, 48 Pac. 202, 203, 6 Wyo. 541, 71 Am. St. Rep. 953.

To constitute duress by threats, it is sufficient to in fact compel the person threatened to do an act which otherwise he would not have done. *First Nat. Bank v. Sargent* (Neb.) 91 N. W. 595, 597, 59 L. R. A. 296.

"Duress by threats is where the threats excite a fear of some grievous wrong, as of death, great bodily injury, or unlawful imprisonment." Thus, where a person was guilty of a crime, and was told that he would be prosecuted criminally unless he gave a certain amount of money, but this was denied by the person who was said to have made it, and it appears that the plaintiff did not want his wife to hear of his crime or arrest or of an action being brought against

him, and for that purpose paid over the money, it was not obtained under duress. *Sieber v. Weiden*, 24 N. W. 215, 216, 17 Neb. 582.

Duress by threats does not exist whenever a promise is entered into and contracted under the influence of the threat, but only where such a threat excites the fear of some grievous wrong, as by death or great bodily injury or unlawful imprisonment. But where the threats, whether of mischief to the person or the property or to the good name, was of sufficient importance to destroy the threatened party's freedom, the law would not enforce any contract which he might be induced by any such means to make; but it is not unlawful for a creditor to demand and secure from his debtor a promissory note for bona fide debt under a threat of suit if such note be not given, and such note cannot be avoided. For a threat to amount to duress, the threats must not only be unlawful, but the contract thus obtained must be essentially unjust towards the parties seeking the relief. *McClair v. Wilson*, 31 Pac. 502, 503, 18 Colo. 82.

Where the defendant in a judgment, who was surety to the principal debtor therein, offered Confederate money to the judgment creditor to apply as a payment on the debt, and she refused to take it, when such surety stated that it was all the money the principal debtor could get, he being in the army; that the Confederate authorities had made it a legal tender; that he inquired the way to Brewster, saying that General Forrest was there, and he would go and see him; that he then got up to start, when the judgment creditor agreed to receive the money, and after he had left said that she had no use for the money, but that she preferred taking it to having any trouble about it—these facts did not show that the money was received under duress. *Johnson v. Roland*, 61 Tenn. (2 Baxt.) 203, 206.

Mere anger or profane words or strong and earnest language will not constitute such duress as will relieve a party from his conduct. For duress by threats which will avoid a contract only exists where such threats excite or may reasonably excite a fear of some grievous wrong, as bodily injury or unlawful imprisonment. *Adams v. Stringer*, 78 Ind. 175, 180.

"Duress by threats does not exist whenever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death or great bodily injury or unlawful imprisonment." *Landa v. Obert*, 14 S. W. 297, 302, 78 Tex. 33 (quoting 1 Para. Cont. p. 393).

A threat to do a legal act, or to subject the party to the legal consequences of a refusal to make an agreement, is not duress.

Parsons on Contracts, p. 398, says that duress does not exist whenever a party has entered into a contract under the influence of a threat, but only where such a threat excites a fear of some grievous wrong, as of death or great bodily injury or unlawful imprisonment. *Phillips v. Henry* (Pa.) 10 Montg. Co. Law Rep'r, 2, 11.

Duress is of two sorts, duress of imprisonment, where a man actually lost his liberty, and duress per minas, where the hardship is only threatened or impending. Where there is a threat, serious and violent, with ample capacity to execute it, and its execution certain to endanger the plaintiff more than if, without waiting its execution, he jump from the train as commanded, there was duress. *Bogges v. Chesapeake & O. Ry. Co.*, 16 S. E. 525, 527, 37 W. Va. 297, 23 L. R. A. 777. See, also, *Lafayette & L. R. Co. v. Pattison*, 41 Ind. 812, 820.

#### Threats of abandonment.

Duress consists of acts which take away freedom of action and are calculated to overcome the mind of a person of ordinary firmness, when believed in. Hence a threat by a husband to abandon his wife and turn her out, thereby inducing her to sign a conveyance, constituted duress. *Tapley v. Tapley*, 10 Minn. 448, 458 (Gil. 360, 364), 83 Am. Dec. 76.

#### Threats of arrest.

A threat to imprison a person on a false criminal charge, and reasonable ground to fear that the threat would be executed, may amount to duress. *Schultz v. Culbertson*, 1 N. W. 19, 21, 46 Wis. 313.

Duress, in the making of a contract, exists when the person making it is induced to make it by reason of being put in fear by means of threats of arresting him and unlawfully charging him with crime, when the threats and the fear induced thereby are such as would influence a man of reasonable courage or prudence, and do deprive the party making the contract of the exercise of free will in making it. The threatened arrest must be wrongful and unlawful, and apparently about to be enforced. *Kennedy v. Roberts*, 75 N. W. 363, 365, 105 Iowa, 521.

A threat of arrest for which there is no ground does not constitute duress, as a party could not be put in fear thereby. *Knapp v. Hyde* (N. Y.) 60 Barb. 80. And threat of imprisonment is not duress unless the imprisonment be unlawful. *Boggs v. Slack & Greenbrier Grocery Co.*, 44 S. E. 777, 778, 53 W. Va. 536 (citing Ham. Cont. § 135, p. 183).

In order to constitute a duress of a person by threats of imprisonment, or by actual

imprisonment or restraint, it must appear that a process to that end had actually been issued, or that there was no reasonable doubt that it would be. Mere threats of violence or of prosecution are not enough; there must be a reasonable ground for creating an apprehension that the threats will be carried into execution, in the mind of a man of ordinary firmness and courage, and must operate upon him directly so as to overcome his will. *Hines v. Hamilton County Com'rs*, 93 Ind. 268, 271 (citing 4 Wait, Act. & Def. p. 490).

At a time when actual war was raging in the country, and the courts and officers of law were in abeyance or powerless, and when the safeguards of the law furnished no protection or vindication against violence and wrong, G., believing his horse had been stolen by B., went to B.'s house, accompanied by five or six men armed with pistols, and demanded payment or settlement, threatening that if B. did not pay or settle he would arrest him and carry him to military headquarters. Held, that a payment made under such circumstances was payment under duress, and void as such. *Belote v. Henderson*, 45 Tenn. (5 Cold.) 471, 474, 98 Am. Dec. 432.

Mere proof of the existence of danger, without proof that it in fact operated upon the mind of the party, is not sufficient to establish the fact of duress. And so though it may have been generally understood that it was unsafe to refuse to accept Confederate money, and that such refusal might subject the party to peril of imprisonment, yet where the currency constituted an ordinary currency of the country, and the party seeking to have a payment made therein set aside on the ground that he accepted it under duress does not show that he made any objection before or at the time, but, on the contrary, it appears that he voluntarily accepted payment of other debts in Confederate money, the payment will not be set aside as made under duress. *Wilkerson v. Bishop*, 47 Tenn. (7 Cold.) 24, 29.

Where, at the time of the Civil War, the payee of a note accepted payment in Confederate currency, not under a vague and general apprehension of giving offense to the Confederate authorities, which might have been common to all the citizens, but with a knowledge that a strong military order threatening arrests and imprisonment to those refusing to take Confederate currency had been issued and enforced by arrests in the section of country in which he lived, and under the immediate pressure of personal threats and a zealous and active combination against him which he was powerless to resist, such acceptance of payment was not binding, but was void as having been procured by duress. *McCartney v. Wade*, 49 Tenn. (2 Helak.) 869, 874.

During the progress of the Civil War vague and indefinite fears of the power of the Confederate government and its military officers, which might have been common to all citizens, were not sufficient to invalidate payments made in Confederate currency. But where an order containing a threat of fine, imprisonment, or confiscation of those who refused to accept Confederate currency was issued by an officer of high rank, and circulated and published throughout the country by soldiers in arms, and where this order was employed and even misrepresented by a Confederate soldier to compel a contract which he could not otherwise have obtained, the contract was void as obtained under duress. *Boyle v. Hammons*, 49 Tenn. (2 Heisk.) 136, 142.

Threat of imprisonment, to constitute duress, need not be unlawful imprisonment, but it is sufficient if a person's liability to lawful imprisonment be used against him by way of threat to force the doing of an act which he would not do voluntarily. *Hartford Fire Ins. Co. v. Kirkpatrick*, 20 South. 651, 654. 111 Ala. 456.

#### Threats of arrest of another.

The word "duress" may be accurately applied to a payment of money procured from the wife in a charge that her husband had committed crime, and threatening his arrest if the money was not paid, and therefore the wife may recover money so paid. *Jaeger v. Koenig*, 62 N. Y. Sunn. 803, 804, 30 Misc. Rep. 580.

#### Threats of attachment.

Threats of attaching a tenant's crop for the payment of rent, made by a person who has entered for the purpose of collecting or securing the rent before its maturity, and who is accompanied by a constable, but who has no legal process, do not constitute duress. *Lehman v. Shackelford*, 50 Ala. 437, 439.

#### Threats of business competition.

Duress by government or its officers is defined by the Supreme Court as moral duress not justified by law. *Maxwell v. Griswold*, 51 U. S. (10 How.) 242, 256, 13 L. Ed. 405. It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form involuntary and void. But where, under an act authorizing a city to erect waterworks, the city had decided to do so, and a subsequent act authorizes the purchase from a private corporation owning waterworks in such place, the fact that the competition by the city with the private corporation, if it erect its own waterworks, would be ruinous to the private corporation, did

not render the sale of its waterworks to the city under the second act of the Legislature void as under duress. *Newburyport Water Co. v. City of Newburyport* (U. S.) 103 Fed. 584, 594.

#### Threats of civil suit.

It is not duress to institute or threaten to institute civil suits or take proceedings in court, or for any person to declare that he intends to use the courts wherein to insist upon what he believes to be his legal rights. "If the violence used be only a legal constraint," declares Civ. Code, art. 1856, "or the threats only of doing that which the party using them has the right to do, they shall not invalidate the contract." *New Orleans & N. E. R. Co. v. Louisiana Const. & Imp. Co.*, 33 South. 51, 55, 109 La. 13.

It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. *Morse v. Woodworth*, 155 Mass. 233, 250, 29 N. E. 525.

A threat to bring suit does not constitute duress, merely because it will subject the party to costs in case he is beaten. *Falvey v. Hennepin County Com'rs*, 79 N. W. 302, 303, 76 Minn. 257.

A threat to bring a civil suit for a balance due on an overdue account, a part of which is conceded to be justly owing, does not constitute such duress as will avoid a promise made by the debtor under the threat. *Atkinson v. Allen* (U. S.) 71 Fed. 58, 59.

#### Threats of destruction of vessel.

Duress arising from threats of destruction of the vessel and cargo of a neutral, captured by a belligerent in time of war, cannot be admitted to avoid a contract of ransom where the capture was justified by proper cause, and still less where condemnation must have ensued in the regular prize proceedings. *Maisonnaire v. Keating*, 16 Fed. Cas. 513, 517.

#### Threats of ejectment.

In order to entitle a party to recover back money which was claimed to have been paid under duress, it must appear that it was paid upon a wrongful claim or unjust demand under the pressure of actual or threatened imprisonment, restraint, or harm, or an actual or threatened seizure or interference of his property, of serious import to him, and that he could escape from an injury only by making such payment. Threats that a person, if a certain sum of money is not paid to him for a deed, will eject and turn plaintiff out of possession of a certain tract of land, where it did not appear that he threatened personal violence or ejected plaintiff by force, are not sufficient to constitute

duress. *Kraemer v. Deustermann*, 35 N. W. 276, 277, 37 Minn. 489.

#### Threats of foreclosure.

Threats of foreclosure in case the mortgagor did not pay the amount claimed by the mortgagee to be due was not duress. *Shuck v. Interstate Building & Loan Ass'n*, 41 S. E. 28, 31, 63 S. C. 134.

#### Threats of prosecution.

Where there was no imprisonment or restraint of the party, no process of arrest against the party, no prosecution for any criminal offense instituted, no officer of the law ready to arrest, no threat of any kind made by this particular plaintiff, and no threat made by anybody, directly to the person affected, but only a threat to resort to criminal proceedings made in another state to certain friends of the party by counsel for creditors, and communicated by them to their principal, there was not duress. *Phillips v. Henry*, 28 Atl. 477, 478, 160 Pa. 24, 40 Am. St. Rep. 706.

It is not sufficient to establish duress that threats were uttered. It must be shown that they constrained the will of the promisor, and so induced the promise. It is not duress to enforce one's legal writing, even by an arrest of the person. The threat of criminal prosecution, designed to coerce, but not shown to have been effective, is not sufficient to constitute duress. *Sternback v. Friedman*, 50 N. Y. Supp 1025, 1026, 23 Misc. Rep. 173.

To constitute a payment under duress from fear of prosecution, the money must have been exacted under a threat of prosecution, and have been paid unwillingly and under protest. "It is settled by many authorities that the mere apprehension of legal proceedings is not sufficient to make a payment compulsory, and that where there is a threatened prosecution the payment must be made under protest." *Town of Ligonier v. Ackerman*, 46 Ind. 552, 562, 15 Am. Rep. 323 (citing *Harvey v. Town of Olney*, 42 Ill. 386; *Elston v. City of Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Taylor v. Board of Health of City of Philadelphia*, 31 Pa. 73, 72 Am. Dec. 724; *Cook v. City of Boston*, 91 Mass. [9 Allen] 393).

Duress by threats exists, not wherever a party has entered into a contract under the influence of a threat, but only when such threat excites fear of some grievous wrong, as of death or great irremediable injury or unlawful embezzlement; threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute a duress. Thus one who embezzles money, and gave a note in acknowledgment of the debt, cannot defend in an action on the note on the ground that he executed it to escape a threat-

ened criminal prosecution. *Beath v. Chapoton*, 73 N. W. 806, 807, 115 Mich. 506, 69 Am. St. Rep. 589.

"Duress" implies a constraint which overcomes the will. Where this may be brought about by threat of prosecution for a criminal offense, yet where no threat was made, but defendant was pressing a claim for a debt caused by the action of a clerk in taking property from a store without accounting for it, it does not constitute duress, especially after a settlement was made with a full and fair understanding of the nature of the transaction. *Francis v. Hurd*, 71 N. W. 582, 584, 113 Mich. 250.

It is not the threat of criminal prosecution in any case that constitutes duress, but the condition of mind produced thereby. The threat must be of such nature, and made under such circumstances, as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by said person while in such condition. *Wolff v. Bluhm*, 70 N. W. 73, 74, 95 Wis. 257, 60 Am. St. Rep. 115.

Under the modern doctrine, duress is established where actual or threatened violence or restraint, contrary to law, compels one to enter into or discharge a contract. It is duress when there is a fear of imprisonment excited by threats. Duress was established where it was proven that the plaintiff, a man 72 years old and ignorant of the law, was threatened by defendant with prosecution imprisonment, and fine for selling cider without a license, unless he would pay defendant \$150, and that plaintiff, on being confronted with several men who claimed that he had sold them cider, and on being informed by defendant that the men would so testify, under the influence of such threats paid the \$150 without any consideration. *Cribbs v. Sowle*, 49 N. W. 587, 589, 87 Mich. 340, 24 Am. St. Rep. 166.

Where a man of mature years signs a document because an agent of the party with whom he previously had dealt told him that he was liable to imprisonment for grand larceny, and that if he did not make the settlement he would have him sent to state's prison, such threats did not constitute duress. *Rochester Mach. Tool Works v. Weiss*, 84 N. W. 866, 867, 108 Wis. 545.

Where an officer not authorized to issue a warrant notifies a person that he will have him arrested on a warrant and prosecuted unless he pays a certain tax, and such person because of such threat pays the tax, the payment is not made under duress. *Williams v. Stewart*, 42 S. E. 256, 115 Ga. 864.

A complaint alleging that the defendant had extorted money from plaintiff by false



representation that he had employed the county attorney to bring a civil and criminal suit against him for taking certain property, and threatened that if the plaintiff did not pay a certain sum he would send plaintiff to state's prison for larceny, does not show payment under duress. *Darling v. Hines*, 32 N. E. 109, 111, 5 Ind. App. 319.

The fact that the defendant, who had unlawfully caused the pregnancy of a girl, was threatened by the girl's father with criminal prosecution unless he gave a note and mortgage to provide for the care of the girl and child, and that he complied with the demand, does not show duress, where several days intervened between the demand and the compliance, during which defendant had consulted with friends, who advised him to settle. *Wolff v. Bluhm*, 70 N. W. 73, 74, 95 Wis. 257, 60 Am. St. Rep. 115.

Where the maker of a note testified that he signed it because of a threat; that the payee threatened to prosecute him for obtaining property under false pretenses, and threatened to make it cost him his farm, and that he did not know whether he had done anything criminal or not; and it appeared that he was a man of intelligence, and was surrounded by his family, some of whom counseled him against signing the note—it was not given under duress. *James v. Dalbey*, 78 N. W. 51, 53, 107 Iowa, 463.

A threat of a criminal prosecution, made to compel the giving of a mortgage to secure a just debt, is not duress. *Plant v. Gunn* (U. S.) 19 Fed. Cas. 800, 803.

A master who, by his own conduct and representations and that of his attorneys, so arouses his servant's fears by threats of a criminal prosecution for embezzlement that the latter, in compliance with a demand, surrenders up his property to avoid the prosecution, is guilty of duress, and the transaction will be set aside on a proper showing that the servant was in fact innocent of the crime. *Landa v. Obert*, 14 S. W. 297, 302, 78 Tex. 33.

#### Threats of prosecution of another.

A wife may avoid her contract on the ground of duress when it was extorted by threat of the criminal prosecution of her husband. *City Nat. Bank of Dayton v. Kusworm*, 59 N. W. 564, 567, 88 Wis. 188, 26 L. R. A. 48, 43 Am. St. Rep. 880.

Terrifying a woman by threats of prosecuting her husband for alleged embezzlement is such coercion as to avoid a transfer of her property thus obtained. A threat to procure the arrest and imprisonment of a son under a false and criminal charge, and reasonable grounds to believe that such threats will be executed, constitutes duress. *McCormick Harvesting-Mach. Co. v. Hamilton*, 41 N. W. 727, 729, 73 Wis. 488.

A mortgage executed by a wife upon her separate estate to secure a debt owing by her husband for money embezzled by him is not executed under duress, although done to prevent his being convicted and sent to the penitentiary. *Mundy v. Whittemore*, 19 N. W. 694, 696, 15 Neb. 647.

#### DURESS OF IMPRISONMENT.

"Duress of imprisonment is defined as an arrest for an improper purpose without just cause, or an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, even though under process." *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 215, 19 L. Ed. 184; *Hatch v. Barrett*, 8 Pac. 129, 135; *Morrill v. Nightingale*, 28 Pac. 1068, 1070, 93 Cal. 452, 27 Am. St. Rep. 207; *Richardson v. Duncan*, 3 N. H. 508; *Davis v. Luster*, 64 Mo. 43, 44.

To constitute duress by imprisonment, either the imprisonment or the duress thereto must have been felonious and unlawful. *Meacham v. Town of Newport*, 89 Atl. 631, 632, 70 Vt. 67; *Heaps v. Dunham*, 95 Ill. 583.

To constitute duress by imprisonment, the imprisonment must be tortious and without lawful authority, or by an abuse of lawful authority. Imprisonment under a regular and legal process, upon probable cause, without malice, does not constitute duress, so as to invalidate a contract entered into by the prisoner to procure his freedom, unless he has been induced thereto by unlawful force or privations. A threat to do a lawful act, or subject a party to the lawful consequences of a refusal to make an agreement, is not duress. *McDonald v. Carlton*, 1 N. M. 172, 176 (citing 1 Bouv. Law Dict. 493; 2 Jac. Law Dict. 325).

To constitute duress by means of an arrest, the arrest must have been originally illegal, or have become so by the subsequent abuse of it. An instrument executed while under arrest is not necessarily void therefor on the ground of duress. *Fisher v. Walter* (Pa.) 3 C. P. Rep. 161, 162.

Duress which will avoid a contract is either by unlawful restraint or imprisonment; or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation, or danger; or when the arrest, though made under legal authority, is made for an unlawful purpose. It is those contracts only which are made under fear of unlawful imprisonment, and not those made under fear of imprisonment which would be legally justifiable, that can be avoided for duress. *Sanford v. Sonborger*, 41 N. W. 1102, 1106, 26 Neb. 295.

Duress by imprisonment imports that the imprisonment must be unlawful, or there must be an abuse of, or an oppression under,

lawful process or legal detention. If there is an arrest for a just cause, but for an unlawful purpose, the party arrested, if he is induced to enter into a contract, may avoid it as one procured by duress. *Fillman v. Ryon*, 32 Atl. 89, 90, 168 Pa. 434.

Where a person is illegally restrained of his liberty by being confined in the common jail or elsewhere, and during such restraint enters into a bond or other security to the person who causes the restraint, he may avoid the same for duress of imprisonment. Thus where a boy was arrested on a false charge of bastardy, and in order to procure his release consented to marriage, such marriage was void. *Shoro v. Shoro*, 14 Atl. 177, 60 Vt. 268, 6 Am. St. Rep. 118.

Duress of imprisonment is any illegal restraint of one's liberty without warrant of law; and, moreover, if one be restrained of his liberty on a legal and regular warrant, but yet if, on going behind such warrant, it be found to be bottomed on a false charge without probable cause, and used only as a feint or pretext to cover some illegal design, it will be construed in law as "duress of imprisonment"; and, further, when the charge is well founded, if the prisoner is maltreated while so confined, it would make his confinement duress of imprisonment. *Hatter's Ex'rs v. Greenlee* (Ala.) 1 Port. 222, 225, 26 Am. Dec. 870.

Where an imprisoned debtor conveys land to his creditor to procure his enlargement, in the eye of the law he acts freely, there being in the case no unlawful restraint or imprisonment. If the imprisonment be lawful in form, but founded upon an abuse of process, it constitutes duress. But if it be lawful, an instrument executed to obtain enlargement cannot be avoided on the ground of duress. *Crowell v. Gleason*, 10 Me. (1 Fairf.) 325, 333.

Duress by imprisonment is where one is restrained of his liberty by an unlawful imprisonment, or by a tortious detention thereafter. If, therefore, a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action. And although the imprisonment be lawful, yet, unless the deed be made freely and voluntarily, it may be avoided by duress. And if the imprisonment be originally lawful, yet if the party obtaining the deed detained the prisoner in prison unlawfully by covin with the jailer, this is a duress which will avoid the deed. It is a sound and correct principle of law that when a man shall falsely, maliciously, and without probable cause sue out a process in form regular and

legal to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may be avoided by duress of imprisonment. *Watkins v. Baird*, 6 Mass. 506, 513, 4 Am. Dec. 170.

A note payable to one who, for the sole purpose of intimidating the maker, illegally and fraudulently procured a warrant for his arrest on a charge of embezzlement, and which note was executed in fear of and to procure immunity from arrest and imprisonment, was executed under duress. *Morrill v. Nightingale*, 28 Pac. 1068, 1070, 93 Cal. 452, 27 Am. St. Rep. 207.

A person accused before a justice was brought before him by summons, the offense charged being one of which the justice had no jurisdiction save as an examining magistrate. The justice erroneously led the party charged to believe that he had jurisdiction to impose a fine, but that an appeal might be taken, and accused entered a plea of guilty and paid the fine imposed by the justice. If such payment was made in order to procure release from custody, it was a payment made under duress by imprisonment; but if paid, not because of threatened imprisonment, but to avoid further inconvenience in the district court, the payment was voluntary. *Houtz v. Uinta County Com'rs* (Wyo.) 70 Pac. 840, 846.

#### DURESS PER MINAS.

"Duress per minas," as defined at common law, is where a party enters into a contract (1) for fear of loss of life, (2) for fear of loss of limb, (3) for fear of mayhem, (4) or for fear of imprisonment. *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 215, 19 L. Ed. 134; *Hartford Ins. Co. v. Kirkpatrick*, 20 South. 651, 654, 111 Ala. 456; *Mundy v. Whittemore*, 19 N. W. 694, 696, 15 Neb. 647.

Duress, at the common law, is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of "duress per minas" are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. *Morse v. Woodworth*, 155 Mass. 233, 250, 29 N. E. 525.

Duress per minas is restricted to fear of loss of life, or of remediless injury to the person, or of imprisonment; but duress by threat of imprisonment must be such as to excite a reasonable fear of immediate imprisonment. We do not think a threat of prosecution, addressed to a man conscious of innocence, is such a threat as would induce in any man of ordinary firmness an overwhelming fear of immediate imprisonment. *Buchanan v. Sahlein*, 9 Mo. App. 552, 558.

Duress per minas is confined to fear of loss of life or of limb, fear of mayhem, and fear of unlawful imprisonment. While the rigidity of the common-law rule has been somewhat relaxed in this country, and the definition extended by some decisions to include fear of a mere battery or of the destruction of goods, we know of no case in which it has been held to include a threat of lawful punishment. *Davis v. Luster*, 64 Mo. 43, 44.

## DURING.

A statute requiring public notice to be made "during" at least four weeks excludes publication in a periodical published monthly. *York Borough Case*, 3 Pa. Co. Ct. R. 514, 518.

"During" is defined as in the time of; throughout the continuance of; so that, as used in a contract providing that defendant should employ plaintiff during the seasons of navigation, it was ambiguous, so that evidence was admissible to show whether "during" meant throughout the continuance of or in the course of. *Bird v. Beckwith*, 60 N. Y. Supp. 1041, 1042, 45 App. Div. 124.

Where a deed contains an exception that a Presbyterian society has the right to have a certain horse shed stand where it now does, "during the life thereof," such phrase should be construed as referring to the shed, and not the Presbyterian society, and means the continuance or existence of the shed as such, making the clause in the deed equivalent to saying that the shed, so long as it could be reasonably used for the purpose for which it was erected, should continue to stand on the land conveyed. *Benham v. Minor*, 38 Conn. 252, 254.

### As throughout the course of.

An answer in an interrogatory addressed to an applicant for insurance, "Is there a watchman in the mill during the night?" means, "Is there such a watchman through the night?" and the answer, "There is a watchman nights," is an affirmative answer, meaning in this connection every night and through the night. *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309.

"During which years," as used in a statement in a ground of appeal that a pauper served certain offices for certain specified years, "during which years he was an inhabitant and resident in C.," imports that he inhabited and resided in C. during the whole of those years, and not at some time in those years. *Reg. v. Inhabitants of Anderson*, 9 Adol. & El. (N. S.) 663, 668.

"During," as used in a complaint in a suit by a devisee to set aside an execution

sale of his testator's estate, alleging that the testator was "during" his lifetime the owner of real estate, should be construed as equivalent to "continuously." *Riddell v. Harrell*, 12 Pac. 67, 70, 71 Cal. 254.

## DURING CONTINUANCE IN OFFICE.

The expression in a sheriff's bond, "during the continuance in office," clearly has reference to the actual duration of the office by virtue of the appointment under which the bond was taken. *Commonwealth v. Fairfax* (Va.) 4 Hen. & M. 208, 211.

A deputy sheriff's bond, conditioned for the performance of his duty, indemnifying the sheriff "during his continuance in office," without specifying the length of time, binds only for the year for which he was first appointed. *Munford v. Rice* (Va.) 6 Munf. 81, 82.

Where a banking institution at an annual meeting elected a treasurer for the ensuing year, and such treasurer gave bond to faithfully administer his trust during his continuance in office, the words "during his continuance in office" will be held to cover only the year for which he was elected, and hence the sureties are not liable for defaults made after the expiration of a year from his election. *Ulster County Sav. Inst. v. Ostrander*, 57 N. H. 627, 628, 163 N. Y. 430.

## DURING COVERTURE.

The legal import of the words "during coverture," as employed by Lord Coke (volume 1, p. 149), means "while the marriage lasts." *State ex rel. Hamilton v. Guinotte*, 156 Mo. 513, 518, 57 S. W. 281, 282, 50 L. R. A. 787 (citing *People v. Burbank*, 12 Cal., loc. cit. 392; *State, to Use of Gentry, v. Fry*, 4 Mo., loc. cit. 159).

## DURING NATURAL LIFE.

Where a testator devised real estate to his wife "during her natural life," such phrase meant that she was given a user of all income, and could only enjoy it during her life without waste. *Appeal of Churchman* (Pa.) 12 Atl. 600, 602.

Testator bequeathed a farm to his son "during the term of his natural life and no longer," and "after the death of my said son I give and devise said farm to his heirs forever, but should he desire to sell the farm I empower him to do so and to convey the land in fee." Held, that the phrase, "during the term of his natural life and no longer," did not mean that the son was to take a life estate instead of a fee. *Clarke v. Smith*, 49 Md. 106, 118.

A devise of property to a certain person "during her natural life," with remainder over to the heirs of her body, is not sufficient, and cannot be construed as limiting the devisee's interest to a life estate, but vests an absolute property in such devisee. *Hughes v. Nicklas*, 17 Atl. 398, 70 Md. 484, 14 Am. St. Rep. 377.

In a will giving to testator's wife the horses and farm, with all their appurtenances, and after such horses and cattle and other articles were sold for the payment of debts the balance of the stock, cattle, and other articles should be hers and at her disposal "during her natural life," such phrase cannot be construed to imply a limitation on the right of the wife to dispose of any of the property by alienation. *Elyton Land Co. v. McElrath* (U. S.) 53 Fed. 763, 767, 8 O. C. A. 649.

A devise "during his natural life, and after his death to his heirs and assigns forever," gives an estate of inheritance. *Andrews v. Lowthrop*, 20 Atl. 97, 98, 17 R. L. 60.

Where a testator devises land to his daughter "during her natural life, and after her death to the begotten heirs or heiresses of her body," the words of description do not mean simply the children of such daughter, but create an estate tail, under the rule in *Shelley's Case*, which was converted into a fee simple under Code, § 1325, providing that a person seized of an estate tail shall be held seised in fee simple. *Leathers v. Gray*, 7 S. E. 657, 659, 101 N. C. 162, 9 Am. St. Rep. 80.

A marriage settlement between parties "during their joint and natural lives" means during their joint lives and the life of each of them. *Smith v. Oakes*, 14 Sim. 122, 124.

An agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife and during the life of the survivor. *Douglas v. Parsons*, 22 Ohio St. 526.

A will bequeathing certain property to one who should pay a certain sum per year "during the lives of said M. and his present wife" means so long as either M. or his wife lives, and does not cease on the death of one of them. *Merrill v. Bickford*, 85 Me. 118, 119.

#### DURING PENDENCY OF ACTION OR PROCEEDINGS.

In 14 Stat. 529, providing that no bankrupt shall be liable to arrest during the pendency of proceedings in bankruptcy, the phrase "during pendency of proceedings" means until the bankrupt's discharge is granted or denied, and the proceedings are pending only down to the granting or refusal

of the discharge. In *re Dole* (U. S.) 7 Fed. Cas. 828, 831.

Code Civ. Proc. § 604, authorizing an injunction against the defendant "during the pendency of the action," when it appears by affidavit that the defendant is doing, or is about to do or to procure, or to suffer to be done, an act in violation of plaintiff's rights, relates to the time when the threatened injury is likely to take place, and not to the time when the injunction order may be granted; and, in order to judicially satisfy the judge that the defendant threatens to do some act "during the pendency of the action" that will impair or defeat the plaintiff's remedy, it is not necessary to show that the action has been actually commenced. It is enough if it appears that there is a cause of action, which the plaintiff is about to prosecute, and that defendant threatens to do an act which will render the judgment ineffectual, to confer jurisdiction upon the judge to grant the injunction, which, however, will not become operative unless served with or after the summons. *People v. Van Buren*, 32 N. E. 775, 777, 136 N. Y. 252, 20 L. R. A. 446.

A statute which authorizes the court, in a suit brought by a married woman for a divorce or separation, "during the pendency of the cause or at its final hearing or afterward," to make such order between the parties for the custody of the children as may seem necessary and proper, means that the court shall provide for the provisional custody of the children during the pendency of the action, and to empower the court, when a decree shall be granted, to award the custody of the children, as their interests may seem to require; and hence, under such statute, the court had no authority, pending the suit, to give judgment awarding the custody of the children to the plaintiff, and to make provision for their maintenance out of the property of the husband. *Davis v. Davis*, 75 N. Y. 221, 227.

A statute authorizing an injunction in aid of an action at law at any time "during the pendency of the action" is held to be satisfied by the showing of a cause of action which the plaintiff is about to prosecute. *People v. Van Buren*, 32 N. E. 775, 777, 136 N. Y. 252, 20 L. R. A. 446.

#### DURING PLEASURE.

"During their pleasure," as used in habendum clause of a lease to the lessees for and during their pleasure, did not create a strict tenancy at will, but a covenant for perpetual enjoyment by the lessees; the other parts of the grant being to "the lessees and their legal representatives." *Cole v. Winnipisseogee Lake Cotton & Woolen Mfg. Co.*, 54 N. H. 242, 277.

An appointment of a person "to continue in office during the pleasure of the Governor for the time being" cannot be construed to mean that if the Governor making the appointment did not remove the appointee during his gubernatorial term the tenure of his appointment ceased by operation of law with the term of such Governor. *Kaufman v. Stone*, 25 Ark. 336, 344.

#### DURING THE TERM.

A lease providing that the landlord might, in case of a vacancy "during the term," enter and relet the premises for the assignee's account, and that the assignee should meet any deficiency accruing on the reletting, meant not only the actual duration of the leasehold estate, but the period for which the estate was granted; and hence a recovery in summary proceedings by the landlord by reason of the nonpayment of rent was a vacancy occurring "during the term." *Baldwin v. Thibaudeau*, 17 N. Y. Supp. 532, 534, 28 Abb. N. C. 14.

#### DURING TERM OF OFFICE.

Const. art. 6, §§ 15, 16, providing that the compensation of judges shall not be increased or diminished "during the term" for which they shall have been elected, means during the time or period for which the officer is elected. "When the Constitution says, 'the judge shall hold his office for six years,' it means that this period of six years is the term of his office; it is that quantum of time assigned to him by the Constitution as his right to the enjoyment of the office, and this quantum may not improperly be called a 'term.' If A. is elected district judge, and enters on the office or accepts it for a day, he is disqualified for other office during the whole period of six years, and so after his election it would not be competent for the Legislature to change the compensation." *People v. Burbank*, 12 Cal. 378, 392.

A sheriff's bond, conditioned that as he had been duly appointed sheriff for three years from and after a certain date, and had accepted such appointment, and undertaken the duties and obligation incident to said office, if he should faithfully discharge the duties of such office, and answer all damages which any person or persons may sustain by any unfaithfulness or neglect in the same "during said term of three years," it should be null and void, should be construed as meaning incident to said term of three years, which would include all obligations and duties which have their origin during that time. It is used merely as descriptive of the sheriff's term of office, and not as restrictive of the obligations of the bond. The sheriff was elected for three years. That is the constitutional requirement, and if there are duties and obligations incident to

the term of office that require more than three years for their discharge they are covered by the phrase "during said term of three years." Hence the bond binds the sureties if the sheriff commences service of a writ of attachment during his term of office, and neglects, after his term has expired, to make return of the writ on which property has been taken, and in consequence of such neglect the claim of a creditor has been lost. *Baker v. Baldwin*, 48 Conn. 131, 134.

#### DURING TERM TIME.

A rule of court which provided that neither party should be required "during term time" to attend the taking of a deposition except in the town in which the court were holden, and at an hour when the court is not actually in session, unless on special order by the court in good cause shown, does not mean all the time from the commencement to the final rising of the court; and hence where the court adjourned on the 22d to the 29th of the month, and the plaintiff's attorney gave a legal notice of his intention to take a deposition on the 26th of the same month, in the town where the defendant's attorney resided, the deposition was not taken during the term time. *Holmes v. Sawtelle*, 53 Me. 179, 181.

#### DURING THEIR LIVES.

Where a testator directed his executors to procure a suitable residence for his daughter at an expense not exceeding \$8,000, and to hold the same in trust for her and her son "during their lives," devising the property over, the term "during their lives" clearly imported an intention on the part of the testator to give an interest during their joint lives and the life of the survivor, which, on her death before the testator's death, did not lapse, but went to the son for life. *Dow v. Doyle*, 103 Mass. 489, 491.

#### DURING TIME OF CONTEST.

Rev. St. 1889, § 13, provides that if the validity of a will be contested, or the executor be a minor or absent from the state, letters of administration should be granted "during the time of such contest," minority, or absence to some other person. It was held that an order of the probate court revoking letters of administration, issued under such section, made after the determination of a will contest in such court, but during the pendency of an appeal therefrom, was erroneous, the appeal to the supreme court being a part of the time of such contest. *State ex rel. Hamilton v. Guinotte*, 57 S. W. 281, 282, 156 Mo. 513, 50 L. R. A. 787.

#### DURING TRIAL.

The statutory provision that no person indicted for any felony can be tried unless

he be personally present "during such trial" includes all proceedings had in impaneling the jury, the introduction of evidence, the summing up of counsel, and the charge of the court to the jury, and the receiving and recording the verdict. *Maurer v. People*, 43 N. Y. 1, 3; *State v. Smith*, 1 S. W. 753, 755, 90 Mo. 37, 59 Am. Rep. 4; *State v. Buckner*, 25 Mo. 167, 172.

The phrase "during the trial," in the statutory provision that no indictment for a felony shall be tried unless the defendant be personally present during the trial means that it is necessary that the defendant should be in court at each and every time and on all occasions at which and when any substantive step is taken by the court in his cause, and after the indictment is presented by the grand jury to the court up to and until final judgment (including that also) is pronounced in his cause by the court, and even afterwards, if any subsequent step should be taken by his counsel. *Osborn v. State*, 24 Ark. 629, 635.

The hearing of a motion to quash the information in a prosecution for felony is a part of the trial, within Code Cr. Proc. § 207, providing, "no person indicted or informed against for a felony can be tried unless he be personally present during the trial." This means throughout the whole trial. *State v. Clifton*, 57 Kan. 448, 449, 46 Pac. 715.

#### DURING THE VOYAGE.

"During the voyage," as used in a charter party providing that a ship should with all convenient speed be made ready, and, being loaded, should proceed to Stettin, and deliver the cargo, and so end the voyage, "restraints of princes," etc., "during the said voyage always mutually excepted," applies only to the time after the voyage commenced; that is, after the vessel had left her port. *Crow v. Falk*, 8 Adol. & El. (N. S.) 467, 472.

#### DURING WIDOWHOOD.

"During her widowhood," as used in a will devising all the testator's real and personal estate to his wife to be held and freely possessed and enjoyed "during her widowhood," are words of limitation, and not of condition, limiting the estate to her during her widowhood. Kent, in drawing the distinction between words of limitation and words of condition, says: "Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation. The one specifies the utmost time of continuance, and the oth-

er marks some event which, if it takes place in the course of that time, will defeat the estate." *Harmon v. Brown*, 58 Ind. 207, 208.

The expression "during her widowhood," as used in a will, means during life unless sooner terminated by marriage—that is, a devise or bequest to a wife during her widowhood, or so long as she remains the widow of testator—and is a gift for life only, which may be terminated by a second marriage of the widow. *Krats v. Krats*, 59 N. E. 519, 520, 189 Ill. 276.

A will wherein testator devised property to his wife "during her widowhood, or while she bears my name," but that in case the wife should marry again then the whole should go to a daughter and her heirs forever, gives the devise to the widow during her widowhood, with a vested remainder to the daughter. *Farmers' Bank v. Hoeff* (U. S.) 3 Fed. Cas. 1032, 1033.

#### DURING WORKING HOURS.

See "Working Hours."

#### DUTCH AUCTION.

A "Dutch auction" consists of the public offer of property at a price beyond its value, and then gradually lowering the price until some one becomes the purchaser. *Crandall v. State*, 28 Ohio St. 479, 482.

Where property was offered at a certain high price, and then gradually lowered until some one accepted it as a purchaser, it was an auction. *Village of Deposit v. Pitts* (N. Y.) 18 Hun, 475, 477.

#### DUTCH BEER.

"Dutch beer" is a malt inebriating liquor, and does not differ from strong beer, only in its strength and in being less intoxicating. There is nothing in the ordinary sense of the word "Dutch," as qualifying the word beer, to show that beer designated as "Dutch beer" was not intoxicating. *People v. Wheelock* (N. Y.) 3 Parker, Cr. R. 9, 15.

#### DUTCH LOTTERY.

Two kinds of lottery may be distinguished. The Genoese or numerical, and the Dutch or class, lottery. The former is described as a scheme by which out of ninety consecutive numbers five are to be selected or drawn by lot. The players have fixed on certain numbers, wagering that one, two, or more of them would be drawn among the five, or that they would appear in a certain order. In the Dutch or class lottery the number and value of the prizes are regularly estimated. All the ticket holders are inter-

ested at once in the play, and chance determines whether a prize or a blank shall fall to a given number. *Fleming v. Billa*, 8 Or. 286, 291.

## DUTCH METAL.

Old cannon, composed of above 90 per cent. of copper and 7 per cent. of tin, though practically worthless for use against modern implements of war, are not free from duty as Dutch metal, within paragraph 505, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1682], but are dutiable as manufactures of metal. *Downing v. United States* (U. S.) 116 Fed. 779.

## DUTIES.

See "Ad Valorem Tax"; "Excise"; "Executive Duties"; "Tonnage Duty."

The term "duties" embraces all impositions or charges levied on persons or things. *Alexander v. Wilmington & R. R. Co.* (S. C.) 3 Strob. 594, 595. But in its more restrained sense it is often used as equivalent to customs or imposts. *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 328; *Pacific Insurance Co. v. Soule* (U. S.) 7 Wall. 433, 435, 19 L. Ed. 95.

The word "duty" ordinarily means an indirect tax imposed on importation, exportation, or a consumption of goods, having a broader meaning than "custom," which is a duty imposed on imports or exports. The term "impost" also signifies any tax, tribute, or duty, but it is seldom applied to any but the indirect taxes. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108 (citing *Cooley, Tax'n*, p. 3).

"Duties," as used in the federal Constitution, must be confined to the idea which they commonly and ordinarily present to the mind as exactions to fill the public coffers for the payments of the debts and promotion of the general welfare of a country. *Worsley v. Second Municipality of New Orleans* (La.) 9 Rob. 324, 333, 41 Am. Dec. 333.

As used in Const. art. 1, § 10, cl. 3, which prohibits a state without the consent of Congress from laying any "imposts or duties on imports, exports or tonnage," were at the time of the adoption of the Constitution "known to the commerce of the civilized world to be distinct from fees and charges for pilotage and from the penalties by which commercial states enforced their pilot laws, as they were from charges from wharfage or towage or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words 'imposts or duties on imports, exports or tonnage' would be

to confound things essentially different, and which must have been known to be actually different by those who used this language"; hence the clause above referred to would not include pilot dues or penalties. *Cooley v. Board of Wardens of Port of Philadelphia* (U. S.) 12 How. 299, 314, 13 L. Ed. 996.

The term "duty," in a brought note referring to a sale of tobacco to be delivered "duty cash" at a certain price, has but one meaning, and refers to the custom or import charges imposed by the government under the tariff upon the importation of the tobacco. *Ashner v. Abenheim*, 43 N. Y. Supp. 69, 72, 19 Misc. Rep. 282.

In the case of *Huse v. Glover*, 119 U. S. 543, 549, 7 Sup. Ct. 313, 30 L. Ed. 487, it was said by the terms "tax," "impost," "duty," mentioned in the ordinance of 1787, is meant a charge for the use of the government, not compensation for improvement. The fact that any surplus remaining from the tolls over what is used to keep the locks in repair, and for their collections, is to be paid into the state treasury as a part of the revenue of a state, does not change the character of the toll or impost, and hence wharfage fees are not included. *Ouachita & M. R. Packet Co. v. Aiken*, 7 Sup. Ct. 907, 909, 121 U. S. 444, 30 L. Ed. 976. The clause does not prevent the artificial improvement of such streams and the exaction of reasonable tolls by the state to pay therefor. *Sands v. Manistee River Imp. Co.*, 8 Sup. Ct. 113, 117, 123 U. S. 288, 31 L. Ed. 149.

The expression "taxes and duties," as used in a lease of land executed after the passage of St. 1866, c. 174, by which the lessee agreed to pay all the "taxes and duties levied or to be levied thereon during the term," includes assessments for betterments authorized by the statute of 1866. *Blake v. Baker*, 115 Mass. 188.

"Duty on exports," as used in a clause of the federal Constitution prohibiting any state from imposing any duty on exports, includes stamp duties on bills of lading of goods exported, as such bills are "necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." *Almy v. California* (U. S.) 24 How. 169, 174, 16 L. Ed. 644.

As used in Act March 3, 1857, providing that the collector's decision shall be final and conclusive as to the "liability of the importation to duty or exemption," unless, etc., refers to the liability of the importation to duty, and not to the rate or amount of the duty imposed. *Benkard v. Schell*, 3 Fed. Cas. 192.

## DUTIES OF DETRACTION.

"Duties of detraction" are a tax levied upon the removal from one state to another

of property acquired by succession or testamentary disposition. This tax was formerly levied very generally where foreigners or emigrants withdrew property acquired by the death of relatives from the state of which the decedent was a citizen. By such term is not intended taxes upon succession to our transfers of property. *Frederickson v. State of Louisiana*, 64 U. S. (23 How.) 445, 16 L. Ed. 577. So that a transfer tax on all property which shall pass by will or by the intestate laws of a state is a succession tax, and not a duty of deduction. In re *Strobel's Estate*, 39 N. Y. Supp. 169, 5 App. Div. 621.

## DUTIES ON IMPORTS.

As tax, see "Tax—Taxation."

A "duty on imports," within the constitutional provision that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, is not merely a duty on the act of importation, but a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. *Brown v. Maryland* (U. S.) 12 Wheat. 419, 437, 6 L. Ed. 678.

## DUTY.

See "Active Duty"; "Appropriate Duties"; "Certain Duty"; "Judicial Duty"; "Jury Duty"; "Legal Duty"; "Ministerial Duty"; "Official Duties"; "Positive Duty"; "Specific Duty"; "Line of Duty."

All duties, see "All."

The word "duty," as applied to the military service of a trooper, includes the act of the trooper in learning to ride immediately after his enlistment. *Bayley v. Jenners*, 1 Strange, 2.

The "duty of a telegraph company," as defined by Gen. St. c. 64, § 10, is that it "shall receive dispatches from and for other telegraph line companies and associations and from and for any person, and on payment of the usual charges for transmitting dispatches according to the regulations of the company shall transmit the same faithfully and impartially." The liability of a telegraph company may be limited by reasonable stipulations expressed in its contracts with the senders of messages, and a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it unless the sender orders the message to be repeated by sending it back to the office which first received it and pays half the regular rate additional, is a reasonable regulation,

and binding upon all who assent to it. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 302, 18 Am. Rep. 485.

The phrase "a duty imposed by law," as used in Pen. Code, § 288, punishing omission to perform a duty imposed by law, has reference to persons designated by the common law and by the statute, as parents, guardians, or those who, by adoption or otherwise, have assumed the relation in loco parentis; and the duty so to do is made obligatory on them by statute, though not required by the common law. *People v. Pierson*, 68 N. E. 243, 245, 176 N. Y. 201.

### As debt.

"Duty," as used in a statute for the protection of creditors, and for the avoidance of conveyances made to avoid any debt or duty, was to be construed as to be commensurate only with "debt." *Fowler v. Frisbie*, 3 Conn. 320, 324.

### Discretion implied.

"Duty," as used in an instruction that if the plaintiff has, by a preponderance of the evidence, proved the material allegations of his complaint, the jury will find in his favor, and that it is their duty to determine the amount of his damage, instead of directing them that they "may" find in his favor and "may" assess his damage, will not be construed as coercive upon the jury, and tending to deprive the jury of their freedom of action in the matter, and hence to be an invasion by the court of the province of the jury. *North Chicago St. R. Co. v. Zeiger*, 54 N. E. 1006, 1007, 182 Ill. 9, 74 Am. St. Rep. 157.

In Comp. St. c. 79, § 4, clause 1, providing that it shall be the duty of the county superintendent to create a new district from other organized districts on a petition signed by one-half of the legal voters in each district affected, "duty" should be construed to mean rather a judicial discretion than a duty to be enforced by the authority of mandamus. *State v. Clary*, 41 N. W. 256, 257, 25 Neb. 403.

The word "duty," in Act Cong. 1793, declaring that it shall be the duty of the executive authority of the state to cause a fugitive demanded in extradition proceedings by another state to be arrested, etc., means the moral obligation of the state to perform the compact in the Constitution, when Congress had by that act regulated the mode by which the duty was to be performed. The word "duty" was not a mandatory word, but merely declaratory of that obligation which the state was under as a part of its comity with other states. *Kentucky v. Dennison* (U. S.) 24 How. 66, 107, 16 L. Ed. 717.

### As legal obligation.

"Duty," as used in Laws 1811, p. 462, § 3, providing that, when any suit is founded on



any writing, the court in which the same is pending shall receive such writing as evidence for the debt or duty for which it is given, means "a legal obligation to perform some act." *Allen v. Dickson* (Ala.) Minor, 119, 120.

In a canon proposed by counsel as follows: "A communication made bona fide on any subject-matter in which the party communicating has an interest, or in reference to which he has a 'duty,' is privileged, if made to a person having a corresponding interest or duty, though it contained criminal matter which without this privilege would be slanderous and actionable"—the word "duty" cannot be confined to legal duties, enforceable by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation. *Harrison v. Bush*, 5 El. & Bl. 344, 349.

#### As obligation.

One's "duty" is what one is bound or under obligation to do. *Crockett v. Village of Barre*, 29 Atl. 147, 68 Vt. 269 (citing Soule, Syn. [Ed. 1890] p. 129).

In Civ. Code, § 55, providing that consent alone will not constitute marriage, but that it must be followed up by a solemnization, or by a mutual assumption of marital rights, duties or obligations, the word "duties" is synonymous with the word "obligations" as there used, and signifies the obligations which flow from the relation of husband and wife. *Sharon v. Sharon*, 16 Pac. 345, 349, 75 Cal. 1.

#### Power implied.

As used in St. 1855, c. 152, declaring it to be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, the word "duty" includes both power and right. What it is a man's "duty" to do, he has the rightful power to do. *Commonwealth v. Anthes*, 71 Mass. (5 Gray) 185, 252.

The word "duties," as used in Const. art. 5, § 8, providing that in case of the removal of the Governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same should devolve on the Secretary of State, necessarily implies powers, and in legal effect is equivalent to the words "powers and duties." *Chadwick v. Earhart*, 4 Pac. 1180, 11 Or. 389.

#### As service.

"Worcester, among his other definitions, defines 'duty' as follows: 'Any service, business, or office.' A like definition is given in the Imperial Dictionary. When we speak of 'duty,' as applied to a servant or employé, the matter involves his service or business. We intend to refer to what he does in his service or business. When we ask a servant what his general duties are, we intend

to ask him what service or work he generally performs." *Missouri Pac. Ry. Co. v. Mackey*, 6 Pac. 291, 302, 33 Kan. 298.

## DWELL

See "Actually Dwells."

"Dwell" means to abide as a permanent resident. *Hinds v. Hinds*, 1 Iowa (1 Clarke) 38, 41.

To "dwell" is to inhabit; to live in a place; to reside; to have a habitation. *Gardener v. Wagner*, 9 Fed. Cas. 1154, 1158.

To "dwell" is to abide as a permanent resident, or inhabit for a time; to live in a place; to have a habitation for some time or permanently. It invariably involves the idea of the present home of a person, whether it is designed to be permanent or temporary, and whether for general or special purposes. *Ex parte Blumer*, 27 Tex. 734, 736.

"Cohabit" means to dwell with, to dwell or live together, as husband and wife; and to "dwell" means to abide as a permanent resident, or to cohabit in a place for a time; to live during a considerable period in a place; to have a habitation for some time or permanence; to be domiciled; to remain. A man and a woman, by stopping one night at a house on a transitory visit and assuming marital relations, did not "dwell" together. *Turney v. State*, 29 S. W. 893, 987, 60 Ark. 259.

"Dwelleth or hath his home," as used in the Constitution providing that "every person having certain enumerated qualifications shall have a right to give in his vote for senators for the district of which he is an inhabitant, and to remove all doubt concerning the word 'inhabitant' in this Constitution, every person shall be considered as an inhabitant (for the purpose of electing or being elected into any office or place within this state) in that town, district and plantation, where he dwelleth or hath his home," is not to be construed as meaning the same thing as "legal settlement" within the intent of the statutes providing for the support of paupers. A person may have his legal settlement in one town and be entitled to vote in another. The purpose of the law is to give the selectmen of the town the means of scrutinizing the claim of a person to a right to vote. *Putnam v. Johnson*, 10 Mass. 488, 502.

Act March 21, 1821, declaring that any person resident at any town, who has not within one year received support or supplies from some town as a pauper, shall be deemed to have a settlement in the town where he then "dwells and has his home," means some permanent abode and residence with intention to remain, or at least without

an intention of removal; something more than the habits and life of a wanderer, who has no place where he has a right to continue and call it and claim it as his rightful home. *Inhabitants of Turner v. Inhabitants of Buckfield*, 8 Me. (3 Greenl.) 227, 231.

As used in a statute declaring that the settlement of a pauper shall be the town in which he dwells and has his home, the phrase "dwells and has his home" means a place of fixed abode, as distinguishing the pauper from a tramp. It is not necessary that he should have a dwelling house in the town, so long as he uniformly resides there. *Inhabitants of Parsonsfield v. Perkins*, 2 Me. (2 Greenl.) 411.

As used in a statute authorizing probate courts of the county in which the deceased dwelt to take jurisdiction of his estate, "dwelt" meant the county in which the deceased was an inhabitant, unless he was a stranger and had only a residence, and did not give a judge of a county where a man happens to die, jurisdiction, though the man was on a temporary absence from home. *Harvard College v. Gore*, 22 Mass. (5 Pick.) 370, 379.

"Dwells," as used in 9 & 10 Vict. c. 95, § 128, giving the superior court a concurrent jurisdiction to the county court where "the plaintiff dwells more than 20 miles from the defendant," means the ordinary dwelling of the party, and not a place like a jail, where a person is temporarily detained, and may be for a single night or day in custody. *Dunston v. Paterson*, 5 J. Scott (N. S.) 267, 277.

One who resided at Inverness, but had been in the habit for some years of coming to London and residing for some months in Golden Square for the purpose of his business, did not "dwell" in Golden Square within the meaning of 9 & 10 Vict. c. 95, relating to the jurisdiction of the county court. *Macdougall v. Paterson*, 7 Eng. Law & Eq. 510, 518.

Testator devised to his daughter two houses and lots, "she permitting at the same time her mother to occupy and dwell in the better of them for and during her natural life." Held, that "to dwell" means to inhabit, to live in; and there was not a grant of the beneficial interest in the house to the mother, so that she might either occupy it or let it, receiving the rent, but that she might live in it merely. *Gardener v. Wagner*, 9 Fed. Cas. 1154, 1156.

#### Actual presence.

"Dwell" means to reside, to inhabit, to have a fixed place of residence; but it is not restricted in meaning to actual presence. *Eatontown v. Shrewsbury*, 6 Atl. 319, 320, 49 N. J. Law (20 Vroom) 188 (citing Worcester, Dict.).

One who resides in Scotland, and carries on business in London by means of an agent, does not "dwell or carry on his business" within the city of London within the meaning of 10 & 11 Vict. c. 71, requiring such dweller to sue in the city small debt court for a debt not exceeding £20. *Shells v. Rait*, 7 Q. B. 116, 118.

#### Boarding.

"Actually dwells," as used in Rev. St. § 1500, subd. 7, providing that whenever any territory shall be organized into any town every person having a legal settlement in such territory, and who actually dwells or has his home therein, shall have thereafter a legal settlement in such new town, should be construed to include one who is boarded or supported at a particular house. They mean nothing more than the place where the person actually remains, tarries, abides for some length of time, continues, stays, sojourns. The place where he actually lodges and takes his meals must come within the meaning of the words "actually dwells." *Town of Hay River v. Town of Sherman*, 18 N. W. 740, 741, 60 Wis. 54.

#### In reference to corporations.

A corporation or quasi corporation "dwells" at the place where its business is carried on, within 9 & 10 Vict. c. 95, § 128, authorizing a plaintiff to sue in the superior court or the county court when he dwells more than 20 miles from the defendant. *Taylor v. Crowland Gas & Coke Co.*, 11 Exch. 1.

### DWELLING—DWELLING HOUSE

See "Private Dwelling"; "Inhabited Dwelling House"; "Quasi Dwelling House"; "Separate Dwelling House"; "Single Dwelling House."

As building, see "Building (In Criminal Law)."

"Dwelling house," as used in Rev. St. § 2428, providing that whoever willfully and maliciously burns a dwelling house, or any building adjoining such dwelling house, shall be punished, etc., refers to dwelling houses other than those of the accused, though no other dwelling house is specifically mentioned in the statute. *Hicks v. State*, 29 South. 631, 632, 43 Fla. 171.

Where the building insured in a policy is described as a "dwelling house," it is merely descriptive of the building, and does not include a warranty that it is used as such. *Niagara Fire Ins. Co. v. Johnson*, 45 Pac. 789, 791, 4 Kan. App. 16. See, also, *Browning v. Home Ins. Co.*, 71 N. Y. 508, 511, 27 Am. Rep. 87.

Under 2 Rev. St. p. 657, § 9, every house which shall have been usually occupied by

a person lodging therein at night shall be deemed a "dwelling house" of any person so lodging therein, so as to render accused setting fire to same guilty of arson in the first degree. *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

The term "dwelling house," in the statute making it an offense to burn a dwelling house, cannot be construed to include a building which is not in fact a dwelling house. *Commonwealth v. Hayden*, 23 N. E. 51, 150 Mass. 332.

#### **Additions**

A dwelling house is an entire thing; it includes the buildings, and such attachments as are usually occupied and used for the family for the ordinary purposes of a house; and an insurance policy on a "stone dwelling house" covers a wooden kitchen, one story high, attached thereto. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52, 55.

In a contract to complete a "dwelling house" conveyed, a one-story building annexed to the house proper, designed for a kitchen, and another erection attached to it, designed for a washroom, is included. *Hovey v. Luce*, 31 Me. 346, 349.

#### **Apartments in tenement.**

"Any and every settled habitation of a man and his family is his house or his mansion in respect to its burglarious entry," and a set of apartments in a tenement opening into a common hall is a "dwelling house" within the meaning of the statute defining "burglary." *Mason v. People*, 26 N. Y. 200, 202; *Smith v. Birmingham Waterworks Co.*, 104 Ala. 315, 16 South. 123, 125.

The plaintiff in error was indicted and convicted as an accessory before the fact to the crime of arson in the first degree. The fire was set in a five-story tenement house, having a common entrance upon the street and from a yard in the rear. Upon the different stories the apartments of the tenants, consisting of several rooms, opened upon common halls. The plaintiff in error and his wife rented and lived in three rooms on the second floor. One K. occupied, with his wife and two children, three rooms adjoining those of the plaintiff in error, but not directly communicating with them. The fire was set in the rooms of the plaintiff in error, and burned portions thereof, but not to any extent the rooms occupied by K. There was no one in the rooms of the plaintiff in error when the fire was set, but there were in those of K. The indictment charged the principal with having in the nighttime set fire to and burned a certain dwelling house of one K. Held, that the indictment properly charged that the fire was set in the dwelling house of K. *Lavy v. People* (N. Y.) 19 Hun, 383, 385.

#### **Attached building.**

The term "dwelling house," within the meaning of Nix. Dig. 289, § 34, prohibiting the pulling down or removal of any dwelling house in the construction of roads, was construed to include all the buildings attached to and used in connection with the house in which persons dwelt or usually lived; and therefore it was held to embrace a billiard saloon attached to a hotel and always used in connection with and as a part thereof for business purposes, though it was not actually dwelt in by any person. *Rogers v. Troth*, 36 N. J. Law (7 Vroom) 422, 424.

#### **Barn or granary.**

"Dwelling," as used in Acts 1882, No. 41, which provides that no person shall give away intoxicating liquors except in his "own private dwelling," does not include his barn and granary. *State v. Camp*, 24 Atl. 1114, 64 Vt. 295.

"Dwelling house," when used in a warrant authorizing an officer to search for liquors in a certain dwelling house, does not include the barn. *Jones v. Fletcher*, 41 Me. 254, 256.

Under a statute (Comp. Laws, § 5754) defining "burglary" in the same terms in which it was defined at common law, it is held that the term "dwelling house" must be presumed to have been used in the same sense in which it was used in the common-law definition, and that consequently a barn was a "dwelling house" within the statute, the term "dwelling house" including all the occupied buildings occupied and used by the family for domestic purposes. *Pitcher v. People*, 16 Mich. 142, 143.

#### **Boarding house.**

"A man's 'dwelling house' is that in which he and his family, if he have any, eat, sleep, and make their home; and it is none the less his dwelling house because he may not be the owner of it, that in it he keeps rooms for lodgers and furnishes meals to others, and that the license for so doing is in the name of another." It is so used in a statute making larceny from a dwelling house criminal. *State v. Leedy*, 8 S. W. 245, 246, 95 Mo. 76.

Within the meaning of the statute prohibiting the establishment of a saloon "within 200 feet of the nearest entrance to a dwelling house," the fact that the owner of the house, in which he dwelt with his family, was in the habit of letting rooms in such house by the week to persons who might apply for them, did not make such house a boarding house, or deprive it of its character as a dwelling house. It was not a place where the general public would be invited to enter and transact business, but to every intent it would still be a private house, and its

occupants entitled to the privacy which surrounds a dwelling house. In *re Veeder*, 65 N. Y. Supp. 517, 31 Misc. Rep. 569.

The use of a house leased to be used strictly as a private dwelling, and not for any public or objectional purpose, is violated by its use as a boarding house. *Gannett v. Albree*, 103 Mass. 372, 374.

The change from a dwelling house or a private dwelling house to a boarding house was not a violation of a policy of insurance of a house insured as a "dwelling house." *Rafferty v. New Brunswick Fire Ins. Co.*, 18 N. J. Law (3 Har.) 480, 482, 88 Am. Dec. 525.

The fact that six or seven boarders live in a house, and a few others take meals there, does not destroy its character as a "dwelling," within the terms of a contract between a waterworks company and the city for domestic rates for water furnished dwellings. *Birmingham Waterworks Co. v. Truss*, 33 South. 657, 135 Ala. 530.

#### Buildings in curtilage.

"Dwelling house," as used in a definition of burglary as being a breaking and entering of a dwelling house, etc., has been the subject of much diversity of opinion. Some cases include all within the curtilage, and this, according to Blackstone, appears to have been the common-law rule, while others have been made to turn upon the use. It has been said that burglary may be committed by breaking into a dairy or laundry standing near enough the dwelling house to be used as appurtenant, or into such outbuildings as are necessary to it as a dwelling. *State v. Langford*, 12 N. C. 253. Also by breaking into a smokehouse opening into the yard of a dwelling house, and used for its ordinary purposes. And cases are to be found which hold that if an outhouse be so near the dwelling proper that it is used with it as appurtenant to it, although not within the same inclosure even, yet burglary may be committed in it. *State v. Twitty*, 2 N. C. 102. It need have no internal communication with the dwelling proper to give it this character. In *Rex v. Lithgo, Russ. & R.* 357, the breaking was into a warehouse. There was no internal communication between it and the dwelling of the owner; but they were contiguous, inclosed in the same yard, and under the same roof; and it was held to be burglary. It is difficult to lay down any general rule upon the subject, owing to the nice distinctions to be found in some of the cases. It seems to us, however, that both the use and the situation should be considered. Can the place which has been entered, considering both its situation and use, be fairly considered as appurtenant to and a parcel of the dwelling house, or, as the older writers say, a parcel of the messuage? If so, then

burglary may be committed by breaking into it. *Mitchell v. Commonwealth*, 11 S. W. 209, 210, 88 Ky. 349. See, also, *State v. McCall*, 4 Ala. 643, 644, 39 Am. Dec. 314; *Stearns v. Vincent*, 15 N. W. 86, 91, 50 Mich. 209, 45 Am. Rep. 37; *People v. Taylor*, 2 Mich. 250, *Pitcher v. People*, 16 Mich. 142, 146; *State v. Evans*, 18 S. C. 137, 139; *State v. Whit*, 49 N. C. 349, 352; *State v. Mordecai*, 68 N. C. 207, 208; *Quinn v. People*, 71 N. Y. 561, 568, 27 Am. Rep. 87; *State v. South*, 3<sup>d</sup> S. W. 716, 136 Mo. 673; *State v. Hecox*, 83 Mo. 531, 535.

As used in 21 & 22 Vict. c. 105, enacting that every person who shall sell or expose for sale within the limits of the act, other than in his own dwelling house, any article in respect to which tolls are authorized, shall forfeit a certain sum, the term "dwelling house" was employed in a popular sense, not including the curtilage, the intention being that the established traders of the district who carried on their business in their own dwelling houses or shops should not be interfered with. *Llandaff & C. Dist. Market Co. v. Lyndon*, 8 C. B. (N. S.) 515, 524.

The term "dwelling" was held in a homicide case to include a net house near the building which defendant occupied as a dwelling; which net house was used not only for preserving the nets, but in the occupation of defendant as fisherman, and also as a permanent dormitory for his servants, though not included with the house by a fence. "It was held in *People v. Taylor*, 2 Mich. 250, that a fence was not necessary to include buildings within the curtilage, as within a space no larger than that usually occupied, for the purposes of the dwelling and customary outbuildings." *Pond v. People*, 8 Mich. 150, 181.

"Dwelling house," as used in a statute punishing the burglary of a dwelling house, does not include a barn, used for storing grain, 300 yards from the dwelling house and in a different inclosure. This building was not a dwelling house or any part of one; it was an outhouse, and not an outhouse belonging to or used with a dwelling house; it was used for storing the products of a farm, and not for any purpose connected with the occupancy or enjoyment of the dwelling. *Whalen v. Commonwealth (Ky.)* 32 S. W. 1095, 1096.

A house in which no member of the family slept, and used for the sale of goods, is not a part of the dwelling house, though within 30 feet of it, and within the same inclosure. *Armour v. State*, 22 Tenn. (3 Humph.) 379, 385.

A log cabin belonging to the owner of a tobacco factory, in which the superintendent of the factory usually slept, being a substantial and permanent one, is a "dwelling house" in which burglary may be committed. But a

smokehouse 35 steps from a dwelling house is not included in the term, the dwelling house having no inclosure around it. *State v. Jake*, 60 N. C. 471, 472.

Under Code, § 4386, in reference to burglary, declaring that all outhouses contiguous or within the curtilage or protection of the mansion or "dwelling house" shall be considered as parts of the same, the breaking and entering a gearhouse, separated from the main yard by a fence and fenced to it, may constitute burglary if there is a gate between it and the main yard always left open at night, so as to constitute one yard under the protection of the yard dog. *Bryant v. State*, 60 Ga. 358, 359.

Within the meaning of a statute forbidding the pulling down or removal of any dwelling house in laying out a highway, the word "dwelling" is not as comprehensive as when that term is used in defining the crimes of burglary or arson, where it includes not only the dwelling, but also outhouses which are within the curtilage, though not under the same roof. That construction is impracticable in the laying out of a highway. The statute does not prohibit the laying of highways through buildings, except of the enumerated class. With respect to any other building, the ownership of which is in a private individual, a public road may be laid out so as to compel its removal without regard to the expense thereof. The term "dwelling house" in this statute should be restricted to its literal import—a place of habitation. *Pancoast v. Troth*, 34 N. J. Law (5 Vroom) 377, 383.

"Dwelling house," as used in Rev. Code, c. 34, § 2, punishing arson, means an inhabited house. In deciding whether it was the legislative intent to include inhabited houses only, or to extend the term "dwelling houses" to all structures within the curtilage, it is proper to regard the penalty imposed, since, where such penalty is very high, it may be reasonably supposed that the Legislature intended to restrict the term to inhabited houses. *State v. Clark*, 52 N. C. 167, 168.

#### Cellar.

"Dwelling house," as used in Revision 1879, § 1309, providing for the punishment of any larceny committed in a dwelling house, cannot be construed to include an underground cellar used for storing ice and beer, having no internal door of communication with the living rooms in the upper stories of the same building, and not under the control and dominion of any occupant of the building. If one part of a building is used for abode, it gives the character of dwelling house to every other part to which there is an internal communication, even though generally occupied by another person for an entirely different purpose. *State v. Clark*, 1 S. W. 332, 89 Mo. 422.

#### Character of building as affecting.

Buildings 12 feet long by 8 feet wide and 7 feet high, without windows or chimneys, not lathed or plastered, and which had not been used as dwellings until occupied by a man of migratory habits, without family, will not be held to be "dwellings" within the meaning of Liquor Tax Law, § 28, providing that there shall be filed with the application for a liquor certificate a consent in writing executed by the owners of at least two-thirds of the buildings occupied exclusively for dwellings. In re *Lyman*, 53 N. Y. Supp. 577, 578, 24 Misc. Rep. 552.

A shanty put up and occupied for the sole purpose of preventing a condemnation of a stone quarry, and not in good faith for a dwelling house, will not entitle the owner to the exemption of location of quarries within 200 yards of a dwelling house, as provided by statute. *Morris v. Schallsville Branch of Winchester & Red River T. P. R. Co.*, 67 Ky. (4 Bush) 448, 449.

By the term "dwelling house" as used in a statute relating to homesteads, no particular kind of a house is intended. It may be a brownstone front all of which is occupied for a residence, or it may be a building part of which is used for a bank or business purposes, or it may be a tent of cloth. All that the law requires is that the homestead claimant and his family should reside in this habitation or dwelling house, whatever be its character, on the premises claimed as a homestead. *Corey v. Schuster*, 62 N. W. 470, 44 Neb. 269.

A "dwelling house," which under the statute is exempt when situated on a city lot, means the habitation or abode of the owner thereof and his family, and does not require that it should be constructed in any particular style or built in any prescribed manner, but it is to be in good faith and truly the dwelling house, or residence or abode, of the owner and his family, in order to be exempt. *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244.

#### Character of use of building as affecting.

A dwelling house "is a building inhabited by man; the abode or residence of a family. The character of its occupation, and not the purpose for which it was erected, govern the question of whether or not it is a dwelling house"; and a building originally erected as a dwelling house, but subsequently for many years used for other purposes, cannot be regarded as a dwelling house. *New York Fire Dept. v. Buhler*, 33 How. Prac. 378, 383, 35 N. Y. 177.

The word "dwelling" is not free from ambiguity. In a certain sense any house in which people dwell might be considered a

*dwelling.* *Glover v. National Fire Ins. Co.* (U. S.) 85 Fed. 125, 130, 30 C. C. A. 95.

"Dwelling," as used in a deed providing that the vendee should not erect on the land any building for other use or purpose than a private dwelling, restricts the character of buildings by eliminating all buildings for business purposes, such as stores, livery stables, factories, and the like. *Skillman v. Smathehurst*, 20 Atl. 855, 856, 57 N. J. Eq. 1.

In construing a prosecution for arson in burning a barn on a farm situated about 30 yards from the dwelling house in which the owner with his family lived, there being a sleeping apartment in the loft of the barn in which a man had slept for more than a month up to the time of the burning, and in which he was sleeping when he discovered the barn on fire, the court said: "Whether a building was a 'dwelling house' or not depended upon the fact whether it was usually occupied by persons lodging therein at night, and not upon the popular understanding of that term. If a part of it was occupied as a sleeping room, it was sufficient, although other parts might be used for other and entirely different purposes. It matters not how rude and devoid of comforts a dwelling house may be, if it is the usual sleeping place of a human being, and he is occupying it when it is feloniously burnt, the statute makes it arson in the first degree. The statute makes no distinction between the burning of a palace and the hostler's room in this respect. In either case a human life is imperiled." *State v. Jones*, 17 S. W. 366, 368, 106 Mo. 302.

A loghouse without fire or fireplace, and with its single window boarded up, built for the use of wood-choppers when working near by, in which several persons were staying temporarily, with the consent of the owner, sleeping and eating there, is a "dwelling house" within Rev. St. 1889, § 2531, defining the crime of burglary. Being occupied as a dwelling house, it must be held to have been such, for the use to which a house is put usually determines its character. *State v. Weber*, 56 S. W. 893, 894, 156 Mo. 257.

Whether a building is or is not a dwelling house depends upon the use to which it is put. A barn may be converted into a dwelling house, or a dwelling house into a barn, by the change of uses. So a county infirmary may be or may not be a dwelling house, depending in no wise on the question of its ownership, or the purpose of its original construction, but upon outside facts and circumstances. *Davis v. State*, 38 Ohio St. 505, 506.

#### Construction of building as affecting.

In Rev. St. 1889, § 3525, providing that no building shall be deemed a dwelling house within the provisions of the statute relating

to burglary unless the same be joined to, immediately connected with, and is a part of the dwelling house, the phrase "part of a dwelling house" means a part of the building which constituted a dwelling house. Where a room was separated from another by about four feet, both being inclosed under the same roof, and connected by porches on each side extending from the door of one to the door of the other, in one of which rooms a person lived, and the other being used for storing and keeping things not in immediate use, the latter room is a part of the dwelling house, though there was no internal communication between this room and the other. *State v. Hutchinson*, 20 S. W. 84, 111 Mo. 257.

#### Courthouse and jail.

The term "dwelling house," within the definition of arson as the "burning of a dwelling house," includes a courthouse and jail, when the jailer lives with his family in a part of the building. The court will not inquire into the tenure of interest which such person has when the house burned. It is enough that it was his actual dwelling at the time. *People v. Van Blaricum* (N. Y.) 2 Johns. 105.

Rev. St. pp. 657, 666, 667, declaring the willful burning of an inhabited dwelling house a crime, etc., includes a gaol or prison. The words "inhabited dwelling house" include such a building, though setting fire to it by a prisoner therein in order to effect his escape would not constitute arson. *People v. Cottrell* (N. Y.) 18 Johns. 115, 120.

Under Rev. St. 1889, § 3511, providing that the burning of any dwelling in which there shall be at the time some human being, is arson in the first degree, and section 3512, providing that every house, prison, jail, etc., shall be deemed a dwelling house, an indictment for arson in the first degree, charging defendant with burning a jail, which fails to allege that it is a dwelling house, is fatally defective. *State v. Whitmore*, 147 Mo. 78, 81, 47 S. W. 1068.

#### Curtilage or surrounding land included.

As used in Rev. St. 1840, c. 81, § 5, providing that no "dwelling house" shall be taken in locating a railroad without the consent of the owner of the house, the term does not include the garden, orchard, or curtilage. *Wells v. Somerset & K. R. Co.*, 47 Me. 345, 347.

As used in Act 1849, which forbade a railroad company to pass through any dwelling house, in the occupancy of the owner or owners thereof without his or her consent, the "dwelling house" embraces as much of the curtilage as is necessary for a reasonable and proper enjoyment of the house as a residence, in view of its location and surround-

*lugs. Damon v. Baltimore & P. R. Co., 13 Atl. 217, 221, 119 Pa. 287.*

A devise of a dwelling house with all the appurtenances and privileges thereunto belonging, designated as premises which the testator had improved as a boarding house, was construed to pass not only house, with stable, yards, gardens, etc., but also 18 acres of land adjoining the house. *Jackson v. White (N. Y.) 8 Johns. 59, 63.*

In a statute prohibiting a railroad company from passing through any "dwelling house in the occupancy of the owner thereof without his consent," the term "dwelling house" necessarily includes some curtilage connected therewith. The exact extent of that curtilage cannot be defined by an arbitrary rule as to distance. As each case arises, the right of the owner and occupier of the dwelling house against hostile location of a railroad must be determined by a consideration of what is necessary for a reasonable and proper enjoyment of the house as a residence, in view of its location and surroundings. Within this rule it is held that the taking by the railroad company of a rear corner of a lot, 150 feet from the nearest point to the dwelling house is not prohibited. *Appeal of Swift, 2 Atl. 539, 541, 111 Pa. 516.*

A grant of a "dwelling house" will convey the buildings belonging to it, its garden, orchard, and the land on which it is built, within reasonable limitations. *Marston v. Stickney, 58 N. H. 609, 610.*

In an information for forcible detainer, charging that defendant forcibly kept the owner out of a dwelling house, the words, "dwelling house" embraced the land on which it stood, and the charge of its forcible detention was equivalent to a charge of the forcible detention of the land on which it was standing. *Endsley v. State, 76 Ind. 467, 469.*

Under a statute providing that, on the destruction of a building so as to be unfit for occupancy, the lessee shall not be liable to pay rent thereafter unless otherwise expressly provided, the territory that will be included under the designation "building" or "dwelling house" in a lease of the same, without any qualifying word to restrict its meaning, would pass no more land than is necessary for its complete enjoyment; and where a dwelling house was leased, which was in the center of an 11-acre lot, and the building was destroyed by fire, the fact that certain outbuildings were still uninjured would not prevent the tenant from claiming the benefits of the statute. *Avery v. House (Ohio) 1 O. C. D. 468.*

**Different use of part of building as affecting.**

Where the owner of a dwelling house used one room of his house as a shoe shop,

and this room was connected with the rest of the house, it was properly held to be a part of the dwelling house. *People v. Dupree, 56 N. W. 1046, 1047, 98 Mich. 26.*

As used in a fire insurance policy describing the place insured as the "frame dwelling house," a certain number on a street means a building in use as a dwelling house, and not used for any purpose incompatible therewith. The use of part of the building as a grocery store is an inconsistent and incompatible use with that of dwelling. *Dougherty v. Greenwich Ins. Co., 42 Atl. 485, 486, 64 N. J. Law, 716.*

A lot of land was conveyed subject to a restriction that no building should be erected thereon excepting a dwelling house. It was held a violation of the restriction for the grantee to build a dwelling house on the lot and use the lower story as a grocery. *Dorr v. Harrahan, 101 Mass. 531, 534, 3 Am. Rep. 398.*

The term "dwelling house," as employed in the act defining arson in the first degree, is one which is wholly or is in part usually occupied by persons lodging therein at night, although other parts or the greater part may be occupied for an entirely different purpose. *People v. Orcott (N. Y.) 1 Parker, Cr. E. 252, 255.*

A building the front room of which on the first floor was occupied as a store, the back room as a dining room, and the upper rooms as sleeping apartments for the owner, is a "dwelling house," so as to render the riotous destruction of the front door and window of the storeroom within a statute punishing the pulling down or destruction of a dwelling house. *Samanni v. Commonwealth (Va.) 16 Grat. 543, 545.*

Breaking and entering into a store on the ground floor of a dwelling house, both store and dwelling being occupied by the owner thereof, was a breaking into a "dwelling house" occupied and used by a family for domestic purposes. *People v. Griffin, 77 Mich. 585, 586, 43 N. W. 1061.*

Where the lower story of a building was occupied for a store, and the upper story for a dwelling, and the back door was common to the store and the dwelling, the store was not a part of the "dwelling," so as to render an officer breaking open the door into the store under an execution guilty of a trespass. *Stearns v. Vincent, 15 N. W. 86, 91, 50 Mich. 209, 45 Am. Rep. 37.*

The term "dwelling house," as used in the law of burglary, may be applied to a building occupied by one in charge of a plantation, who ordinarily sleeps in one room of it, although another room may be occasionally occupied as an office or bedroom by an

other, who, while there, is the master of the plantation. *Ashton v. State*, 68 Ga. 25, 26.

Where by contract with a city a water company agrees to furnish water at a fixed yearly rate to dwellings, a building, the first floor of which is used as a store, the second as offices, and the third as sleeping apartments for single men, is a "dwelling," within the meaning of the contract, to the extent of the rooms occupied as sleeping apartments. *Smith v. Birmingham Waterworks Co.*, 18 South. 123, 125, 104 Ala. 315.

The term "dwelling house," as used in a statute exempting homesteads, does not contemplate any particular kind of a house. This requirement of the law is satisfied if the homestead claimant and his family reside in a habitation, whatever may be its character, on the premises claimed as the homestead. Thus where the building was a two-story frame building, and the debtor used the first floor for mercantile purposes, and resided with his family on the second floor, such building constituted a dwelling house. *Corey v. Schuster*, 62 N. W. 470, 44 Neb. 269.

#### As domicile or residence.

A "dwelling house" means a place of abode; a habitation; a house occupied or intended to be occupied as a residence. *Agricultural Inv. Co. v. Hamilton*, 33 Atl. 429, 430, 82 Md. 88, 30 L. R. A. 633, 51 Am. St. Rep. 457.

In Comp. Laws, § 4893, providing that the service of summons may be made at the dwelling house of defendant in the presence of one or more members of his family, the "dwelling house" as contemplated is one in which a person has his legal residence or domicile, and one in which he permanently resides. *Massillon Engine & Thresher Co. v. Hubbard*, 77 N. W. 588, 11 S. D. 325 (citing *Ames v. Winsor*, 36 Mass. [19 Pick.] 247; *Opinion of Judges*, 46 Mass. [5 Metc.] 587).

"Dwelling house," as used in Prac. Act, § 49, providing that the service of summons shall be made upon the defendant in person, or by leaving it at his dwelling house or usual place of abode, does not mean residence, but is a much more restricted term, meaning the place where defendant is actually living at the time when the service is made. *Mygatt v. Coe*, 44 Atl. 198, 199, 63 N. J. Law, 510; *Hervey v. Hervey*, 38 Atl. 767, 773, 56 N. J. Eq. 166; *Stout v. Leonard*, 37 N. J. Law (8 Vroom) 492, 495.

Where there was a house or building on property claimed as a homestead, and the claimant resided in it, the building should be dignified with the name of a "dwelling." *Lozo v. Sutherland*, 38 Mich. 168, 170.

The term "dwelling house," as used in an indictment for burglary, means that the

building broken and entered into was a place of residence, occupied as such at the time of the breaking and entering. *Bell v. State*, 20 Wis. 599, 601.

Where a petitioner asks for a cartway leading "from his dwelling house and lands, and through the lands of L., into the public highway," by the words "dwelling" and "lands" is fairly meant the home of the petitioner; the place where he lives; where he settled; and is a sufficient compliance with Code, § 2056, providing that any person "settled upon" any land to which there is leading no public road may petition for a private way. *Warlick v. Lowman*, 9 S. E. 458, 459, 103 N. C. 122.

The term "dwelling house," within the meaning of a search warrant, authorizing the search of the house of a certain person, means the house in which he dwells. "He may own a dozen houses and live in a hired one himself. A warrant to search the 'dwelling house' of such a person would confer an authority to search the house in which he dwells, but not the houses which he owned and rented to other persons." *Humes v. Taber*, 1 R. I. 464, 471.

#### Hotel.

"Dwelling house," as used in Cr. Code, § 3786, defining burglary as the breaking and entering a dwelling house, does not necessarily include an hotel, for an hotel may or may not be a dwelling house, according to the facts as to its occupancy and habitation. *Thomas v. State*, 12 South. 409, 410, 97 Ala. 3.

The term "dwelling house," as used in a statute limiting the height of dwelling houses in the city, should receive its ordinary and popular import, and does not include hotels. *People v. D'Oench*, 18 N. E. 862, 111 N. Y. 359.

The term "dwelling house," in a fire policy on a dwelling house, does not correctly describe a house which has been used for years as a hotel and purchased by insured as such, though it is only occupied by a care-taker till insured is able to sell it, and therefore a recovery cannot be had on the policy. *Thomas v. Commercial Union Assur. Co.*, 37 N. E. 672, 673, 162 Mass. 29, 44 Am. St. Rep. 323.

#### House distinguished.

"Dwelling house" is not synonymous with "house." The former is used in a broader and more comprehensive sense than the latter. *State v. Garity*, 46 N. H. 61, 62.

As used in a statute taking the benefit of clergy away from persons convicted of burning a dwelling house or barn having corn or grain in it, "dwelling house" should



not be construed as synonymous with "house," and hence, where the indictment charges the burning of a house, the benefit of clergy will be allowed. The appropriate meaning of "house" may be the abode of man, but its more general sense, as a covering or place of shelter, is too common to be altogether disregarded. *State v. Sutcliffe* (S. C.) 4 Stroh. 372, 403.

#### Millhouse.

A millhouse in which no one sleeps, at a distance of 75 yards from its owner's dwelling house, but separated by a public highway therefrom, and not proved to be appurtenant, is not a parcel of the dwelling house so as to be the subject of burglary at common law. *State v. Sampson*, 12 S. C. 567, 569, 32 Am. Rep. 513.

#### Ownership as affecting.

A "dwelling house," within Rev. St. 1889, § 3521, defining burglary, includes any house inhabited by man, and is the dwelling of one who resides there, although it is owned by another. *State v. Weber*, 56 S. W. 893, 894, 156 Mo. 257.

#### Piazza.

An open piazza in front of a dwelling house and attached to it is not a house, nor can it be a dwelling house. It may be attached to the house, and may in some sense be a part of the house, but it is not of itself the house. To be in such a piazza is not to be in the house, and the piazza is not within the spirit of the law which attaches a sanctity to the house, and adds to the punishment of larceny therefrom on account of that sanctity. *Henry v. State*, 39 Ala. 679, 680.

#### Schoolhouse.

A "dwelling house," within the meaning of a statute making the burning of such a house a crime, should be construed to include a schoolhouse, which is the dwelling of the school for the purposes of education. *State v. O'Brien* (Conn.) 2 Root, 513.

#### Single room.

A furnished room occupied by a single man as a lodging room in the basement of a building, the upper part of which is occupied by him and others as offices, is a "dwelling house" within a statute punishing every person who shall steal in the daytime from any dwelling house. *People v. Horrigan*, 36 N. W. 236, 68 Mich. 491.

A room within a house may be a dwelling house, or it may not. A room occupied by a lodger, the key to the outer door of which room is kept by the landlord, is not a dwelling house. *Monks v. Dykes*, 4 Mea. & W. 563, 568.

"Dwelling house," as used in an information charging one with the crime of burglary in entering the dwelling house of a certain person, should be construed to include a room in a hotel for which a person, who had no other place of abode, paid rent by the week, and in which he kept his personal effects. *State v. Johnson*, 30 Pac. 672, 673, 4 Wash. 593.

A room or an apartment in a public inn, when it is either hired or occupied, becomes the "dwelling" of the person hiring, under Pen. Code, § 4628, relating to burglary; and the fact that the room was occupied by another, as well as the person hiring it, does not in legal contemplation make it any less the dwelling of the prosecutor. *Jones v. State*, 75 Ga. 825, 827.

An indictment for breaking and entering a sample room in a "hotel" does not indicate that the place broken was a dwelling house, within Cr. Code, § 3786, defining burglary as the "breaking and entering of a dwelling house." A hotel may or may not be a dwelling house, according to the facts as to its occupancy and habitation. So each separate room in a hotel may be a "dwelling house" within the provisions of the statute, according to such facts, though ordinarily a house is an entirety, each room being merely a constituent part of it; but it cannot be said, as a matter of law, that every hotel is a dwelling house, or that any particular room in a hotel is a dwelling house, where the averment is a mere general description of, or, rather, reference to, the property as "a certain hotel." *Thomas v. State*, 12 South. 409, 410, 97 Ala. 3.

Stealing in a bedroom over a stable in a yard, not under the same roof nor having any direct communication with the house in which the prosecutor resides, cannot properly be charged as a stealing in his "dwelling house." *Rex v. Turner*, 6 Car. & P. 407.

The term "dwelling house," within the meaning of the statute in reference to burglary, includes a room in which a person sleeps and lives, though it is in a building in which other rooms are devoted to business purposes. *State v. Smith*, 14 Mo. App. 585.

#### Ship's cabin.

The cabin of a ship is not a "house" within the meaning of the statute relative to burglary. *Rex v. Humphrey* (Conn.) 1 Root, 63.

#### Store or storehouse.

A clause in a fire policy permitting the use of kerosene oil in dwellings cannot be construed to authorize the use of such oil in stores. *Cerf v. Home Ins. Co.*, 44 Cal. 321, 322, 18 Am. Rep. 165.

The term "dwelling house," in a definition of burglary as being "the breaking and entering of a dwelling house," etc., applies to a part of a storehouse, communicating with the part used as a store, which is habitually slept in by the owner or one of his family for the purpose of protecting the premises; but where the person sleeping there is a mere watchman hired to protect the premises the store is not a dwelling house. *State v. Potts*, 75 N. C. 129, 180.

The term "dwelling house," within the meaning of a statute making the burning of a dwelling house criminal, does not include a small one-room structure which has not been occupied as a dwelling for 8 or 10 years, and which is unfit for habitation, and has for many years been used only for the storage of cotton. *Henderson v. State*, 16 South. 931, 105 Ala. 82.

Where a clerk had for four years occupied a counting room as his regular sleeping apartment, such fact constituted the counting room a "dwelling house" within a statute punishing burglary in a dwelling house. *State v. Outlaw*, 72 N. C. 598, 602.

A "dwelling house" is one designed to be occupied as a place of abode by night as well as by day, and which is constructed with a special reference to that object, and, as long as it is capable of being so used in whole or in part, it retains its character as such. A building erected for a store or warehouse does not become a dwelling house because a place is fitted up in it for persons to sleep at night. Neither does a dwelling house cease to be such though a part of it has been converted into a store. *Fire Dept. of New York City v. Buhler* (N. Y.) 1 Daly, 391, 394.

"Dwelling house," as used in statute exempting from forced sale one-quarter of an acre of land in a village or city, and the dwelling house thereon owned and occupied by the debtor as a homestead, cannot be construed to include a business block used as a dwelling. The question whether it is a dwelling house or not is not determined by occupation, but by the character and construction of the building. "Dwelling house" should be construed in its common and ordinary sense, and to distinguish such building from other buildings it need not be exclusively used for the purpose of a dwelling, but in some reasonable sense should be susceptible of being a dwelling house. A building may be constructed for a store and dwelling house, but its construction should in some limit and to some extent manifest its character of dwelling house, so as to give some appearance of good faith in calling or claiming it as such. In *re Lammer* (U. S.) 14 Fed. Cas. 1048, 1049.

The term "dwelling house," as used in Wisconsin homestead statute, does not in-

clude a store or saloon which was not originally intended for a dwelling house, and which was in no wise adapted for such purpose, although the owner, previous to the filing of his homestead petition, had moved into such store and claimed to occupy it as his dwelling. In *re Lammer* (U. S.) 14 Fed. Cas. 1048, 1049.

In an indictment alleging the unlawful burning of a house used as a dwelling house, the term "dwelling house" should be construed to include a building erected for a storehouse, near a mine, which was used by the owner of the mine, when working it, as a dwelling house, there being a bedstead and cord in the house when burned. *McLane v. State*, 4 Ga. 335, 339.

The term "dwelling house," as understood in reference to burglary, has a technical meaning, not that meaning which is annexed to it in common acceptance. All outhouses standing in the same yard with the dwelling house, and used by the owner of the dwelling house as appurtenant thereto, whether the yard be open or inclosed, are, in the eye of the law, parts of the "dwelling house," and will satisfy that word used in an indictment of burglary. So if a store stand out of the yard and curtilage, and be separated therefrom, but the owner or his servants sometimes sleep therein, it is in law a dwelling house. *State v. Wilson*, 2 N. C. 242.

The term "dwelling house," in the law of burglary, does not ordinarily include a storehouse, but it may be made to assume the character of a dwelling house by being used habitually and usually by the owner, or his clerk or servant, as a place of sleeping, but not by being used occasionally only for such a purpose. In the latter case it is not and cannot properly be called a "dwelling house," the place of man's repose, which it is necessary for the law to protect from nocturnal invasion by announcing the penalty of death against the invader. Thus we find it stated in 1 Hale, P. C. 557, 558, that if a man hire a shop, in which he or his servant usually or often lodge, burglary may be committed therein; "but," says Mr. East, in his *Pleas of the Crown*, vol. 2, p. 497, "generally speaking, it seems that a mere casual use of a tenement as a lodging, or only upon some particular occasions, will not constitute it a dwelling house for this purpose." In *Brown's Case* all the judges agreed that the fact of a servant having slept in a barn the night on which it was broken open and for several nights before, being put there for the purpose of watching against thieves, made no sort of a difference in the question whether burglary or not. So it was said in *Smith's Case* that a porter lying in a warehouse to watch goods, which was only for a particular purpose, does not make it a dwelling house. But if all communica-

tion with the dwelling house of which it is a part be not excluded, it may still be a part of the house in which burglary may be committed. *State v. Jenkins*, 50 N. C. 430, 432.

It is not necessary, in order to render a storehouse in which the employes of the owner habitually slept a dwelling house, under an indictment for entering a dwelling house, that the employes board, in the sense of taking meals with the employer, in his house or elsewhere. It is not essential that a man's clerk shall eat at his table or in his house in order to establish the relation of employer and clerk. He may feed them at his own house, at a hotel, at a restaurant, or in the storehouse, or they may board themselves wherever it suits their convenience. *State v. Pressley*, 90 N. C. 730, 732.

#### Temporary absence as affecting.

Within the meaning of Cr. Code, § 36, defining the crime of "burglary" to be the breaking and entering a dwelling house, etc., "dwelling house" should be construed to include a house in which the owner resided, although she was absent at the time, where the beds, carpets, and curtains had been left in their places, while some of the household effects were packed in boxes, and the more valuable articles removed. *Schwabacher v. People*, 46 N. E. 809, 811, 165 Ill. 618.

"To constitute a building a 'dwelling house,' it must be a habitation for man, and usually occupied by some person lodging in it at night, though such occupant may for a time be absent, leaving the furniture therein, with an intention of returning." *State v. Warren*, 33 Me. 30, 31.

A "dwelling house" is a house ordinarily used as a residence, and it does not lose its character as a dwelling house if the owner leaves it temporarily with intention to return. In this country it has been held that if a person have a residence in the city and one in the country, residing with his family during the summer in one and during the winter in the other, both are to be regarded as dwelling houses, so that a breaking of either one is burglary. *State v. Meerchouse*, 34 Mo. 344, 346, 86 Am. Dec. 109.

Where a husband had left the house which had been his dwelling, with no intention of returning to it, but did not remove his effects therefrom, and his wife spent her days in the house and her nights elsewhere, it was his "dwelling." *Bragg v. State*, 69 Ala. 204.

#### Unfinished building.

"Dwelling house," as used in a statute providing that every person who shall willfully and maliciously set fire to the dwelling house of another shall be deemed guilty of

arson, means a dwelling house that is or has been actually occupied by another for the use specified, and hence does not include a building in process of erection to be used as a dwelling, but which has never been used for the purpose for which it was being erected. *State v. Wolfenberger*, 20 Ind. 242; *State v. McGowan*, 20 Conn. 245, 247, 52 Am. Dec. 336.

#### As usual place of abode.

The term "dwelling house," in a statute authorizing service of summons by leaving at the dwelling house or usual place of abode of the defendant, is held to be synonymous with "usual place of abode," and to evidently mean a domicile. *McFarlane v. Cornelius*, 73 Pac. 325, 329, 43 Or. 513.

The term "dwelling house," as used in a return of service of a summons stating that service was made by pasting a copy on the front door of a dwelling house, is not equivalent to "usual place of abode" as used in the statute. The "usual place of abode" means a place where the party usually stays at the time, but a man may have a dwelling house and not dwell or stay in it at or about the time of service or attempted service of process. *Lewis v. Botkin*, 4 W. Va. 533, 536.

#### Vacancy of building as affecting.

"Dwelling house," as used in Code, c. 192, § 2, providing for the punishment of any person burning a dwelling house, cannot be construed to include a house more than a mile distant from the owner's residence, in which no one lived or slept, and which had not been occupied as a dwelling for about 10 months previous to its destruction, though such building had once been used as a dwelling house, and though it was intended for the same use in future. *Hooker v. Commonwealth (Va.)* 13 Grat. 763, 765.

"Dwelling house," as used in Rev. St. c. 126, § 1, defining and punishing arson, means a house, occupied as a place of residence, and a house which has never been occupied by the alleged owner is not a "dwelling house" within the statute. *Commonwealth v. Barney*, 64 Mass. (10 Cush.) 478, 479.

"In its common acceptation the term 'dwelling house' means the house in which a man resides; the house of his present abode; so at common law a man's 'dwelling house,' to be the subject of burglary, must be inhabited by him, either personally or by some of his family; and although some nice distinctions grew up as to what should be a sufficient occupancy by a particular person to answer the description in an indictment, by which an actual personal occupation by the one described as 'owner' was not in all cases held necessary, yet this was upon the ground that the actual occupants stood in such relation to the owner that their occu-

pancy was deemed his." *Bruce v. Cloutman*, 45 N. H. 37, 39, 84 Am. Dec. 111.

A vacant house is not a "dwelling house" within How. Ann. St. § 9123, providing for the punishment of one who willfully and maliciously burns the dwelling house of another in the nighttime. *People v. Handley*, 52 N. W. 1032, 93 Mich. 46.

A dwelling house is the apartment, building, or cluster of buildings in which a man with his family resides. Not even the main structure is a dwelling house, though built for one, unless it is what the law terms "inhabited." And a dwelling house may cease to be such without undergoing any change as a building. If, for example, the furniture is removed, and it is temporarily abandoned to a carpenter for repairs, no one sleeping in it to protect some articles of furniture, its character as a dwelling is suspended. *State v. Huffman*, 37 S. W. 797, 798, 136 Mo. 58.

A conviction for the burglary of a dwelling house cannot be sustained in the absence of evidence that any family resided in the house charged to have been broken and entered. *Fuller v. State*, 48 Ala. 278, 275.

The term "dwelling house," as used in the definition of burglary from dwelling houses, includes a house which is occupied by a family, though they have left the house and rented it, and have left some of their goods therein with intention of returning, even though the tenant has left the house before the burglary. If a husband and wife live together in a house, it is his dwelling house as well as hers, though the title may be in her. *Harrison v. State*, 74 Ga. 801, 802.

#### As where persons sleep.

Statutes punishing arson and burglary have defined a "dwelling house" as: A building, any part of which is usually occupied by a person lodging therein at night. Pen. Code N. Y. 1903, § 502; Gen. St. Minn. 1894, § 6683; Ann. Codes & St. Or. 1901, § 2172. Any building any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such building. Ann. Codes & St. Or. 1901, § 2173. Every building or structure which shall have been usually occupied by persons lodging therein at night. Pen. Code N. Y. 1903, § 492. Every house or edifice, any part of which has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such a house or edifice. Rev. St. Okl. 1903, § 2432; Rev. Codes N. D. 1899, § 7412; Pen. Code S. D. 1903, § 572.

Every house, prison, jail, or other edifice which shall have been usually occupied by persons lodging therein, shall be deemed a dwelling house of any person having charge

thereof or so lodging therein; but no warehouse, barn, shed, or other outhouse shall be deemed a dwelling house, or part of a dwelling house, unless the same be joined to or immediately connected with and a part of a dwelling house. Rev. St. Mo. 1899, § 1872.

As used in definitions of burglary, a "dwelling house" is a habitation for man, usually occupied by some person lodging in it at night. A building which is in fact a dwelling house does not lose its character as such by a mere temporary absence of its inhabitants, who have left with intent to return; but it does not become a dwelling house, though used for having meals and other purposes, unless the person occupying it, or some one of his family or servants, usually sleeps in it at night. *Scott v. State*, 62 Miss. 781, 782.

"Dwelling house," as used in the definition of burglary to the effect that it is the unlawful breaking and entering of a dwelling house in the nighttime with the intent to commit a felony therein, means any house in which a person sleeps at night. *United States v. Johnson* (U. S.) 26 Fed. Cas. 625.

"Dwelling house," as used in the definition of burglary, to the effect that it is the crime of breaking and entering a dwelling house in the nighttime with intent to commit a felony, means a house in which one regularly and habitually sleeps in the nighttime. The purpose of the law creating and defining burglary is to protect the sleeping place. One may have several dwelling houses for his own comfort and convenience, and he may make a house where he carries on a business a dwelling house, in which he may sleep himself or have his servants sleep. And it is none the less a dwelling house because the leading motive for making it so is the incidental protection afforded the property stored therein. *State v. Pressley*, 90 N. C. 730, 732; *State v. Williams*, 90 N. C. 724, 728, 47 Am. Rep. 541.

The statute relative to arson declares that every house or other edifice which shall have been usually occupied by persons lodging therein at night shall be deemed the "dwelling house" of any person so lodging therein. *Levy v. People* (N. Y.) 19 Hun, 383, 385.

#### DWELLING HOUSE OF ANOTHER.

The "dwelling house of another" means a dwelling in the possession of another. *State v. Fish*, 27 N. J. Law (3 Dutch.) 323. And this shows that the phrase "dwelling house of another" is quite different from the expression "dwelling house, the property of another person." The latter is a subject of arson by a tenant in possession of property belonging to another person. *Lipschitz v. People*, 53 Pac. 1111, 1112, 25 Colo. 267.

**DWELLING PLACE.**

A pauper, while supported as such, has no home or "dwelling place," within the meaning of Gen. St. p. 132, providing that upon the division of any town, or the annexation of a part of one town to another town, every person having a legal settlement therein, but being absent at the time of such division or annexation, and not having acquired a settlement elsewhere, shall have his legal settlement in that town wherein his last dwelling place or home shall happen to fall. *Town of Wilmington v. Town of Somerset*, 85 Vt. 232.

Where the parents of a single woman live in one town, and she, when of age, labors for wages in another, a "dwelling place," within the law relating to the settlement of paupers, is in the town where she labors. It is difficult to define with precision the meaning of "dwelling place" or "home." Much depends upon the pursuits and character of the person in relation to whom these terms are used. A lad absent at college may still retain his dwelling place at his home, where he himself owns a freehold estate, and one absent at sea may still retain a dwelling place at his former residence. Indeed, all minors not emancipated, all femes covert, all servants and slaves, though occasionally absent for particular purposes, would seem still to possess the dwelling place of their parents, husbands, and masters. The dwelling place of servants must, for the term of their service, be termed their "home"; and the pauper having left her father's home for permanent purposes, having ceased to be a minor, must be considered at home in the place where she worked, as any person could be who, without a family or freehold, pursued the employment of a domestic. *Town of Gilford v. Town of Gilmanton*, 1 N. H. 194, 195.

The term "dwelling place," as used in the pauper law, is synonymous with the word "residence" or "home." *Town of North Yarmouth v. Town of West Gardiner*, 58 Me. 207, 210, 4 Am. Rep. 279.

**Domicile distinguished.**

"Dwelling place" means some permanent abode or residence where the person residing intends to remain, "and is not synonymous with 'domicile,' as used in international law, but has a more restricted meaning." *Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. (1 App.) 293.

"Dwelling place and home," as used in a statute making a dwelling place and home requisite to establish the settlement of a pauper, cannot be construed in a vague and indeterminate sense, but contemplate something specific. It was intended to define it so that it could not be misunderstood, and so that it should be obvious to the common

sense of every man what should constitute a settlement. The words did not mean constructive dwelling places and homes. They were not used in the sense of "domicile" in its more technical meaning. The words "dwelling place and home" meant some permanent abode or residence with intention to remain. *Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. (1 App.) 293, 301 (citing *Inhabitants of Turner v. Inhabitants of Buckfield*, 8 Me. [3 Greenl.] 229).

**Settlement distinguished.**

"Dwelling place" is synonymous with "residence," and means some permanent abode or residence with intention to remain, and has a different meaning from the word "settlement" in the pauper law. *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 418, 69 Am. Dec. 69.

"Dwelling house" is not synonymous with a place of pauper settlement, and a pauper minor when emancipated can acquire a different dwelling house from that of his parent. *Lisbon v. Lyman*, 49 N. H. 553, 562.

**DYEING.**

The word "dyeing" means to fix color. "Dyeing," technically speaking, and when contrasted with "painting," means a saturation or impregnation of the fiber in order to secure fixation of color. As applied to some animal fibers, such as silk or wool, it means a thorough saturation; as applied to skins, it may signify a thorough or a partial saturation. In other words, skins may be dyed on the surface or a portion of the way through. The dyeing of skins is effected either by plunging or dipping in the dyeing solution, or by spreading the dyeing material on the surface by brushing over it. The Century Dictionary defines "dyeing" as "the operation or practice of fixing colors in solution in textile and other porous substances." *Tannage Patent Co. v. Donellan* (U. S.) 98 Fed. 811, 817 (quoting Cent. Dict.).

**DYEING WORKS.**

The term "dyeing works," as used in all laws relative to the employment of labor, shall mean any premises in which the process of dyeing yarn or cloth or any material is carried on. *Rev. Laws Mass. 1902*, p. 916, c. 106, § 8.

**DYING.**

By his own hand or act, see "Die by His Own Hand or Act."

Intestate, see "Die Intestate."

Without heirs, see "Die Without Heirs."

Without issue, see "Die Without Issue."

Without leaving issue, see "Die Without Leaving Issue."

**DYING DECLARATIONS.****Consciousness of impending death.**

"Dying declarations" are such as are made by the party relating to the facts of the injury of which he afterwards dies, and with a fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance, when he has despaired of life, and looks to death as inevitable and at hand. *Starkey v. People*, 17 Ill. (7 Peck) 17, 21; *Simons v. People*, 150 Ill. 66, 73, 74, 36 N. E. 1019; *Westbrook v. People*, 18 N. E. 304, 307, 126 Ill. 81; *State v. Clemons*, 1 N. W. 546, 547, 51 Iowa, 274; *May v. State*, 55 Ala. 39.

Greenleaf says that dying declarations are admitted because they are considered as standing in the same situation as if they were sworn, the danger of impending death being equivalent to the sanction of an oath. *State v. Pearce*, 56 Minn. 226, 239, 57 N. W. 652.

The theory upon which dying declarations, being mere hearsay, are admissible, is that, when an individual is in constant expectancy of impending death, all temptation or inducement to falsehood is removed, and the solemnity of his situation is supposed to impress him as strongly with the necessity of strict truthfulness as the obligation of a judicial oath. *State v. Eddon*, 36 Pac. 139, 142, 8 Wash. 292; *Pennsylvania v. Lewis* (Pa.) Add. 279, 282; *Richard v. State*, 29 South. 413, 414, 42 Fla. 528.

It is essential to the admissibility of "dying declarations," and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appear in any mode that they were made under that sanction, whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind. *State v. Trusty* (Del.) 40 Atl. 766, 767, 1 Pennewill, 319; *McDaniel v. State*, 16 Miss. (8 Smedes & M.) 401, 402, 47 Am. Dec. 98; *Lowry v. State*, 80 Tenn. (12 Lea) 142, 145; *Newberry v. State*, 58 S. W. 351, 68 Ark. 355.

"Dying declarations" are those made under a consciousness of impending death, which, however, the defendant need not express in direct terms. His bodily condition and appearance, his conduct and language, as well as statements made to him by his attendants, may be considered, and his consciousness thence inferred. It is not neces-

sary that the deceased should have said that he believed he would die immediately, but it is sufficient if the facts detailed were such as to indicate that he was conscious, at the time of making his declaration, of his approaching dissolution. To render such declarations receivable in evidence, the deceased need not have been at the time in articulo mortis. It was only necessary that the statements should have been made under a sense of impending dissolution which soon after occurred. *State v. Jones*, 18 South. 515, 517, 47 La. Ann. 1524.

"Dying declarations" are such as are made under a sense of impending death. It is the fact that they are made under a sense of impending death that renders them admissible in evidence, and, though made within a sufficient length of time before death to justify their admission, they are not "dying declarations" if the deceased at the time believed or strongly hoped that he would recover. *Ex parte Nettles*, 58 Ala. 268, 277.

In order to constitute a "dying declaration," it must appear that deceased at the time of making the declaration had abandoned hope of life; hence, where it appeared that the wounds inflicted upon deceased were not so serious as to impress on him or those who saw him the fact that they were fatal, and that immediately after the injury deceased asked a person to sell him meat and risk his getting well to pay for it, and that he had no medical attendance nor any one to acquaint him with the nature of his injury, his declarations were inadmissible as dying declarations, notwithstanding his wife testified that he had stated he was about to die. *Bell v. State*, 17 South. 232, 234, 72 Miss. 507.

While the text-writers sometimes speak of the weakness of dying declarations because of the want of an opportunity for cross-examination, they still lay down the rule that such admissions are fully satisfactory if the declarant is shown to be conscious of the fact that he is in a dying condition. *State v. Pearce*, 56 Minn. 226, 239, 57 N. W. 652.

**Subject of statements.**

"Dying declarations" are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death. *People v. Fuhrig*, 59 Pac. 693, 694, 127 Cal. 412; *People v. Kraft*, 36 N. Y. Supp. 1034, 1035, 91 Hun, 474; *Miller v. State*, 25 Wis. 884, 387; *State v. Medlicott*, 9 Kan. 257, 283. "They are restricted to the act of killing and to the circumstances immediately attending it, and form a part of the *res gestæ*." *State v. Baldwin*, 45 N. W. 297, 298, 79 Iowa, 714; *State v. Perigo*, 45 N. W. 399, 400, 80 Iowa, 37.

"Dying declarations" relate only to the *res gestæ* of the homicide; that is, the state-

ments must be confined to what actually transpired at the place of the killing, i. e., who were the actors, where it occurred, the positions of persons, what was said by the parties, the instrument used, and how the homicide was committed. A dying declaration is admissible to show all the facts connected with the homicide to which a witness, were he present, could testify. This would exclude narratives of past transactions and opinions or mere conclusions of the declarant. *Medina v. State*, 63 S. W. 331, 332, 43 Tex. Cr. R. 52 (citing *Roberts v. State*, 5 Tex. App. 141; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745; *Boyle v. State*, 5 N. E. 203, 105 Ind. 469, 55 Am. Rep. 218; *People v. Abbott* [Cal.] 4 Pac. 769; *State v. Johnson*, 1 S. E. 510, 26 S. C. 152).

Declarations having no reference to the facts and circumstances of the conflict from which death resulted, but merely being expressive of the opinion of the deceased as to what would have been the result if the accused had not fired so quickly, are not "dying declarations." *Brown v. State*, 74 Ala. 478, 483.

#### Time of death.

In order to be admissible as "dying declarations," the statements need not be made immediately before death, but are "dying declarations" if made at a time when recovery is despaired of, and the deceased feels assured that his disease will prove fatal. *State v. Poll*, 8 N. C. 442, 444, 9 Am. Dec. 655.

#### Written or oral.

Mr. Bishop lays down the rule that a dying declaration may be written or oral, be sworn to or not, come through an interpreter, or by a mere pressure of the hand or otherwise. If made before death seems impending, they will be rendered good by repetition or assent afterwards. If in writing, the writing must be produced in evidence of them. If oral, they may be orally proved, and the evidence will suffice. When the declarant leaves a statement so far unfinished that it appears probable he meant to qualify it by something further, it is not admissible; but

his inability or mere omission to go over the whole transaction, or to speak to another part of it, will not exclude from the jury what he has said. *State v. Parham*, 20 South. 727, 728, 48 La. Ann. 1309 (citing 1 Bish. Cr. Proc. § 1213).

## DYNAMITE.

"Dynamite" is an explosive, made by combining nitroglycerin, which is its active explosive element, with an absorbent solid material. The combination is made for the purpose of a more convenient use of nitroglycerin, which is a fluid. *Sperry v. Springfield F. & M. Ins. Co.* (U. S.) 26 Fed. 234, 235, 237.

The word "nitroglycerin," as used in Rev. St. § 5353 [U. S. Comp. St. 1901, p. 3637], prohibiting the transporting of nitroglycerin upon vehicles engaged in interstate passenger traffic, includes "dynamite," which is made by mixing nitroglycerin with some solid and inert absorbent substance, and contains no other explosive ingredient. *United States v. Saul* (U. S.) 58 Fed. 763, 764.

## DYNAMO.

A "dynamo machine" is a device for converting mechanical energy into electricity. It has a revolving part, called the "armature," usually driven from a steam engine. At one end of the armature there is a projecting part, called the "commutator," standing out something like the hub of a wagon wheel. Upon two opposite sides of this commutator are placed two copper strips, bars or bundles of thin copper leaves, called "commutator brushes," which press upon the surface of the commutator during its revolution. A wire joined to one of these brushes leads away from the machine through the lamps or motors in which the current is used, and back to and through the other brushes. Thus the electric current which is generated in the armature by its revolutions passes out through one brush and back through the other. *Thomson-Houston Co. v. Western Electric Co.* (U. S.) 65 Fed. 615, 616.

## E

## E.

"E," as an abbreviation, means "east."  
Sibley v. Smith, 2 Mich. 486, 503.

## EACH.

**As all or every.**

The word "each," as used in the statute providing for the formation of a board "who shall 'each' be paid," etc., is a distributive adjective pronoun, and denotes or refers to every one of the persons mentioned. *Seller v. State*, 67 N. E. 448, 449, 160 Ind. 605 (citing *And. Law Dict.*; *Adams Exp. Co. v. Lexington*, 83 Ky. 657).

"Each" is defined as being either or any unity of a numerical aggregate, consisting of two or three indefinitely; used in predicating the same thing, or both or all the numbers of the pair, aggregate, or series mentioned or taken into account, considered individually or one by one; often followed by one with or before a noun (partitive genitive), as each sex, each side of the river, each stone in the building; each of them has a different course from every other. *Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 58 N. E. 859, 861, 25 Ind. App. 662 (citing *Cent. Dict.*).

In a contract providing that a party would furnish letter heads, business cards, envelopes, statements, at \$12 per M., and hangers on chromo plate paper, tinned top and bottom, with trade-mark and proper wording, at 22 cents each, "each" refers to all the articles named which precede it. *Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 58 N. E. 859, 861, 25 Ind. App. 662.

Where testator by a clause in a will gives "to each of my nephews, one and all, \$100 each," there is no room for doubt as to the meaning of the clause, and it includes all nephews—those who had been previously remembered in the will, and others. *Bartlett v. Houdlette*, 16 N. E. 740, 741, 147 Mass. 25.

The charter of the city of Lexington, approved April 19, 1882, § 16, providing that the mayor and board of councilmen should have the right to tax and license, and should by ordinance provide for the licensing of, "each express company," must be regarded as indicating that the license fee for each of the companies intended to be included in the provision of the charter, and which were not exempted from city taxation by the then existing law, should be so much, although it is true that the word "each" de-

notes every one of the two or more comprising the whole. It includes the whole of the class which were not then exempted from such taxation. *Adams Express Co. v. City of Lexington*, 83 Ky. 657, 659.

"Each," as used in a contract by which a lessee was given the right of purchasing certain machinery and apparatus on the expiration of certain letters patent and all extensions and renewals thereof, in which are set forth and claimed the inventions and improvements, and each of them, contained in said machinery and apparatus, was construed to mean "every." *Potter v. Berthelot* (U. S.) 20 Fed. 240, 242.

**As apiece.**

"Each," as used by a testator in bequeathing to "each of my immediate nephews and nieces \$1,000 apiece," means the same as the word "apiece," and that is simply that each nephew and niece shall have \$1,000. *Martin v. Mercer University Trustees*, 25 S. E. 522, 523, 98 Ga. 320.

**As each one individually.**

The word "each" is commonly understood to mean every one of the two or more individuals composing the whole, considered separately from the rest. *Knickerbocker v. Peble*, 102 Ill. 218, 233, per *Scott, J.*, dissenting.

"Each" means every one of any number, separately considered. *State v. Maine Cent. R. Co.*, 66 Me. 488, 510.

"Each" means "every one of any number or numerical aggregate, considered individually; equivalent to the adjectival phrase 'each one,' as, 'each went his way,' 'each had two,' 'each of them was of a different size'—that is, from all the others or from every one else in the number." *Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 58 N. E. 859, 861, 25 Ind. App. 662; *Malcomson v. Wappoo Mills* (U. S.) 86 Fed. 192, 194.

Rev. St. S. C. § 102, providing that each ton of phosphate rock, the product of certain mining operations, shall be deemed the property of the state until the persons mining the same shall have paid a certain royalty, means each ton taken severally, individually, shall be deemed the property of the state until the said parties have paid the royalty thereon; that is, on that individual ton. *Malcomson v. Wappoo Mills* (U. S.) 86 Fed. 192, 194.

Const. 1895, art. 5, § 25, providing that each of the justices of the Supreme Court and judges of the circuit court should have



the same power at chambers to issue writs of habeas corpus as when in open court. It was held that the term "each" was used in contradistinction to "all" of the justices, as necessarily implied in the term "court," which was made up of all the justices, and thus that any one of the judges had the same power in regard to issuing the specified writs at chambers as all of the judges had during term of court. *Salinas v. C. Aultman & Co.*, 27 S. E. 385, 387, 49 S. C. 325; *State v. Smith*, 27 S. E. 933, 934, 50 S. C. 558.

The phrase "each particular lot," in a taxation statute requiring the assessor's list of property to particularly set forth the name of the owner or owners of real estate and the number of acres of land in each particular lot, section, or subdivision thereof, etc., is not satisfied with a list describing the property of a certain person as 100 acres in the north part of two lots. *Perkins' Lessee v. Dibble*, 10 Ohio, 433, 434, 442, 36 Am. Dec. 97.

In a will directing the distribution of a share to each nephew and niece then living, "each" separates the class into individuals, and is equivalent to a detailed enumeration. By the use of the word "each" testator did in effect designate the persons all individually as plainly as if he had inserted their several names. In *re Peuney's Estate*, 28 Atl. 255, 256, 159 Pa. 346.

A devise to heirs, to them and "each" of them, will be construed as a direction that such heirs are to take per capita, and not per stirpes. *Daggett v. Slack*, 49 Mass. (8 Metc.) 450, 454.

"Each," as used in a will giving to several persons, designated therein, each a certain sum, in its common acceptation refers singly to the individual designated in the clause. *Auger v. Tatham*, 61 N. E. 77, 78, 191 Ill. 296.

A bequest to A. and B. of "\$2,000 each" was construed to be a gift to A. and B. individually, and therefore the death of one before the testator caused the gift to him to lapse. *Clafin v. Tilton*, 5 N. E. 649, 141 Mass. 343.

#### Joint or several obligation created.

A note reciting that it is signed "each as principal" made both signers principals so far as the creditor was concerned. *Benedict v. Cox*, 52 Vt. 247, 250.

The word "each," following the penalty of a bond signed by defendants, by itself made it a several bond, and the ensuing clause, "for which we bind ourselves and each of us for himself for the whole and entire sum of £1000 each," did not make it a joint undertaking. *Collins v. Prosser*, 1 Barn. & C. 682.

As used in a contract by two persons with a boatbuilder to pay for a boat to be built for them for a certain sum, each his one-half, the expression "each his one-half" makes such contract several and not joint. *Costigan v. Lunt*, 104 Mass. 217, 219.

The conclusion of a bond given by several was as follows: "To which payment well and truly to be made or done, we bind ourselves and each of our heirs, executors and administrators." Held, that the word "each" was intended to be applicable to the persons of both obligors, and hence the obligation was several as well as joint. *Geddis v. Hawks* (Pa.) 10 Serg. & R. 33, 37.

#### Tenancy in common created.

In a devise or bequest to several persons, to each, the words "to each" make the persons tenants in common. *Stetson v. Eastman*, 24 Atl. 868, 870, 84 Me. 366.

In cases where construction is necessary to determine whether an instrument creates a joint tenancy or tenancy in common, the distributive words "among," "any," and "each" are used to distinguish estates in common from joint tenancies, and are given controlling effect in determining the estates to be tenancies in common. *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 257.

#### EACH BEQUEST.

Testator, after directing his debts to be paid, devised his town house and furniture to his sister, directing that all incumbrances thereon should be paid off by the executors. To his brother he devised a country house, subject, however, to sale, if necessary to carry out previous provisions; and the will stated, "It being my intention that 'each bequest' shall be fully carried out in the order in which it appears in the will." Testator then gave several general legacies, and, there being a deficiency of assets, the latter bequest must abate proportionately. Held that, while a bequest is properly used relative to personal estate, the phrase "each bequest" refers to the gifts previously made, although consisting in part of realty. Appeal of *Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 16 Wkly. Notes Cas. 170, 172, 109 Pa. 479, 488.

#### EACH BLOCK.

Sess. Laws 1887, c. 99, § 4, declares that for all municipal paving, etc., assessment shall be made for the full cost thereof on each block separately. Held, that the words "each block separately" mean that each block, or the street between each block for the distance of a block, shall be separate from that of an adjoining block in the city; that each block, or the two half blocks divided by the street, the distance of a block,

becomes a block or taxing district as contemplated by section 4, and does not have reference to a division of the costs and apportionment of the expenses of its improvement between the two half blocks divided by the street. *Blair v. City of Atchison*, 19 Pac. 815, 816, 40 Kan. 853.

#### EACH CASE.

In a policy of insurance on a vessel and cargo, it was stipulated that the underwriters should not be liable "for any partial loss of other goods on the vessel or in freight," unless it amounted to 5 per cent. inclusive "in each case," of all charges and expenses incurred for the purpose of ascertaining and proving the loss. Held, that the words "in each case" did not mean at each time of loss, but that they referred to the three several subjects insured—goods, freight, and vessel. *Donnell v. Columbian Ins. Co. (U. S.)* 7 Fed. Cas. 889, 893.

#### EACH OFFENSE.

"Each," as used in a statute imposing a penalty "for each offense" upon every keeper of a toll gate, ordered by the inspectors to throw open the same or allow persons to pass without toll, who shall not immediately obey such order, means each violation of the order, and does not relate to the description of the offense. *Suydam v. Smith*, 52 N. Y. 383, 389.

#### EACH OTHER.

See "With Each Other."

#### EACH PARTY.

The words "each party," as used in act of Congress providing that each party, whether in civil or criminal cases, shall be allowed peremptory challenges, are used in the sense of either party to the action, i. e., plaintiff and defendant, regardless as to whether one or more than one person is included as plaintiff or defendant. *People v. O'Loughlin*, 1 Pac. 653, 656, 3 Utah, 133. See, also, *Snodgrass v. Hunt*, 15 Ind. 274, 276.

Under Comp. Laws, § 6027, providing that "in all civil cases each party may challenge peremptorily two jurors," defendants, who have united on one issue presented by the same counsel, constitute by their own voluntary action but one party before the court, and any challenge made on behalf of one would necessarily be on behalf of the other also, and when the statutory number of challenges had been made the right of each was exhausted. Nevertheless parties sued in one action, but who plead separately and by a different counsel, are each entitled to the two peremptory challenges allowed by statute.

In such a case their rights and liabilities may be very different, and jurors who, for various reasons, may be objectionable to one, might be perfectly satisfactory to another, and so the adoption of any other rule would result in insuperable difficulties. *Stroh v. Hinchman*, 37 Mich. 490, 491.

#### EACH TAXPAYER.

The words "each taxpayer," as used in Const. 1870, art. 2, § 23, providing that the Legislature shall exempt from taxation \$1,000 worth of personal property in the hands of each taxpayer, apply to each taxpayer, and not to each head of the family. A married woman is therefore entitled to such exemption, though her husband is entitled to and has been allowed the same exemption. *First Nat. Bank v. Town of Morristown*, 23 S. W. 975, 93 Tenn. (9 Pickle) 208.

#### EACH WEEK.

Rev. Laws, p. 218, entitled "An act for the relief of persons imprisoned for debt," and requiring that there should be paid by the dissatisfied creditor to the insolvent debtor a certain sum on the second day of "each week," means that the payments must be made on a fixed day, and that the payments in no instance be more than one week asunder. *State v. Stiles*, 12 N. J. Law (7 Halst.) 296, 297.

#### EACH YEAR.

In Laws 1876, c. 510, which provides that corporations shall within 20 days after the 1st of January in each year make a report, which will state the amount of capital and the portion actually paid in, etc., "each year" means annually. *Allen v. Clark*, 21 N. Y. Supp. 338, 840, 66 Hun, 628.

In a statute providing that it shall not be lawful to catch trout "between the 1st day of October of each year and the 1st day of June of each year," the term "each year" does not mean the same year, so as to forbid the fishing only between June and October; but in view of the order in which the dates are arranged, and the practical construction that has always been placed upon the law, the Legislature evidently intended the close season to run from October of one year to June of the succeeding year. *Ex parte Hewlett*, 40 Pac. 96, 97, 22 Nev. 333.

#### EALDERMAN.

See "Alderman."

#### EAR.

An "ear," in a mechanical sense, is a projecting part from the side of anything.

*Consolidated Vapor-Stove Co. v. Ellwood Gas-Stove & Stamping Co. (U. S.) 63 Fed. 698, 699. (Quoting Web. Dict.)*

## EARLIEST POSSIBLE MOMENT.

An obligation to pay a sum of money at the "earliest possible moment" is not an agreement to pay instantly, unless the maker has the ability so to pay; but it is conditional, and fixes the burden on the person suing on the obligation to prove the ability of the maker to pay the debt. *Rowlett v. Lane*, 43 Tex. 274, 275.

## EARN.

The word "earn" means to gain as a just return or recompense by service, labor, or exertion. *Dayton v. Ewart*, 72 Pac. 420, 421, 28 Mont. 153.

"Earn" means to gain, get, obtain, or acquire as the reward of labor or performance of some service. *Rafferty v. Rafferty*, 5 Pa. Dist. R. 453, 458 (citing *Worcester*, Law Dict.); *In re Lewis' Estate*, 27 Atl. 35, 156 Pa. 337. Hence, under Act Pa. June 3, 1887, § 1, providing that property of every kind owned, acquired, or "earned" by a woman before or during her marriage shall belong to her and not to her husband, a married woman has an exclusive property in the earnings of her own hands. *In re Lewis' Estate*, 27 Atl. 35, 156 Pa. 337.

Wages are "earned," in the sense in which that term is used in the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), giving preference to wages earned within three months before the commencement of the proceedings, so long as a bona fide contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. The practice of giving vacations with continued pay is very general in all departments of business. Vacation wages cannot be regarded as a mere gratuity given in recognition of past or present services. By continuing the relation of employer and employé during a dull season, the employer holds his working force in readiness for the active season. The relation of the employer and employé is as strictly a business relation as it is during the working season, and there is full legal consideration for the master's promise to pay wages during this period. *In re B. H. Gladding Co. (U. S.)* 120 Fed. 709, 711.

## EARNEST.

"Earnest" means payment of part of the price of goods sold, or a delivery of part of the goods, for the purpose of binding the contract. The idea of "earnest" in connection

with contracts was taken from the civil law. As used in the statute of frauds providing that sales of personalty of over a certain value shall be void unless there be a memorandum in writing, or the purchaser receive and accept the same, or give something in earnest, "earnest" means a part payment of the price. *Howe v. Hayward*, 108 Mass. 54, 55, 11 Am. Rep. 306 (citing 2 Bl. Comm. 447; *Pordage v. Cole*, 1 Saund. 319b; *Walker v. Nussey*, 16 Mees. & W. 302); *Hudnut v. Weir*, 100 Ind. 501, 502.

Earnest is only one mode of binding a bargain and giving to the buyer a right to the goods on payment, and, if the buyer does not come in a reasonable time after agreement and pay for and take the goods, the contract is dissolved. *Robinson v. Thoma*, 70 Pac. 240, 241, 30 Wash. 129.

The delivery of sacks by the purchaser of corn, who agreed to pay a certain sum per bushel, and as part of the consideration to furnish the sacks in which to put it, was not a delivery of anything in "earnest," for they were not a part payment for the price of the corn. They continued the property of the defendant after, the same as before, they were delivered to the seller, who took no property in them, nor other right except to fill them with corn and return them. *Hudnut v. Weir*, 100 Ind. 501, 502.

## EARNINGS.

See "Gross Earnings"; "Individual Earnings"; "Net Earnings"; "Personal Earnings"; "Professional Earnings"; "Surplus Earnings."

The word "earnings" means the earnings or reward of labor; the price of services performed. *Pryor v. Metropolitan St. Ry. Co.*, 85 Mo. App. 367, 372; *Goodhart v. Pennsylvania R. Co.*, 35 Atl. 191, 193, 177 Pa. 1, 55 Am. St. Rep. 705.

"Earnings" is that which is earned. *Dayton v. Ewart*, 72 Pac. 420, 421, 28 Mont. 153.

"Earnings" represent, in common speech, the reward for personal services, whether in money or chattels, and they may be acquired or owned or possessed within the fair meaning of a statute providing that a married woman shall have the same right and power as an unmarried person to acquire, own, and possess any property. *Nuding v. Ulrich*, 32 Atl. 409, 410, 169 Pa. 239.

"Wages and earnings," of a debtor, within the meaning of the exemption statute, include such wages and earnings as long as they can be identified, and they do not lose their character by the mere fact of their being paid to the debtor. *Rutter v. Shumway*, 26 Pac. 321, 322, 16 Colo. 95.

"Earnings," as used in a Wisconsin statute providing that the earnings of all married persons, and of all other persons who have to provide for the entire support of a family for 60 days next preceding the issuing of any process, shall be exempt from seizure, means the gains of the debtor derived from his services or labor without the aid of capital. If the debtor has no capital, and no credit contributing to increase his profits, except the credit arising from the labor or service in which he is presently engaged, and out of the proceeds of which his obligations on account of such labor or service are discharged, then his net receipts or gains from such labor or service may fairly be accounted "earnings." *Campfield v. Lang* (U. S.) 25 Fed. 128, 131; *Brown v. Hebard*, 20 Wis. 326, 330, 91 Am. Dec. 408.

#### **Building contract.**

An assignment of a building contract is not an assignment of "earnings," within a statute requiring such an assignment to be recorded. *Abbott v. Davidson*, 25 Atl. 839, 18 R. I. 91.

#### **Compensation from boarders.**

Money due for board furnished to sailors by a debtor, under an agreement with a third person, is "earnings," within the meaning of St. 1865, c. 43, § 2, declaring that an unrecorded assignment of future earnings shall be invalid against a trustee process. *Jason v. Antone*, 131 Mass. 534, 535.

In Code 1873, § 3074, providing that the earnings of a debtor for his personal services or those of his family at any time within 90 days next preceding the levy are exempt from execution and attachment, the term "earnings" means earnings for personal service, as contradistinguished from the income arising from a business involving other elements of gain than the mere personal services of those conducting it. Money due from boarders for board to a boarding house keeper who rents a house for such business, furnishes for the use of the boarders the proper chambers, kitchen, dining room, and other furniture, buys materials for food and has them cooked, employs servants for cooking, waiting on the table, taking care of the chambers, and other purposes, and pays such servants therefor, who assists in and oversees about the house, and charges the boarders a stated sum per month in a lump for the entire board and lodging thus furnished, is not "earnings." The business of keeping a boarding house involves many elements of profit aside from the mere personal earnings of the proprietor and his family. It involves compensation for the use of the premises, including their value and location, the profits on the raw materials employed, and the general character of the establishment. *Shelly v. Smith*, 13 N. W. 419, 420, 59 Iowa, 453.

#### **Compensation for expenditures or materials.**

In St. 1865, c. 43, § 2, declaring an unrecorded assignment of future earnings invalid against trustee process, "earnings" has a more extensive signification than the word "wages," and applies to the compensation for services, a term which involves more than the mere labor of the person by whom they are rendered, and may include compensation for expenditures incurred or materials furnished, as well as labor. *Somers v. Kellher*, 115 Mass. 165, 167; *Jenks v. Dyer*, 102 Mass. 235, 236; *Kendall v. Kingsley*, 120 Mass. 94, 95.

The term "earnings" implies that the sum due shall be claimed for the personal service of the claimant, and that it shall not include, to any substantial extent, recompense for materials furnished. *Dayton v. Ewart*, 72 Pac. 420, 421, 28 Mont. 153.

A fund resulting from sales of materials, manufactured iron, products from the land, or general personal property of a corporation, all indicating a final winding up of the business of the concern, can in no sense be called "earnings." *Gehr v. Mont Alto Iron Co.*, 34 Atl. 638, 639, 174 Pa. 430.

#### **Dividends or net earnings.**

"Earnings," as used in an acceptance of an order and agreement to pay if the earnings of the drawer are sufficient to cover the amount, should be construed to mean the gross earnings, since the word "earnings" never means net earnings unless so qualified. *Smith v. Bates Mach. Co.*, 55 N. E. 69, 182 Ill. 166.

"Earnings," as applied to a corporation, ordinarily means earnings declared as dividends; but it cannot be doubted that a corporation, in the making of contracts and of by-laws, may give to that term a different meaning, and employ it to designate money earned. *Bigbee & W. R. Packet Co. v. Moore*, 25 South. 602, 608, 121 Ala. 379.

#### **Earnings by mental effort.**

In a statute providing that no person summoned as trustee should be charged as such on account of the "personal services or earnings" of the wife of the debtor at any time, or on account of any labor performed by the debtor or any of his family after the service of the process, "earnings" means something more than the term "labor," which has been construed as confined to services where physical toll was the main ingredient, although directed and made more valuable by mechanical skill. Her personal services and earnings may be as well for works of skill and science as for mere physical toll. They are exempt, no matter how earned. *Hoyt v. White*, 46 N. H. 45, 48.

By Laws 1872, c. 155, the individual "earnings" of a married woman, except those occurring by labor performed for her husband, are her separate property, and not subject to her husband's control or liable for his debts. Where a married woman having no separate property purchased a farm on credit, taking the title in her own name, which farm was carried on and managed by her husband, without any specific agreement as to his compensation, the crops raised under such management were "earnings" of the wife, and not liable for the debts of the husband. A wife may get or acquire property by her labor, skill, or talents, and hold and enjoy it as earnings. Dr. Webster defines "earnings" to be that which is earned; that which is gained or merited by labor; service or performance; wages or reward. We know that some gifted women acquire or earn large sums of money by their writings, works of art, or by singing or performance on the stage. Others, again, make wealth in carrying on trade, or by sagacious or well-directed efforts in some branch of industry. These earnings and profits the law secures to the married woman as her separate property. *Dayton v. Walsh*, 2 N. W. 65, 67, 47 Wis. 118, 32 Am. Rep. 757.

#### Earnings with team.

Earnings as used in Rev. St. c. 184, p. 1553, § 140, exempting from seizure on attachment or execution the earnings of all married persons or heads of families for 60 days preceding the process, did not mean merely the earnings by their own manual labor, but would include earnings obtained with team, wagon, or dray and tackle. *Kuntz v. Kinney*, 33 Wis. 510, 513.

#### Profits.

The word "earnings" means the fruit or reward of labor; the price of services performed. Profits derived from an investment or the management of a business enterprise are not earnings. The deduction from such profits of the legal rate of interest on the money employed does not give to the balance of the profits the character of earnings. *Goodhart v. Pennsylvania R. Co.*, 35 Atl. 191, 193, 177 Pa. 1, 55 Am. St. Rep. 705.

#### Rents.

As used in St. 1865, c. 43, § 2, the term "earnings" cannot, upon any construction, however liberal, include rents payable under an ordinary contract or lease which requires no personal service on the part of the lessor. *Kendall v. Kingsley*, 120 Mass. 94, 95.

### EARTH.

"Earth," in chemistry, is a metallic oxide, inodorous, dry, unflammable, and infusible. *Jenkins v. Johnson* (U. S.) 13 Fed. Cas. 525, 527.

Within a contract for excavating, the term "earth" includes everything except rocks, grubbing, and clearing. *Nesbitt v. Louisville, C. & C. R. Co.* (S. C.) 2 Speers, 697, 705.

In St. 1849, c. 437, § 1, authorizing the selectmen of a town to select and lay out a lot of land for a gravel pit for the purpose of securing earth and gravel to be used in the repair of roads, "earth and gravel" should be construed to include any earth, gravel, or stone suitable for use in repairing and constructing roads, and capable of being dug out of the ground and removed by ordinary excavation. The words "earth and gravel" are not to be taken with such extreme strictness as to require that the gravel should be screened, or that the question should be raised and decided judicially how large a piece of gravel or stone may be included in the general description of "earth and gravel." *Hatch v. Hawkes*, 126 Mass. 177, 181.

#### Hardpan and gravel.

"Earth," as used in a contract for the excavation of earth at a certain price per yard, should be construed to include hardpan, which Webster defines as "a hard stratum of earth." Webster defines "earth" to be "soil of all kinds, including gravel, loam, and the like, in distinction from the firm rock." *Dickinson v. City of Poughkeepsie*, 75 N. Y. 65, 71.

"Earth," as used in a contract for the excavation of earth at a certain price per cubic yard, means ordinary earth, and includes all materials whatever from beneath the surface of the ground, which would include indurated earth or gravel. *Shephard v. St. Charles Western Plankroad Co.*, 28 Mo. 373, 377.

In a contract for grading, the term "earth excavations" mean ordinary earth, and, although excavations in general might include all materials found beneath the surface of the ground, yet the expression "excavations of earth" excludes other materials than ordinary earth, such as indurated earth or gravel. *Blair v. Corby*, 37 Mo. 313, 317.

### EARTH OIL.

Under a policy of fire insurance upon a paper mill and machinery, containing a clause prohibiting the storing or use on the premises of "petroleum, rock or earth oil, etc.," kerosene is prohibited. *Buchanan v. Exchange Fire Ins. Co.*, 61 N. Y. 26, 29.

"In the American Encyclopædia (Ed. 1874), 'earth oil' is said to be a term originally employed as a trade-mark for a mixture of certain liquid hydrocarbons used for purposes of illumination. It has been prepared from bituminous coal, bituminous shales, asphaltum, maltus, wood, resin, fish oil, and candle tar; but it is doubtless true that at the

present time its practical business source is petroleum, from which it is obtained by a process of distillation and refinement. It is therefore, in a commercial sense, a refined coal or earth oil." *Bennett v. North British & Mercantile Ins. Co.*, 81 N. Y. 273, 275, 37 Am. Rep. 501.

Naphtha, benzine or benzol, and kerosene are all refined coal or earth oils, not differing in their nature, but only in the degree of inflammability, kerosene being much less inflammable than either of the others. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 536, 11 Am. Rep. 587.

### EARTHENWARE.

"Tiles" are defined as plates or pieces of baked clay used for covering roofs, floors, and walls, and for ornamental work, as well as drains. Such pieces being made of earth are earthen, and, being earthen goods, commodities, or merchandise, are "earthenware" within Customs Duty Act March 3, 1883, c. 121, 22 Stat. 488 [U. S. Comp. St. 1901, p. 2247]. Webster defines "earthenware" as vessels and other utensils, ornaments or the like, made of baked clay. *Rossman v. Hedden*, 145 U. S. 561, 568, 12 Sup. Ct. 925, 36 L. Ed. 817; *Id.* (U. S.) 37 Fed. 99, 102.

"Earthenware," by the Century Dictionary, is anything made of clay, and baked in a kiln or dried in the sun, and does not include statuettes found to be made of plaster of paris, 47 per cent. of which is sulphuric acid, 33 per cent. lime, and 20 per cent. water. *T. Bing & Co.'s Successors v. United States* (U. S.) 121 Fed. 194, 195.

### EARTHY MATERIAL.

Carbonate of lead is an "earthy material"; consequently its use with phosphorus in the formation of a composition for the heads of friction matches is an infringement of a patent for the use, in such connection, of "a paste or composition" consisting of phosphorus and "earthy material," with the addition of a glutinous substance for the purpose of cohesion. *Bryan v. Stevens* (U. S.) 4 Fed. Cas. 510, 511, 513.

### EASEMENT.

See "Apparent Easement"; "Continuous Easement"; "Equitable Easement"; "Implied Easement"; "Intermittent Easement"; "Noncontinuous Easement"; "Private Easement"; "Public Easement"; "Secondary Easement."

Negative easement, see "Amenity."

Other easement, see "Other."

An easement is a liberty, privilege, or advantage which one may have in the land of another without profit. *Appeal of Big*

*Mountain Imp. Co.*, 54 Pa. (4 P. F. Smith) 361; *Albright v. Cortright*, 45 Atl. 634, 635, 64 N. J. Law (35 Vroom) 330, 48 L. R. A. 616, 81 Am. St. Rep. 504; *Pierce v. Keator*, 70 N. Y. 419, 421, 26 Am. Rep. 612; *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367; *Cook v. Chicago, B. & Q. Ry. Co.*, 40 Iowa, 451, 456; *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190; *Johnson v. Lewis*, 2 S. W. 329, 330, 47 Ark. 66; *Scheel v. Alhambra Min. Co.* (U. S.) 79 Fed. 821, 823.

An easement is a liberty, privilege, or advantage in land, without profit, existing distinct from the ownership of the soil. *Harrison v. Boring*, 44 Tex. 255, 267 (citing 3 Kent, Comm. 565); *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453; *Canfield v. Ford* (N. Y.) 23 Barb. 336, 340; *Wessels v. Colebank*, 51 N. E. 639, 640, 174 Ill. 618; *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367.

An easement is a service or convenience which one has of another without profit, as a right of way, water course, or washing place on another's ground. *Brakely v. Sharp*, 9 N. J. Eq. (1 Stockt.) 9, 13 (citing *Jac. Law Dict. tit. "Easement"*); *Dinehart v. Wells* (N. Y.) 2 Barb. 432, 435 (citing 3 Cruise's Dig. n. 484). See, also, *Peck v. Smith*, 1 Conn. 103, 135, 6 Am. Dec. 216; *Rhode Island Hospital Trust Co. v. Hayden*, 40 Atl. 421, 422, 20 R. I. 544, 42 L. R. A. 107.

"Easement" is defined to be a "right without profit, created by grant or prescription, which the owner of one estate may exercise in or over the estate of another for the benefit of the former." *Greenwood, L. & P. J. R. Co. v. New York & G. L. R. Co.*, 31 N. E. 874, 875, 134 N. Y. 435 (quoting *Washb. Easem. 2*); *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa, 451, 456; *McMillian v. Lauer* (N. Y.) 24 N. Y. Supp. 951, 954.

An easement is an interest in land created by grant or agreement, express or implied, which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another. *Los Angeles Terminal Land Co. v. Muir*, 68 Pac. 808, 312, 136 Cal. 36; *Huyck v. Andrews*, 21 N. Y. St. Rep. 924, 927, 929; *Id.*, 20 N. E. 581, 582, 113 N. Y. 81, 3 L. R. A. 789, 10 Am. St. Rep. 432; *Atlantic & P. R. Co. v. Le Sueur*, 19 Pac. 157, 159, 2 Ariz. 428, 1 L. R. A. 244; *Northern Pac. R. Co. v. Garland*, 3 Pac. 134, 139, 5 Mont. 146; *Mayo v. Newhoff*, 19 Atl. 837, 838, 47 N. J. Eq. 31; *Brew v. Van Deman*, 53 Tenn. (6 Heisk.) 433, 436.

An easement is "a privilege without profit which the owner of one tenement has a right to enjoy, in respect of that tenement, in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something

on his own tenement for the advantage of the former." *Stevenson v. Wallace* (Va.) 27 Grat. 77, 87 (quoting *Godd. Easem.* p. 2); *Gray v. McWilliams*, 32 Pac. 976, 977, 98 Cal. 157, 21 L. R. A. 593, 35 Am. St. Rep. 163; *O'Neill v. Bresse*, 23 N. Y. Supp. 526, 527, 3 Misc. Rep. 219; *Wolfe v. Frost* (N. Y.) 4 Sandf. Ch. 72, 89 (citing *Gale & Whatley Easem.* 5); *Churchill v. Burlington Water Co.*, 94 Iowa, 89, 93, 62 N. W. 646; *Stovall v. Coggins Granite Co.*, 42 S. E. 723, 724, 116 Ga. 378.

The term "easement" is used to designate some privilege existing in one not the owner of the real estate, constituting a privilege in reference to the land. *Rowe v. Nally*, 32 Atl. 193, 199, 81 Md. 367.

"An 'easement proper' is a privilege which the owner of one tenement has a right to enjoy, in respect to that tenement, in or over the tenement of another person." *Parsons v. Johnson*, 68 N. Y. 62, 65, 23 Am. Rep. 149.

"An easement is a charge imposed on one heritage for the use and advantage of a heritage belonging to another proprietor." *Manbeck v. Jones*, 42 Atl. 536, 537, 190 Pa. 171.

An "easement" may be concisely defined as a privilege without profit which one has for the benefit of his land in the land of another. *Bonney v. Greenwood*, 52 Atl. 786, 789, 96 Me. 335.

The idea, in definitions of an "easement" to real estate granted, is a privilege off and beyond the local boundaries of the land conveyed. *Tucker v. Jones*, 19 Pac. 571, 573, 8 Mont. 225 (citing *Cave v. Crafts*, 53 Cal. 135).

An easement is a quality superadded to the usual rights, and, as it were, passing the ordinary bounds of property, and with the exception of those easements the enjoyment of which depends upon an actual interference of man at each time of enjoyment, as of a right of way, it is attended with a permanent alteration of the two heritages affected by it, showing that one is benefited and the other burdened by the easement in question. *Tooth v. Bryce*, 25 Atl. 182, 189, 50 N. J. Eq. 589.

"An easement may consist either in suffering something to be done, or in abstaining from doing something upon the servient tenement." 4 Kent, Comm. 419. In the civil law it is denominated a "servitude." A common form of such an easement or servitude is the prohibition of a grantee or lessee from carrying on a particular kind of business or occupation on the servient estate, which, if unobjectionable on grounds of public policy, a court of equity will intervene to establish and protect by asserting a juris-

diction in the nature of specific performance. *McMahon v. Williams*, 79 Ala. 288, 290.

The following land burdens or servitudes upon land may be attached to other lands as incidents or appurtenances, and are then called "easements": (1) The right of pasturage; (2) the right of fishing; (3) the right of taking game; (4) the right of way; (5) the right of taking water, wood, minerals, and other things; (6) the right of transacting business upon land; (7) the right of conducting lawful sports upon land; (8) the right of receiving air, light, or heat from or over, or discharging the same upon or over, land; (9) the right of receiving water from or discharging the same upon land; (10) the right of flowing land; (11) the right of having water flow without diminution or disturbance of any kind; (12) the right of using a wall as a party wall; (13) the right of receiving more than lateral support from adjacent land or things adjacent thereto; (14) the right of having the whole of a division fence maintained by a coterminous owner; (15) the right of having public conveyances stopped, or of stopping the same, on land; (16) the right of a seat in church; (17) the right of burial. The following land burdens or servitudes upon land may be granted and held, though not attached to land: (1) The right of pasture, and of fishing and taking game; (2) the right of a seat in church; (3) the right of burial; (4) the right of taking rents and tolls; (5) the right of way; (6) the right of taking water, wood, minerals, or other things. Civ. Code S. D. 1903, §§ 267, 268; Rev. St. Okl. 1903, §§ 4052, 4053.

#### Apparent, continuous, and discontinuous easements.

Easements or servitudes are divided by the Civil Code of France into continuous and discontinuous ones. *Lampman v. Milks*, 21 N. Y. 505, 515.

"Easements" are divided into two classes, those which are apparent and continuous, and those which are not. The former will pass on the severance of the two tenements as appurtenant without the use of the word "appurtenant," but the latter will not be created unless the grantor uses language in the conveyance sufficient to create the easement de novo. An easement which is continuous, and is made apparent by a permanent structure by means of which the right is enjoyed, is an easement which will be created as an appurtenant without words of grant de novo; as, for instance, the flow of water through a trunk constructed and used for that purpose. *Whalen v. Manchester Land Co.*, 47 Atl. 443, 444, 65 N. J. Law, 206.

Easements are of two kinds, similar to one another in many respects, but differing in many particulars. To the first class belong those easements created by the act of

man, and the second those which are given by law to every owner of land. This latter class is given by law because without them there would be no security in the enjoyment of land by the owner. A right to have surface water flow upon the lands of another in the natural way is an easement of the second class. *Gray v. McWilliams*, 32 Pac. 976, 977, 98 Cal. 157, 21 L. R. A. 593, 35 Am. St. Rep. 163.

#### **As appurtenant to land.**

An easement is part of the estate and vests with it, and is not attached to the person. It is the land constituting the dominant estate which possesses the easement, not the owner of the land. Easements may be acquired either by grant or prescription, but, in whatever manner acquired, they are annexed to dominant estates. The enjoyment by a dominant estate of an easement for a sufficient length of time to create a right by prescription will annex the easement to that estate, and it will pass by grant. *Ross v. Thompson*, 78 Ind. 90, 91.

Generally speaking, an easement is a right which exists in favor of one parcel of land in or over another parcel, and the law of easements relates exclusively to land, and cannot be applied to chattels. In this case it was held that the owner of a building, if he sells part of it, may reserve rights in the part sold, for the benefit of the part retained, which the law will protect. *Mayo v. Newhoff*, 19 Atl. 837, 838, 47 N. J. Eq. (2 Dick.) 81.

#### **Creation.**

An easement is founded on a grant by deed or writing, or by prescription, which supposes one, being a permanent interest in another's land without profit, with a right at all times to enter and enjoy it. *Canfield v. Ford* (N. Y.) 28 Barb. 336, 340 (citing 8 Kent, Comm. 452); *Tabor v. Bradley*, 18 N. Y. 109, 111, 72 Am. Dec. 498; *Long v. Mayberry*, 96 Tenn. (12 Pickle) 378, 382, 36 S. W. 1040; *Ferrell v. Ferrell*, 60 Tenn. (1 Baxt.) 329.

An easement is an interest in land that cannot be created, granted, or transferred except by operation of law, by an instrument in writing, or by prescription. *Smith v. Denniff*, 60 Pac. 898, 399, 24 Mont. 20, 81 Am. St. Rep. 408.

As an easement is an interest in land to be acquired and released only by deed, it cannot be extinguished or renounced by a parol agreement between the owners of the dominant and the servient tenements. *Dyer v. Sanford*, 50 Mass. (9 Metc.) 395, 43 Am. Dec. 899.

Though the grant of an easement is within the statute of frauds and must be in writing, yet a parol grant, executed, will be

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upheld under the same circumstances and on the same principles that a parol contract for the sale of lands would be. *Johnson v. Lewis*, 14 S. W. 466, 467, 47 Ark. 66 (citing *Wynn v. Garland*, 19 Ark. 23, 68 Am. Dec. 190).

There are two very usual methods of creating an easement or imposing a servitude on land: The owner of a tract of land may convey a portion of it, and in the deed of conveyance may retain an easement in it for the benefit of the portion which he does not dispose of; or he may in the deed convey to his grantee an easement in the land which he retains in his possession. These easements are appurtenant to the land, and pass with it to successive grantees. *Rowe v. Nally*, 32 Atl. 198, 199, 81 Md. 367.

#### **Essentials.**

The essential qualities of easements are these: (1) They are incorporeal; (2) they are imposed on corporeal property, and not on the owner thereof; (3) they convey no right to a participation in the profits arising from the sale of the property; (4) they are imposed for the benefit of the corporeal property; (5) there must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests. *Pierce v. Keator*, 70 N. Y. 419, 421, 26 Am. Rep. 612 (citing *Bouv. Law Dict.*; *Wash. Easem. c. 1, § 1*); *Wolfe v. Frost* (N. Y.) 4 Sandf. Ch. 72, 89; *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453; *Kellett v. Ida Clayton & G. W. Wagon Road Co.*, 33 Pac. 885, 886, 99 Cal. 210.

The essential qualities of easements are these: First, they are incorporeal; second, they are imposed on corporeal property; third, they confer no right to a participation in the profits arising from such property; fourth, they are imposed for the benefit of corporeal property. *Shirley v. Crabb*, 37 N. E. 130, 132, 138 Ind. 200, 46 Am. St. Rep. 376 (citing *Robinson v. Thraikill*, 110 Ind. 117, 10 N. E. 647; *Branson v. Studabaker*, 133 Ind. 147, 33 N. E. 98).

#### **Same—Dominant and servient estates.**

The existence of an easement involves the idea of two distinct tenements—a dominant estate, to which the right is accessorial; and a servient estate, upon which it is a burden or charge. *McMahon v. Williams*, 79 Ala. 288, 290.

It is among the essential qualities of every easement that there are two distinct tenements or estates—the dominant, to which the right belongs, and the servient, upon which the obligation is imposed. *Bonney v. Greenwood*, 52 Atl. 786, 789, 96 Me. 335; *Seymour v. Lewis*, 13 N. J. Eq. (1 Beas.) 439, 450, 78 Am. Dec. 108; *Nellis v. Munson*, 15 N. E. 739, 740, 108 N. Y. 453; *Kellett v. Ida Clay-*



ton & G. W. Wagon Road Co., 33 Pac. 885, 888, 99 Cal. 210; *Wolfe v. Frost* (N. Y.) 4 Sandf. Ch. 72, 89; *Pierce v. Keator*, 70 N. Y. 419, 421, 28 Am. Rep. 612; *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354.

"An easement is a right in the lands of another. No one can have an easement in his own lands; and if an easement exists, if the owner of the dominant or servient tenement acquire the other, the easement is extinguished." *Denton v. Leddell*, 23 N. J. Eq. (S. C. E. Green) 64, 66; *Tabor v. Bradley*, 18 N. Y. 109, 111, 72 Am. Dec. 498; *Miller v. Platt*, 12 N. Y. Super. Ct. (S. Duer) 272, 277.

"An easement can only consist of a privilege upon or in the land of another, such as a right of way and the like. From its nature, a man can never have an easement in his own land. Having exclusive and the whole uninterrupted right to this enjoyment, he can in no sense have an easement connected with it;" and hence lands belonging to a bridge company could not pass as an easement to the bridge when it was conveyed by a deed of trust. *St. Louis Bridge Co. v. Curtis*, 103 Ill. 410, 419.

A person cannot have an "easement," in the legal sense of the word, over his own land. Therefore where two adjoining tracts were owned by the same party, who had been accustomed for years to pass from his mansion on the one, across the other, to and from the public road, no right of way as an easement was established appurtenant to the estate on which the house was built. *Stuyvesant v. Woodruff*, 21 N. J. Law (1 Zab.) 133, 136, 151, 57 Am. Dec. 156.

An easement or right appurtenant to one tenement to the enjoyment of some privilege in neighboring land may survive the destruction of a part of the servient estate when there is anything remaining upon which the dominant estate may operate. But the right to the use and enjoyment of a privilege in a particular building of another, which does not involve any interest in the soil apart from the building, is extinguished by the destruction of the building, for the obvious reason that nothing remains on which it can operate. *Bonney v. Greenwood*, 52 Atl. 786, 789, 96 Me. 335.

#### As incorporeal hereditament.

An easement is an incorporeal hereditament, an interest in the servient estate. *Warner v. Rogers*, 23 Minn. 34, 37; *Mackey v. Harmon*, 24 N. W. 702, 703, 34 Minn. 168; *Clawson v. Wallace*, 52 Pac. 9, 10, 16 Utah, 300.

"An easement is an incorporeal hereditament, and passes with the dominant tenement by grant or succession, and the servient tenement is transmitted subject to the easement in a like manner." *Wolfe v. Frost*

(N. Y.) 4 Sandf. Ch. 72, 73. See, also, *Nunnally v. Warner Iron Co.*, 94 Tenn. (10 Pickle) 397, 413, 29 S. W. 361, 28 L. R. A. 421.

#### As an incumbrance.

See "Incumbrance (On Title)."

#### As an interest in land.

An easement is a right in the land of another. *Fetters v. Humphries*, 18 N. J. Eq. (S. C. E. Green) 260, 262.

An easement creates an interest in land. *Robinson v. Thraikill*, 10 N. E. 647, 110 Ind. 117; *Branson v. Studabaker*, 33 N. E. 98, 104, 133 Ind. 147; *Shirley v. Crabb*, 37 N. E. 180, 132, 133 Ind. 200, 46 Am. St. Rep. 376.

An easement is said to be a permanent interest in another's land, with a right at all times to enter and enjoy it, and must therefore be founded upon a grant by deed or writing, or upon prescription. *Emerson v. Bergin*, 18 Pac. 264, 266, 76 Cal. 197; *Jensen v. Hunter* (Cal.) 41 Pac. 14, 17; *Canfield v. Ford* (N. Y.) 28 Barb. 336, 340; *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367; *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa, 451, 456.

"An easement is a privilege, service, or convenience in the estate of another by grant or prescription, but comprises no interest in the thing itself. It supposes that different rights in the use of the same thing may co-exist in different persons." *Peck v. Smith*, 1 Conn. 103, 135, 6 Am. Dec. 216; *Rhode Island Hospital Trust Co. v. Hayden*, 40 Atl. 421, 422, 20 R. I. 544, 42 L. R. A. 107. And nothing is more common than for one to have an easement in the land of another, who has an estate in fee and is in actual possession. It is compatible with the right of the owner of the fee to depasture and mow it, to take the trees and anything growing on it, and hold it in possession for these purposes. *Rhode Island Hospital Trust Co. v. Hayden*, 40 Atl. 421, 422, 20 R. I. 544, 42 L. R. A. 107.

An easement in land, though an incorporeal right, is a hereditament; an interest in land. *Long v. Mayberry*, 96 Tenn. (12 Pickle) 378, 382, 36 S. W. 1040 (citing *Nunnally v. Southern Iron Co.*, 94 Tenn. 397, 413, 29 S. W. 361, 28 L. R. A. 421).

The grant of an easement, such as a right of way, is an estate in land, and hence comes within the purview of our registration law, and unless it is registered it is inoperative against subsequent purchasers without notice. *Parker v. Meredith* (Tenn.) 59 S. W. 167, 170.

The easement of a railroad company in its right of way of which it does not own the fee is not an "easement" in the strict technical sense of the term, which is a right in common with the owner, but is rather in

the nature of an interest in the land. *Boyce v. Missouri Pac. R. Co.*, 68 S. W. 920, 922, 168 Mo. 583, 58 L. R. A. 442.

#### As land.

See, also, "Land."

An easement in a street or other highway appurtenant to an abutting lot partakes of the nature of land. It is a part of the lot to which it is appurtenant, passing to a purchaser with a conveyance of the lot, and descending to the heir on the death of the ancestor. *Baltimore & O. R. Co. v. Lersch*, 51 N. E. 543, 545, 58 Ohio St. 639.

An easement is connected with and appurtenant to real estate, and so far partakes of the character of the lands that it can only be acquired by grant or prescription, which implies a previous grant. *Forbes v. Balen-seifer*, 74 Ill. 183, 185 (citing Washb. Easem. 23); *Atlantic P. R. Co. v. Le Sueur*, 19 Pac. 157, 159, 2 Ariz. 428, 1 L. R. A. 244.

#### As property.

See "Property."

#### As right to use.

"An 'easement' is defined to be the right which one man has to use the land of another for a specific purpose." *Jackson v. Trullinger*, 9 Or. 393, 397; *Tabor v. Bradley*, 18 N. Y. 109, 111, 72 Am. Dec. 498.

An easement is a right which one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor. *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 147, 54 Am. Dec. 744.

The right of making use of the land of others, whether it be that of the public or of individuals, for precise and definite purposes not inconsistent with the general right and all property in the owner, especially where it is for a public use, is in legal contemplation an "easement" or franchise, and not a grant of the soil or general property. *Boston Water Power Co. v. Boston & W. R. Corp.*, 33 Mass. (16 Pick.) 512, 522.

"An 'easement' has been defined to consist of a right of an owner in one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." *Warner v. Rogers*, 23 Minn. 34, 35 (citing 1 Washb. R. P. 397; 2 Washb. R. P. 25, 78; Washb. on Easem. 2-5; Bouv. Dict. tit. "Easement"); *Mackey v. Harmon*, 24 N. W. 702, 703, 34 Minn. 168; *Wessels v. Colebank*, 51 N. E. 639, 640, 174 Ill. 618; *Stevens v. Dennett*, 51 N. H. 324, 330; *Clark v. Gidden*, 15 Atl. 358, 360, 60 Vt. 702.

In strictness an "easement" is a mere use of the land of another without taking anything from it. *Kennedy Stave & Cooper-*

*age Co. v. Sloss-Sheffield Steel & Iron Co.*, 34 South. 372, 373, 137 Ala. 401.

An easement is a right issuing out of the soil, and not the right to possess the soil. It admits the possession to be in the owner of the fee. *Post v. Pearsall* (N. Y.) 22 Wend. 425, 438.

An easement merely gives to a railroad company a right of way in the land; that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purpose of constructing, maintaining, and operating a railroad thereon. The former proprietor of the soil still retains the fee, and his right to the land for every purpose not incompatible with the rights of the railroad company. *Chicago & El. I. R. Co. v. Clapp*, 66 N. E. 223, 224, 201 Ill. 418.

An easement is always distinct from the occupation and enjoyment of the land itself. *Wessels v. Colebank*, 51 N. E. 639, 640, 174 Ill. 618.

#### As title.

Easements are not rights distinct from the title of the land. They are imposed on corporeal property for the benefit of corporeal property. *Seymour v. Lewis*, 13 N. J. Eq. (2 Beas.) 439, 450, 78 Am. Dec. 108 (citing *Gale & Whatley*, Easem. 5, 2 Bouv. Inst. 170).

Strictly speaking, an easement does not confer title, but it may affect the title and possession of the owner to such an extent as to be more than an incumbrance. *Coleman v. Thomson*, 6 Pa. Co. Ct. R. 123, 128.

#### Unity of title.

That which is claimed to be an easement or servitude must not only be appendant, in utility and fitness for use, to the principal or dominant estate, but there must be a unity of title or right in the same person to both the superior estate and the easement claimed. *Meek v. Breckenridge*, 29 Ohio St. 642, 648.

#### Exemption from toll.

The right to take toll is called an "easement," but as a turnpike company has only a right of way or easement in the road, an exemption from toll is not an easement, it not being a right imposed on the corporeal property. *Kellett v. Ida Clayton & G. W. Wagon Road Co.*, 33 Pac. 885, 886, 99 Cal. 210.

#### Highway distinguished.

See "Highway."

#### License distinguished.

An easement is a liberty, privilege, or advantage in land, without profit, existing

distinct from the ownership of the soil; and, because it is a permanent interest in another's land, with a right to enter at all times and enjoy it, it must be founded upon an agreement by writing or upon prescription. But a license is an authority to do a particular act or series of acts upon another's land without possessing any estate therein. It is founded on personal confidence, and is not assignable or within the statute of frauds. The distinction between a "license" and an "easement" is oftentimes very subtle and difficult to discern.) *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa, 456. The right to use a stairway granted by the owner of the building to the owner of an adjoining building, constitutes an easement. *Stokes v. Maxson*, 84 N. W. 949, 950, 113 Iowa, 122, 86 Am. St. Rep. 367; *Cook v. Chicago, B. & Q. R. Co.*, 40 Iowa, 451, 456; *Jensen v. Hunter* (Cal.) 41 Pac. 14, 17; Washburn, in discussing the distinction between an "easement" and a "license," says that "an easement always implies an interest in the land on or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration; an easement must be an interest in or over the soil. It lies not in livery, but in a grant, and a freehold interest in it cannot be created or passed otherwise than by deed." *Nellis v. Munson*, 13 N. Y. St. Rep. 825, 827. See, also, *Atlantic P. R. Co. v. Lesueur*, 19 Pac. 157, 159, 2 Ariz. 428, 1 L. R. A. 244; *Schaeffler v. Miehling*, 34 N. Y. Supp. 693, 13 Misc. Rep. 520; *Rochester Trust & Safe-Deposit Co. v. Rochester & I. R. Co.*, 60 N. Y. Supp. 409, 410, 29 Misc. Rep. 222.

An "easement" implies an interest in the land, which can only be created by writing, or constructively, its equivalent, prescription. A "license" may be created by parol. A license is an authority to do particular acts or series of acts on another's land without possessing any estate therein, and hence a "license" and "easement" are distinguished by the fact that it requires words of grant to create an easement or permanent interest in realty; so that a writing signed by N., reciting that for a certain consideration he agrees to allow the W. Co. to pass the muddy water from its ore washers through a stream on his farm so long as the said W. Co. may wish to run or have run said washers, merely gives a license and not an easement. *Nunnally v. Southern Iron Co.*, 29 S. W. 361, 365, 94 Tenn. (10 Pickle) 397, 28 L. R. A. 421.

"License," as a term of real estate law, is defined to be an authority to do a particular act or series of acts upon another's land, without possessing any estate therein, and is generally created by parol, though it may be inferred from circumstances in the relationship of the parties. It is distinguished

from an "easement," which must be created by grant or prescription, in the fact that the latter always implies an interest in the land upon which it is imposed; while a "dis-pensation" or "license" passes no interest, nor does it alter or transfer property in anything, but only makes an action lawful which without it would have been unlawful. *Baldwin v. Taylor*, 31 Atl. 250, 251, 166 Pa. 507.

A "license" is defined to be an authority given to do some act or a series of acts on the land of another, without passing any interest in the land; while an "easement" is a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a specific purpose not inconsistent with a general property in the owner; a right which one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor. The grant of an easement does not pass the realty to the grantee. It conveys an interest in the realty, it is true; but that interest consists of a right to use, like a way over land, or a right of aqueduct or drainage through it, while the general property remains in the grantor. It is well settled that an easement must pass by deed or by prescription, while a mere license to do a particular act or series of acts on the lands may be by parol. It is apparent that the distinction between an "easement" and a "parol license" cannot always be maintained either in respect to the extent of the privilege or its duration. *Clark v. Glidden*, 15 Atl. 358, 360, 60 Vt. 702.

An easement is a permanent right, conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with the general ownership. *Lorr; Island R. Co. v. Garvey*, 159 N. Y. 334, 338, 54 N. E. 60, and cases cited. A franchise is a grant by or under the authority of government, conferring a special, and usually a permanent, right to do an act or series of acts of public concern, and when accepted it becomes a contract, and is irrevocable unless the right to revoke it is expressly reserved. *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 378, 387, 8 Am. Dec. 243; *Bank of Augusta v. Earle* (U. S.) 13 Pet. 519, 595, 10 L. Ed. 274; *California v. Central Pac. R. Co.*, 127 U. S. 1, 40, 8 Sup. Ct. 1073, 32 L. Ed. 150. A license is a personal, revocable, and nonassignable privilege given by writing or parol to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. *Greenwood Lake & P. J. R. Co. v. New York & G. L. R. Co.*, 134 N. Y. 435, 440, 31 N. E. 874, and cases cited. "Although originally revocable at the will of the licensor, it may become irrevocable through

expenditure of money by the licensee." *Id.* These definitions, while not comprehensive enough to cover all cases, are sufficient to show that the resolutions of the trustees of a town which give a person liberty to make a roadway and erect a bridge, and which is passed in the exercise of a governmental power conferred by charter in colonial days, creates a franchise rather than a license or an easement. *Trustees of Freeholders & Commonalty v. Jessup*, 56 N. E. 538, 539, 162 N. Y. 122.

#### **Profit a prendre distinguished.**

See "Profit a Prendre."

#### **Right of way.**

A right of way over the land of another is designated in common law as an "easement." *Manbeck v. Jones*, 21 Pa. Co. Ct. R. 300, 302; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. (9 P. F. Smith) 290, 294; *Kieffer v. Imhoff*, 26 Pa. (2 Casey) 438; *Clawson v. Wallace*, 52 Pac. 9, 10, 16 Utah, 300; *Lidgerding v. Zignego*, 80 N. W. 360, 361, 77 Minn. 421, 77 Am. St. Rep. 677; *Clayton v. Chicago, I. & D. Ry. Co.*, 25 N. W. 150, 67 Iowa, 238; *Appeal of Hoffman*, 12 Atl. 57, 60, 118 Pa. 512; *Truax v. Gregory*, 63 N. E. 674, 676, 196 Ill. 83; *Cairo, V. & C. R. Co. v. Brevoort (U. S.)* 62 Fed. 129, 135, 25 L. R. A. 527; *Northern Pac. R. Co. v. Carland*, 3 Pac. 134, 139, 5 Mont. 146.

#### **Right of way in gross distinguished.**

The principal distinction between a "right of way in gross" and an "easement" is found in the fact that in the first there is, and in the second there is not, a dominant tenement. The right of way is in gross and personal to the grantee because it is not appurtenant to the other premises. The owner of premises may grant the right of way in either form, and, if it is the intention to grant a right of way in gross, there is no mention of dominant premises. If the grant is of an easement it is always made for the benefit of other premises, and the premises to which the way becomes appurtenant are described in the grant. *Wagner v. Hanna*, 38 Cal. 111, 116, 99 Am. Dec. 354.

#### **Riparian rights.**

The term "easement" includes the servitude in a river, which is an appendant to land fronting thereon. *Slingerland v. International Contracting Co.*, 60 N. Y. Supp. 12, 17, 43 App. Div. 215.

The flow of water to and over riparian lands is not a mere easement, but, while more than an easement, may be stated to include the qualities of an easement. *Lux v. Haggin*, 69 Cal. 255, 293, 10 Pac. 674, 693.

St. 1840, c. 87, § 1, providing that the Supreme Judicial Court has original and ex-

clusive jurisdiction of all "actions respecting easements on real estate," but not including complaints for flowing land, should be construed to include an action for the erection of a dam below the mill and close of the plaintiff whereby the water of a river was prevented from flowing and passing off from plaintiff's wheel along the river in its usual course, thereby ran water back on the plaintiff's wheel, since the right of plaintiff to have the waters of the river flow over the land of another below his land and mill, at the place where the obstruction was erected, in its accustomed course, free from all artificial obstruction, was a right to a natural easement. The right which a party has to the use of water flowing over his own land is a real or corporeal hereditament, and not an easement; but the right of a party to have the water of a stream or water course flow to or over his lands or mill from the land of another is an incorporeal hereditament and an easement, and it is immaterial whether the water course be natural or artificial, or whether the right was derived *ex jure naturæ* or by grant or prescription. *Cary v. Daniels*, 46 Mass. (5 Metc.) 236, 237.

#### **Tenancy in.**

The definition of an "easement" excludes the idea of its being held as a tenancy. There may be an enjoyment of the easement, but no possession such as can be made the basis of an action of ejectment. No such action will lie to recover possession of the water course. *Swift v. Goodrich*, 11 Pac. 561, 563, 70 Cal. 103.

#### **EASEMENT APPURTENANT.**

See "Appurtenance—Appurtenant."

#### **EASEMENT IN GROSS.**

"An easement in gross is a mere personal interest in the real estate of another, and is not assignable or inheritable. It dies with the person, and it is so exclusively personal that the owner by right cannot take another person in company with him." *Cudwalader v. Bailey*, 23 Atl. 20, 21, 17 R. I. 495, 14 L. R. A. 300.

An easement is appurtenant and not in gross when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it. Thus, where a right of way was granted by the owner of land on a highway to an adjoining owner who had no means of access to the highway, such right of way was an easement appurtenant to the

adjoining owner's loss, and not in gross. *Lidgerding v. Zignego*, 80 N. W. 380, 381, 77 Minn. 421, 77 Am. St. Rep. 677.

An "easement in gross," as the term is now commonly used, is a mere personal right in the land of another, while an "easement appurtenant" is an incorporeal right which is attached to and belongs to some superior right. In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances. Thus a grant of a right of way to the owners of a stone quarry for the purpose of building a spur track from the main track of a railroad to the stone quarry is an easement appurtenant, and not an easement in gross. *Stovall v. Coggins Granite Co.*, 42 S. E. 723, 724, 116 Ga. 376.

An easement in gross is a personal right; one which may be assigned by the grantee to another person. Thus a deed of a lot of land which grants a right of way from a street across the rear of another lot owned by the grantor, to be used in common with the owners of the two lots, gives an easement appurtenant to the land conveyed, and will not be presumed to be personal or an easement in gross. *Reise v. Enos*, 45 N. W. 414, 415, 76 Wis. 634, 8 L. R. A. 617.

A deed granting to a city the right of going upon the land and constructing and maintaining a canal for its use, and to cut timber and carry stone for such purpose, was an easement in gross, because it does not appear to be appurtenant to any estate in land, and it was upon condition that before letting the water into the canal the city should construct and operate a highway of certain dimensions along the canal. *Pinkum v. City of Eau Claire*, 51 N. W. 550, 553, 81 Wis. 301.

#### EASEMENT OF ACCESS.

See "Access (Easement of)."

#### EASEMENT OF NATURAL SUPPORT.

An "easement of natural support" of the land of one by the land of the adjacent owner applies only to lands in their natural condition, and does not extend so as to give the owner of a building erected on the confines of his land the right to have it supported laterally by the land of his neighbor; and so it has become the settled doctrine of the law that if one by excavating on his own land adjacent to the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it stood to give way. *Booth v. Rome, W. & O. T. R. Co.*, 35 N. E. 592, 594, 140 N. Y. 267, 24 L. R. A. 105, 37 Am. St. Rep. 552.

#### EASEMENT OF NAVIGATION.

Clearly the term "easement of navigation" should not be construed in any narrow scientific sense, but, having in mind that the reservation of the easement of navigation by a state in a navigable river is for the benefit of the public in its use of the highway, it should receive a construction in harmony with the nature of the uses of the water by the public, and the objects of a public good to be accomplished by such uses. Those objects relate to trade and commerce, which is the interchange of goods or products between nations or individuals by means of transportation, or, as applied to commerce on the water, by means of navigation. One dictionary meaning of "navigation" is "the science or art of conducting a ship from one place to another." Another definition is "the science or art of ascertaining the position and directing the course of vessels, especially at sea, by astronomical observations or calculations; nautical science or art." And still another definition is "shipping," which would embrace conduct of ships generally. Commerce, then, is the object; navigation, the instrument or incident. In other words, navigation is the means by which commerce is accomplished, and it is for the purpose of aiding commerce that navigation is encouraged and protected. When the term "easement of navigation" is used, therefore, it carries with it the idea of navigation for the purpose of commerce, so that whatever relates to commerce or is incident to it is embraced in the term. *Pollock v. Cleveland Shipbuilding Co.*, 47 N. E. 582, 583, 56 Ohio St. 655 (citing *State v. Shannon*, 36 Ohio St. 423, 38 Am. Rep. 599; *Sweatt v. Boston, H. & M. R. Co.*, 23 Fed. Cas. 530).

#### EAST.

In describing courses, the word "east" means true course, and refers to the true meridian, unless otherwise declared. *Pol. Code Cal.* 1903, § 8903; *Pol. Code Mont.* 1895, § 4103.

"East of the Cape of Good Hope," as used in *Tariff Act* 1872, fixing an additional ad valorem duty on goods imported from countries east of the Cape of Good Hope, should be construed to mean countries which, before the construction of the Suez Canal, ordinarily carried on commerce with the United States by passing around the Cape of Good Hope. "Although the act of 1872 was passed after the Suez Canal was in operation, we see no indication of an intention by Congress to give a new meaning to the language employed, which had received a judicial construction. The words used are words of description, and indicate to the popular mind the same countries now as they had before the course of trade was to some extent changed by cutting through the Isthmus of

Suez." *Powers v. Comley*, 101 U. S. 789, 790, 25 L. Ed. 805.

### EASTERLY.

The word "easterly," as used in a mining location describing the location of a vein, will not be held to mean due east, as in the case of deeds, but that the general course of the vein or location runs nearer towards the east than any of the other cardinal points of the compass. *Wiltsee v. King of Arizona Min. & Mill. Co. (Ariz.)* 60 Pac. 896, 898.

There are very few words in our language more indefinite and uncertain in their meaning than the words "southerly," "easterly," and "northerly." The word "southerly," as applied to the course of a proposed highway, designating the course as "thence southerly to avoid a certain creek, and thence easterly and northerly through certain lands," means nearly south, but how near, and whether east or west or south, it is impossible to tell without the use of other qualifying words; and so with regard to the words "easterly" and "northerly." It is impossible to determine with any certainty the course intended thereby. *Scraper v. Pipes*, 59 Ind. 158, 164.

The words "northerly" and "easterly" in the description in a deed, where there is no object to direct their course, must be taken to mean due north and due east, and, when there are monuments to which they are applicable, they have their legitimate meaning and full force, and yet the course may incline either way any distance, so long as it tends toward the north and east. *Foster v. Foss*, 77 Me. 279, 280.

The word "easterly" means due east, unless controlled by other words, or by lines, monuments, or natural objects. *Pol. Code Cal.* 1903, § 3904; *Pol. Code Mont.* 1895, § 4104.

### EASTWARDLY.

"Eastwardly," as used in a deed or grant of land to describe a call or a line to run eastwardly, is an indefinite expression, and means nothing more, necessarily, than that the land shall lie on the eastern, and not on the western, side of a given line. It signifies on which side of the base of the lines marking the survey the land is to lie. *Freeble v. Vanhoozer*, 5 Ky. (2 Bibb) 118, 120.

"Eastwardly," as used in a grant, means due east, unless there be some object which can be found to control the course, in which case the course will run east, varying from that point to include the object. *Simms v. Dickson* (U. S.) 3 Tenn. (1 Cooke) 137, 140, 22 Fed. Cas. 158.

"Eastwardly," in a description in a deed, when used alone, will be construed to mean

due east, but when used with other words which are added to qualify its meaning, it will be held to mean precisely what the qualifying words make it mean. Thus, where the boundary line on one side of land conveyed is described as running from a given monument eastwardly to a creek parallel with the southerly line of another tract of land, and the line of the other tract is not a straight line, but meanders, then the boundary line described in the deed will run parallel with the other line in its meanders, and not straight due east and parallel with its ordinary course. *Fratt v. Woodward*, 82 Cal. 219, 227, 91 Am. Dec. 573.

### EATING HOUSE.

An eating house for meals cannot be considered an inn, nor can the liabilities attaching to innkeepers be extended to the proprietor of such an establishment. It is wanting in some of the requisites necessary to constitute it an inn, as no lodging places are provided for travelers. *Carpenter v. Taylor* (N. Y.) 1 Hill. 193, 195.

"Eating house," as used in Acts 1872-73, c. 144, § 13, imposing a tax for the privilege of carrying on eating houses, cannot be construed to include a stall in a market house at which meals were furnished to the public, for in ordinary conversation nobody would speak of a stall in a market as a "house," nor, because meals were sold at the stall, would it be ordinarily spoken of as an "eating house." *State v. Hall*, 73 N. C. 252, 253.

The words "regular hotels and eating houses," in Rev. St. § 8092, providing that all places where intoxicating liquors are sold shall be closed on Sunday, but that the term "place," in reference to regular hotels and eating houses, shall be construed to mean a room or part of the room where such liquors are usually exposed to sale, designate the place of the principal, and not the subordinate, business, which is the carrying on the hotel or eating house. *Lederer v. State*, 3 O. C. D. 303, 304.

### EAVES.

The "eaves" of a building are the edges of the roof projecting beyond the face of the walls. *Proprietors of Center St. Church v. Machias Hotel Co.*, 51 Me. 413, 414.

### EAVESDROPPER.

An "eavesdropper" is one who is secretly a listener to conversations between others, and would include a person who merely overheard communications or conversations between a husband and wife. *Selden v. State*, 42 N. W. 218, 219, 74 Wis. 271, 17 Am. St. Rep. 144.

**EAVESDROPPING.**

Blackstone, defining the offense of "eavesdropping," says: "Eavesdroppers, or such as listen under walls or windows or the eaves of houses, and harken for discourse, and thereupon frame slanderous and mischievous tales, are a common nuisance." 4 Bl. Comm. 168. Bishop says: "It consists in the nuisance of hanging about the dwelling house of another, hearing tattle, and repeating it, to the disturbance of the neighborhood." *State v. Pennington*, 40 Tenn. (3 Head) 299, 300, 75 Am. Dec. 771 (citing 2 Bish. Cr. Law, 274).

"Eavesdropping" consists in privately listening, but not looking or peeping, into the affairs of another. Eavesdropping is an indictable offense in Pennsylvania, but it seems that no prosecution would lie for such offense if it was proved to have been committed either by or under the authority of the husband of the prosecutrix, who was the subject of the offense, there being no law which can prevent a husband from setting a watch on his wife. *Commonwealth v. Lovett* (Pa.) 4 Clark, 5.

**EBONY.**

The terms "ebony" and "rosewood," as used in Tariff Act July 30, 1846, Schedule B, providing that manufacturers of ebony and rosewood, etc., should be subject to a duty of 40 per cent. ad valorem, did not mean articles manufactured from ebony and rosewood entirely, but included as well fancy boxes made of common wood, and veneered with rosewood or ebony, invoiced as rosewood and ebony boxes, and known to the trade by those names, and also as fancy boxes and furnishing boxes, it not appearing that there are any articles known as "ebony boxes" or "rosewood boxes" made wholly from those woods. *Sill v. Lawrence* (U. S.) 22 Fed. Cas. 115, 116.

**EBRIETY.**

"Ebriety" is a word nearly synonymous with "inebriation" and "intoxication," and is expressive of that state and condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of intoxicating liquors. *Commonwealth v. Whitney*, 65 Mass. (11 Cush.) 477, 479.

**ECCENTRICITY.**

A distinction between mere "eccentricity" and "unsoundness of mind," similar to that between "weakness" and "unsoundness," must be noticed and remembered. In the order of nature, no two individuals of the same species are exactly alike. Each individual has his own idiosyncrasies or peculiar

government of his powers, and, while he resembles all others in certain general features of body and mind, he differs from them in certain particulars. "Eccentricity" is a marked peculiarity and yet essential difference. The great masses of sound minds, like a company of travelers, are found near together, but there are some whose eccentricities travel so widely they are seen apart, yet not so far that it can be said that they have parted company and entered the ranks of the unsound of mind. *Ekin's Heirs v. McCracken* (Pa.) 11 Phila. 534, 535.

**ECCLESIASTICAL.**

"Ecclesiastical" is something belonging to or set apart for the church, as distinguished from "civil" or "secular," with regard to the world. *Wharton and Black, Law Dicts.*

**ECCLESIASTICAL CORPORATIONS.**

"Ecclesiastical corporations," says Blackstone, "are where the members who compose it are entirely spiritual persons, such as bishops, certain deans, and prebendaries; all archdeacons, parsons, and vicars, which are sole corporations; deans and chapters at present, and formerly priors and convents, abbots and monks, and the like; bodies aggregate." And in describing the class of lay corporations known as "eleemosynary," he adds: "And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies." 1 Bl. 470. It is not the profession of piety by the individuals that renders the corporation of which they are the members ecclesiastical. The corporation must be spiritual in a legal, and not in a popular or scriptural, sense. Lay corporations may be for the advancement of religion, and the members may all be clergymen even, but that does not make the corporation ecclesiastical. *Robertson v. Bullions* (N. Y.) 9 Barb. 64, 87.

Religious corporations incorporated under the law of New York are not "ecclesiastical corporations" in the sense of the English law. *Robertson v. Bullions*, 11 N. Y. (1 Kern.) 243, 265, 266.

**ECCLESIASTICAL COUNCIL.**

An "ecclesiastical council" is a tribunal frequently resorted to in the settlement of clergymen, and reconciling and healing differences and divisions in churches, and adjusting and terminating controversies between pastors and their churches. It is frequently called an "advisory court." *Stearns v. First Parish in Bedford*, 38 Mass. (21 Pick.) 114, 124.

An "ecclesiastical council" is a judicial tribunal whose province it is, on the proper presentation of charges, to try them on evidence admissible before such a tribunal. They have no power to dissolve a contract, nor to absolve either party from its obligation. They may not only try and determine the existence of the causes which work a forfeiture of a clerical office, but they may also give their advice in cases where there is no forfeiture, and well would it be for parishes and pastors were such advice more frequently followed. *Sheldon v. Congregational Parish in Easton*, 41 Mass. (24 Pick.) 281, 288, 289.

#### ECCLESIASTICAL COURTS.

The term "ecclesiastical courts" is used in England to designate the courts administering the canon law. *Equitable Life Assur. Soc. of United States v. Paterson*, 41 Ga. 338, 364, 5 Am. Rep. 535.

#### ECCLESIASTICAL JURISDICTION.

The jurisdiction of the lay and ecclesiastical courts. "In Anglo-Saxon times there was no distinction between lay and ecclesiastical jurisdiction. The county court was as much a spiritual as a temporal tribunal. The rights of the church were ascertained and asserted at the same time and by the same judges as the rights of the laity. It was not till after the Norman Conquest that the common-law and ecclesiastical courts were separated and the latter invested with the sole jurisdiction over ecclesiastical cases." *Short v. Stotts*, 58 Ind. 29, 35 (quoting 3 Chitty, Bl. Comm. pp. 61, 63).

#### ECCLESIASTICAL LAW.

Of the several branches of the unwritten law of England there is one properly to be deemed common law, yet technically called "ecclesiastical law." To the branch of the common law called "ecclesiastical" the subject of marriage and divorce in England pertains. *De Witt v. De Witt*, 66 N. E. 136, 138, 67 Ohio St. 340 (citing Bish. Mar. & Div. § 114).

#### ECCLESIASTICAL THINGS.

The phrase "ecclesiastical things," as used in the corpus juris canonici, which is an abridgment of the canon law of the Church of Rome, includes church buildings, church property, the ornaments, cemetery, or property given to the church for poor orphans or any other pious purpose whatever. *Smith v. Bonhoff*, 2 Mich. 115, 116, 121.

#### ECLECTIC.

In medicine "eclectic practice," "is a system of practice which is unusual and eccen-

tric, and not countenanced by the allopathic school of medicine, but characterized by them as spurious and denounced as dangerous. It is essentially different from the allopathic practice, and based on different views of the nature and causes of diseases, their appropriate remedies, and the modes of applying them." *Bradbury v. Bardin*, 34 Conn. 452, 453.

#### ECUMENICAL COUNCIL.

An "ecumenical council" is a universal council, a council of all and not of a part, and is only applied to the councils of the Catholic Church. A synod is improperly spoken of as an "ecumenical council." The word "synod" signifies simply a meeting of the few adjoining presbyteries. *Groesbeeck v. Dunscomb* (N. Y.) 41 How. Prac. 302, 344.

#### EDGE.

A deed of land defining one of its boundaries as the "edge of the mill pond" means the bank of the pond, and gives the land a defined boundary without regard to the contingent subsidence of the water constituting a pond, thereby leaving the land dry, and passes no title to the land under the pond. The grantee can acquire no title to the land thereunder by accretion, as in the case of a navigable stream. *Holden v. Chandler*, 18 Atl. 310, 311, 61 Vt. 291.

#### EDIBLE.

The word "edible," in Tariff Act 1890, par. 560, relating to the duties on certain drugs, etc., which are not edible, etc., is intended to exclude from the exemption such of the enumerated articles as are edible according to the common understanding. *Cruikshank v. United States* (U. S.) 59 Fed. 446, 449, 8 C. C. A. 171.

"Edible," as used in Act Cong. Oct. 1, 1890, relating to the tariff on edible spices, is a relative term, qualified somewhat by the noun which follows it. As applied to spices, it means a spice which is eaten as spices are eaten, namely, as a sauce, a condiment, a relish, not as a food product capable of sustaining life. In re *Cruikshank* (U. S.) 54 Fed. 676, 677.

#### EDITION.

An "edition" of a book is the publication of it. *Hone v. Kent*, 6 N. Y. (2 Seld.) 390, 395.

An "edition" of a publication is the total number of copies issued or published at once. *Mooney v. United States Industrial*



Pub. Co., 61 N. E. 607, 608, 27 Ind. App. 407.

An "edition" is defined to be a republication, sometimes with a revision and correction; any publication of a book before published; and a publication of court rules of 1874, with appropriate notes, is not a "subsequent edition" of the court rules of 1871. *Banks v. McDivitt* (U. S.) 2 Fed. Cas. 759, 761.

### EDITION DE LUXE.

In reference to the publishing of books, the term "edition de luxe" means an elaborate and costly edition, often limited; a sumptuous edition as regards paper, illustrations, binding, etc. It is a generic expression, meaning simply an elegant edition of some kind, and in an action on a contract of sale, describing the article sold as the "Edition de Luxe of Art and Architecture," it was competent for the defendant to allege and prove that he was led to believe that the expression meant an artist-proof edition. *Barrie v. Miller*, 80 S. E. 840, 841, 104 Ga. 812, 69 Am. St. Rep. 171.

### EDITOR.

#### Of newspaper.

As printer, see "Printer."

As laborer, see "Laborer."

An editor of a newspaper is one who superintends publication of a newspaper. *Pennoyer v. Neff*, 95 U. S. 714, 721, 24 L. Ed. 565 (citing Webster).

An editor of a newspaper is one who, while he may not furnish as the production of his mind the words, sentences, and ideas printed, or set the type or work the press, superintends the correction of the proof sheet of the printer, and who, in regard to the publication of the paper, selects the matter for publication. *Brown v. Woods' Heirs*, 29 Ky. (6 J. J. Marsh.) 11, 17, 18.

#### Of statutory.

The term "editor" is used in the business of the production of bronze statuary to designate the founder who casts the statuary from the clay model made by the artist. *Merritt v. Tiffany*, 10 Sup. Ct. 52, 58, 182 U. S. 167, 88 L. Ed. 299.

### EDUCATE—EDUCATION.

See "Collegiate Education"; "Common School Education"; "English Education"; "German Education"; "Theological Education."

As charity, see "Charity."

As county purpose, see "County Purpose."

As public use, see "Public Use."

"Education" is the bringing up, physically and mentally, of a child, or the preparation of a person, by some due course of training, for a professional or business life or calling. *State ex rel. Henderson v. Lesueur*, 13 S. W. 237, 238, 99 Mo. 552, 7 L. R. A. 784.

"Education" is a broad and comprehensive term. It has been defined as the process of developing and training the powers and capabilities of human beings. To "educate," according to one of Webster's definitions, is to prepare and fit for any calling or business, or for activity and usefulness in life. Education may be particularly directed to either mental, moral, or physical powers and faculties, but in its broadest and its best sense it embraces them all. And, where an institution is incorporated for the education of boys, its trustees did not exceed their authority when they established an institution providing a place where young men whose early education had been neglected could be instructed, their physical welfare cared for, and a practical knowledge of work, especially agriculture, given them daily. *Mount Herman Boys' School v. Town of Gill*, 145 Mass. 139, 146, 18 N. E. 354, 357.

"Education" is a broad term, and includes all knowledge. If we take it in its full and not in its legal or popular sense, whatever we learn by observation, by conversation, or by other means away from what has been implanted by nature, is 'education.' In fact, everything not known intuitively and instinctively is 'education.'" *Cook v. State*, 16 S. W. 471, 472, 90 Tenn. (6 Pickle) 407, 13 L. R. A. 183.

#### Moral and physical training.

As applied to minors, it has been said "education" comprehends not merely the instruction received at school, or knowledge, but the whole course of training, moral, intellectual, and physical. *State ex rel. Henderson v. Lesueur*, 13 S. W. 237, 238, 99 Mo. 552, 7 L. R. A. 784.

The word "education," in the statement of a father's duty toward a child to the effect that it is his duty to provide for the child's education, means not merely instruction in the pursuits of literature, but comprehends a proper attention to the moral and religious sentiments of the child. *Commonwealth v. Armstrong*, 1 Pa. Law J. 392-394.

"Educate," as used in Code, § 2521, empowering a county court to remove a guardian for neglecting to educate or maintain his ward, means proper moral as well as intellectual and physical instruction, and a guardian may be removed for his having contaminating principles and domestic associations. *Ruohs v. Backer*, 53 Tenn. (6 Heisk.) 395, 400, 19 Am. Rep. 598.

**Subsistence and personal care.**

"Educate and bring up," as used in a will wherein a legacy was given on the condition that the legatee should educate and bring up testator's granddaughter, means to furnish the granddaughter with subsistence and also personal care. *Merrill v. Emery*, 27 Mass. (10 Pick.) 507, 511.

**EDUCATIONAL APPLIANCE.**

An "appliance" is anything brought into use as a means to effect some end. An "educational appliance" is something necessary or useful to enable the teacher to teach the school children, such as a blackboard, map, or dictionary, but it must be of the nature that a few will answer for the needs of all. *Honaker v. Board of Education of Pocatillo Dist.*, 24 S. E. 544, 545, 42 W. Va. 170, 32 L. R. A. 413, 57 Am. St. Rep. 847.

"Educational appliances," as used in Rev. St. 1894, § 5920, Rev. St. 1881, § 4444, providing that school trustees may provide suitable furniture, apparatus, and other educational appliances necessary for the thorough organization and efficient management of the schools of his township, does not include reading circle books, and the township cannot be rendered liable for the purchase of such books by the school trustee, under the statute. *First Nat. Bank v. Adams School Tp.*, 46 N. E. 832, 833, 17 Ind. App. 375.

**EDUCATIONAL INSTITUTION.**

As benevolent association, see "Benevolent Association."

As eleemosynary corporation, see "Eleemosynary."

The term "educational institution," as used in St. 1891, c. 425, exempting educational institutions from taxation on collateral legacies, includes a free public library, and hence legacies given to a town to establish and maintain a free public library are exempt. *Inhabitants of Town of Essex v. Brooks*, 41 N. E. 119, 120, 164 Mass. 79.

Acts 1891, c. 425, imposing a tax on property passing by will or succession, and exempting property passing to or for charitable, educational, or religious societies or institutions, contemplates an institution which owns property, and not a charitable gift itself; and hence the commonwealth is entitled to levy a tax on a legacy left to a trust company in trust for needy, aged women and men who had been in better circumstances in early life. *Hooper v. Shaw*, 57 N. E. 361, 362, 176 Mass. 190.

**EDUCATIONAL OBJECTS.**

Under Revenue Law 1901, §§ 83, 86, imposing an opera-house tax, and exempting

from taxation all exhibitions or entertainments given for the benefit of "educational objects," a musical conservatory owning a hall in which it gives musical entertainments for the special benefit of its pupils, charging an admission and selling tickets to the public to defray the expenses of the performances, is not liable for the opera-house tax, the day having long since passed since music can be denied a part in the educational systems of the age. *Markham v. Southern Conservatory of Music*, 41 S. E. 531, 532, 130 N. C. 276.

**EDUCATIONAL PURPOSES.**

A will giving property for charitable and educational purposes requires the use to be one which directly promotes the cause of education. *Haynes v. Carr*, 49 Atl. 638, 642, 70 N. H. 463.

In 3 Starr & C. Ann. St. p. 3706, par. 202, providing that the levy of school taxes shall not exceed a certain per cent. for educational purposes and a certain per cent. for building purposes, the words "building purposes" are special, and apply solely to the building of schoolhouses and matters incident thereto, while the words "educational purposes" are general, and apply to all matters for which a board of directors may levy school taxes. *O'Day v. People*, 49 N. E. 504, 505, 171 Ill. 293.

A school building is used for "purposes of education," within the meaning of the act incorporating it and exempting it from taxation so long as it is used only for the purposes of education, the greater portion of which is used and occupied in the conduct of the school, though two rooms are let at a monthly rental paid to it, which monthly rental was used in defraying the legitimate expenses of conducting the school, paying salaries of teachers, keeping the building in repair, and in paying debts of the association incurred in the building. *North St. Louis Gymnastic Soc. v. Hudson*, 85 Mo. 32, 34.

**School for blind.**

"Institutions for educational purposes," within the meaning of Const. art. 5, § 19, includes the Institution for the Blind at Nebraska City. *Curtis v. Allen*, 61 N. W. 568, 43 Neb. 184.

**District school.**

Several persons associated themselves as proprietors of a building to be erected and "used exclusively for an academy and similar purposes," and appointed trustees with power to lease the building. The building was erected on land conveyed to the trustees to hold in trust for the proprietors "while they maintained a building thereon for the purposes of education," and was first

used as an academy, but afterwards leased by the trustees to a district school. Held, that the words "building for the purpose of education" should be construed to include a district school, and hence the grantees' estate was not terminated by the lease of the building to the district school. *Peck v. Clafin*, 105 Mass. 420, 423.

#### Heating and repairing.

The term "educational purposes" properly characterizes the use by a university of a tract of six acres of land which is part of a larger body, and divided from the residue, on which the main buildings of the university are erected, by streets only, though the only buildings on such six acres are two small buildings erected and used by the primary departments, the remainder of the tract being cultivated by the students, who receive pay for their labor in board and tuition, the products being consumed at the university, and on which it is intended, when funds are procured, to erect another large building, and therefore such tract is exempted from taxation by Const. art. 2, § 28, and Acts 1883, c. 105, §§ 1, 2, exempting from taxation all property belonging to educational institutions and actually used for educational purposes. *State v. Fiske University*, 10 S. W. 284, 87 Tenn. (3 Pickle) 233.

A tax for heating and repairing purposes is a tax for "educational" and not for "building purposes," the latter words referring to the building of schoolhouses only, within 8 Starr & C. Ann. St. p. 1194, limiting the taxes levied in any one year to a certain per cent. of the assessed valuation for educational purposes and a certain per cent. for building purposes. *Chicago & A. R. Co. v. People*, 45 N. E. 122, 123, 163 Ill. 616.

#### EDUCATIONAL STAFF.

The word "educational staff" in Greater New York Charter, § 1117, providing that all superintendents, and all principals, teachers, and other members of the educational staff in the public school system of New York City as constituted by the act, shall continue in office, is to be construed as "teaching staff." "If it had been intended to continue all officers and employes within the possible capacity of the former words when standing alone, they would not have been preceded by the words 'principals' and 'teachers.' By a well-settled principle of statutory construction, when a particular class is spoken of, and general words follow, the class first mentioned is to be treated as referring to persons ejusdem generis with such class. The words as so used do not include attendance officers." *People v. White*, 72 N. Y. Supp. 91, 93, 64 App. Div. 890; *People v. Board of Education of New York City*, 83 N. Y. Supp. 803, 805, 86 App. Div. 537.

#### EFFECT.

See "Force and Effect"; "Natural Effect"; "Prosecute to or with Effect"; "Take Effect."

"Effect," as used in a statute providing that appeals from the marine court were to be taken in the same manner and with like "effect" as appeals in the Supreme Court, means that the party appealing should have all the benefits and advantages given to a party appealing in the Supreme Court. The manner relates to the mode of proceeding in effecting an appeal. The effect relates to the consequences produced by the appeal, as under what circumstances it shall operate to stay proceedings. "Effect" is an appropriate word to describe a result that follows after the appeal is completed. *Roberts v. Donnell*, 31 N. Y. 446, 449.

Code Civ. Proc. § 2260, providing that appeals from final orders in summary proceedings may be taken to the same court in the same manner and "with like effect" as appeals from the district court, means "with like results, and this includes any disposition in the one case which the appellate court could make in the other." *Moench v. Yung*, 9 N. Y. Supp. 637, 16 Daly, 143.

Where specifications of a patent state that so high a temperature is not absolutely necessary to produce a "beneficial effect," and then adds that, as the "effect" does not depend on the nature of the material, other metals than iron may be used, the word "effect" is equivalent to "beneficial effect." *Nelson v. Harford*, 8 Mees. & W. 806, 825.

#### Exact copy imported.

Where an indictment alleged that the oath on which perjury was assigned was "not substantial and to the effect, to wit," an exact recital was not necessary, the word "effect" not requiring an exact copy. *People v. Warner* (N. Y.) 5 Wend. 271, 273.

The words, "effect and purport following," in an indictment for forgery, setting out the forged instrument as being of the effect and purport following, does not render the indictment invalid. "While we concede that the precedents are in favor of the form which uses the tenor rather than the purport and effect, we have no thought that under our statutes a defect of this character would vitiate the indictment. These words might be rejected without in the least changing the meaning of the pleader." *State v. Johnson*, 28 Iowa, 407, 413, 96 Am. Dec. 158.

A statute requiring that a certain notice be given in a specified form or to the like "effect" was complied with by a notice which gave all the information which the legislature intended to be given by the form recom-

mended. *Regina v. Harwich*, 1 El. & Bl. 617, 618.

"To that effect," as used in Act April 8, 1883, § 7 (P. L. 249), providing that it shall be proved that the testator at the time of pronouncing the bequest did bid the persons present, or some of them, to bear witness that such was his will, "or to that effect," was intended to prevent the inference that any set form of words should be necessary, but not to diminish the requirement of a distinct and explicit request of the testator to persons present to remember and be ready to testify that the testator was thereby making his will. In *re Wiley's Estate*, 40 Atl. 980, 981, 187 Pa. 82, 67 Am. St. Rep. 569.

Pub. St. c. 126, § 4, provides that when lands are given by deed or will to a person for life, and after his death to his heirs in fee, or by "words to that effect," the conveyance shall be construed to vest an estate for life only in such degree, and a remainder in fee simple to his heirs. Held, that by the phrase "by words to that effect" were included words which were practically synonymous with "heirs," and that any word used or intended to mean the heirs or issue of the testator was sufficient to bring the devise within the meaning of the statute. *Trumbull v. Trumbull*, 21 N. E. 366, 367, 149 Mass. 200, 4 L. R. A. 117.

#### Of climate.

A bill of lading exempting a carrier from liability from loss resulting from the "effect of climate" means the effect of climate in the passage of the vessel, and not damages caused by exposure in the unloading thereof. *Wessles v. The Aline* (U. S.) 25 Fed. 562, 568.

#### Of evidence.

Rev. Code, § 2673, declares that the court shall not charge on the "effect of evidence" unless requested to do so by either party. Held, that the phrase "effect of the evidence" was not synonymous with "burden of proof," and therefore a charge on the burden of proof was not objectionable, under the statute. *Hill's Adm'r v. Nichols*, 50 Ala. 336, 339.

The word "effect," as used in an instruction relative to determining what weight or effect the jury would give the testimony of each witness, etc., is held to mean precisely the same thing as "weight," and hence not to be confusing. *Jessen v. Donahue* (Neb.) 96 N. W. 639, 640.

#### Of judgment.

The "effect" of a judgment is not to bear interest, though that is one of its incidents; so that under Pol. Code, § 3716, declaring that every tax has the effect of a judgment against the person, the tax does

not bear interest. *People v. Central Pac. R. Co.*, 105 Cal. 576, 38 Pac. 905, 910.

#### EFFECTED.

An insurance policy providing for notice of any other insurance effected on said property relates not only to other insurance effected prior to the execution of the policy, but to insurance obtained thereafter. *Warwick v. Monmouth County Mut. Fire Ins. Co.*, 44 N. J. Law (15 Vroom) 83, 85, 43 Am. Rep. 343.

#### As completed.

In construing Village Law, § 159, providing that persons damaged by the change of a street grade must present a verified claim within 60 days after such change is effected, the word "effected" was held to have been used in the sense of "completed," and that the change of grade for which the injured party may claim damages is not effected until it is completed, and until the village has taken some action to indicate that it has closed the work in connection with the improvement under way. The best evidence of this intention on the part of the village would seem to be the final grading and placing of a permanent sidewalk. Until that time the petitioner, in the absence of other evidence, is not bound to assume that the change of grade contemplated has been effected. Used in one sense, a change of grade might be said to have been effected every time a wagon load of dirt was removed or brought upon the highway, but the change contemplated in the statute requires more than this. It has in view the official and authoritative as well as the physical change of grade. A property owner is not bound to know whether a public improvement has been accomplished when the work is suspended unless there are facts and circumstances which would bring notice to a man of ordinary intelligence. *Phipps v. Village of North Pelham*, 70 N. Y. Supp. 630, 632, 61 App. Div. 442.

#### As enforced.

"Effected," as used in Code 1873, § 2018, providing that a landlord's lien on crops may be effected by the commencement of an action within a prescribed period, in which the landlord shall be entitled to a writ of attachment, should be construed to mean "enforced." *Nickelson v. Negley*, 32 N. W. 487, 488, 71 Iowa, 546.

#### As procured.

A contract providing that one of several joint owners of land should have a commission on sales which he "effected" means sales of which he was the procuring cause, and did not require a sale in the sense of a binding consummated agreement, or in the sense of an executed conveyance, as he

could not complete a sale without the concurrence of the others. *McCreery v. Green*, 38 Mich. 172, 184.

### EFFECTS.

See "Civil Effects"; "Household Effects"; "Personal Effects."

Goods, effects, and credits, see "Goods."  
Other effects, see "Other."

"Effects" are defined to be property or worldly substance; property in a more extensive sense than "goods." *Union Nat. Bank v. Byram*, 181 Ill. 92, 100, 22 N. E. 842 (citing *Bouv. Law Dict.*); *Illinois Anglo-American Storage Battery Co. v. Long*, 41 Ill. App. 833, 835; *Neely v. Grantham*, 58 Pa. (8 P. F. Smith) 433, 440; *In re Reimer's Estate*, 28 Atl. 186, 187, 159 Pa. 212; *Arthur v. Morgan*, 5 Sup. Ct. 241, 243, 112 U. S. 495, 28 L. Ed. 825; *Campbell v. Prescott*, 15 Ves. 500, 507; *Welsh v. Parish* (S. C.) 1 Hill, 155, 157.

The word "effects," as used in a will disposing of all the effects of which the testator died possessed, was synonymous with "worldly substance," which means whatever can be termed of value; therefore real and personal effects means all a man's property. *Hogan v. Jackson*, Cowp. 299, 304; *The Alpena* (U. S.) 7 Fed. 361, 362; *Beall's Lessee v. Holmes* (Md.) 6 Har. & J. 205, 214.

"Effects" is a term nearly synonymous with "goods," and includes land, tenements, furniture, etc. *Vawter v. Griffin*, 40 Ind. 593, 601.

Ordinarily, the word "effects," when used in connection with the word "goods," means personal property, and not real property; but this is not its correct meaning where a contrary intention appears from the terms of the instruments in which the word occurs, the word being a very general term, used to denote whatever a man has that can affect, produce, or bring forth money by sale. It is defined to be property or worldly substance. *Adams v. Akerlund*, 48 N. E. 454, 456, 183 Ill. 632.

A devise of "effects, both real and personal," passes a freehold estate and all chattels, real and personal. *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 65.

The word "effects," standing alone in a devise of "all or the whole of my effects," is sufficient to pass the testator's entire estate. *Ennis v. Smith*, 55 N. S. (14 How.) 400, 409, 14 L. Ed. 472; *Welsh v. Parish* (S. C.) 1 Hill, 155, 157 (citing *Campbell v. Prescott*, 15 Ves. 500, 507).

"Effects" in law means everything which is subject to the laws of property and ownership, whether real or personal, and as to

personalty, whether of possession or in action. *State v. Newell*, 1 Mo. 248, 249.

### As ejusdem generis.

See, also, "All."

A will bequeathing "all my effects," my carriage and my horse included, to certain persons, which will was made in France, does not include the testator's personal estate in the United States, it not being alluded to in any way in the will. Effects in French, or the word "effets," has the same meaning, in common parlance and in law, that it has in English. Its meaning, properly, either when used indefinitely in wills, and in connection with something particular and certain, is limited by its association to other things of a like character, and it is from the subject-matter of its use that intention of something else is to be implied, and that, of course, may be larger or less. In some instances in wills the word has carried the whole personal estate. *Ennis v. Smith*, 55 U. S. (14 How.) 400, 420, 14 L. Ed. 472.

Code, § 3069, providing for the landlord's lien on the goods, furniture, and "effects" belonging to the tenant, his child, etc., must be construed in connection with goods and furniture, and refers to property ejusdem generis. *McKleroy v. Cantey*, 11 South. 258, 259, 95 Ala. 295; *First Nat. Bank v. Consolidated Electric Light Co.*, 12 South. 71, 72, 97 Ala. 465.

A devise of all the testator's "household furniture and effects" applies to articles of the same kind—that is, household furniture—and not to personalty generally. *Rawlins v. Jennings*, 13 Ves. 38, 44.

In a mortgage of real estate used for a sugar refinery, "and also all the machinery and effects in the said sugar refinery," the word "effects" was not cut down on account of its connection with the preceding word "machinery," under the rule that where general words follow a particular one they are to be used ejusdem generis, but included all personal property. *Thurber v. Minturn* (N. Y.) 62 How. Prac. 27, 28.

### As lands or real estate.

"Effects" will embrace lands, tenements, etc. *State v. Newell*, 1 Mo. 248, 249.

"Effects," used in a will disposing of testator's effects, will be construed to include land, where it can be collected from other parts of the will that such was testator's intention. The term "effects" is capable of expansion, so as to embrace real and personal estate. "I take 'effect,'" says Lord Mansfield, "to be synonymous to 'worldly substance,' which means whatever can be termed of value, and that therefore

real and personal effects means all a man's property." Page v. Foust, 89 N. C. 447, 449.

"Effects," as used in a judgment providing that execution may be levied upon the effects of testator's estate, includes real estate as well as personalty, though the word "effects," when not affected by the context, is generally held to include only personal property. Horton v. Garrison, 20 S. W. 773, 774, 1 Tex. Civ. App. 31.

Under a statute authorizing the institution of trustee process to reach goods, effects, and credits of the debtor, it is held that land fraudulently conveyed is neither goods, effects, nor credits, within the statute. Hunter v. Case, 20 Vt. 195, 197.

Goods are valuable possessions, or pieces of property; effects are goods, movables, or personal estate; and so goods and effects have never been held to include real estate, and will thus be construed as used in the treaty of 1873 between the United States and Sweden (page 1042, Treaties and Conventions between the United States and Other Powers), providing that subjects of the contracting parties may freely dispose of their "goods and effects," either by testament, donation, or otherwise. Meier v. Lee, 76 N. W. 712, 715, 106 Iowa, 303.

"Effects," as used in describing property devised without words of qualification, denotes personalty, and realty will not pass thereunder. Camfield v. Gilbert, 3 East, 516, 522; Haw v. Earles, 15 Mees. & W. 450, 456.

A power of attorney to sell claims and effects was a power to sell personal property, and cannot be construed to embrace real estate. De Cordova v. Knowles, 37 Tex. 19, 20.

A devise by testator to his brother of all of his "property and effects" of all claims he shall have," means that all his property and the produce of all his claims should go to his brother. It is much the same as though he said, "all I have and all I am worth," and was sufficient to pass real estate. Doe v. Morgan, 6 B. & C. 512, 518.

#### As movables or personalty.

The word "effects" is the equivalent of the word "movables." Appeal of Vandergrift, 83 Pa. 126, 129.

The term "effects" is not as extensive as that of "chattels." State v. Harvey, 42 S. W. 938, 939, 141 Mo. 343.

As the word "effects" is ordinarily used, it is understood to mean goods, movables, personal estate. Hunter v. Case, 20 Vt. 195, 197.

The word "effects" prima facie applies to personal property. Doe v. Morgan, 6 B.

& C. 512, 518. See De Cordova v. Knowles, 37 Tex. 19, 20.

"Effects," means all kinds of personal estate. Planters' Bank of Mississippi v. Sharp, 47 U. S. (6 How.) 301, 321, 12 L. Ed. 447.

In common parlance the term "effects" is confined to personal things, and it has been judicially decided to bear that meaning, unless the context shows that the testator used it in a more comprehensive sense. This was held by all the court of king's bench in the cases of Camfield v. Gilbert, 3 East, 516, and of Doe v. Langlands, 14 East, 370. Haw v. Earles, 15 M. & W. 450, 456.

The word "effects," it is said by Lord Ellenborough in Anderson v. Lainchburg, 11 East, 296, in its natural sense more peculiarly imports movable personal property; and this is no doubt correct, yet it is not infrequently employed to express personal estate generally. West v. Franklin Fire Ins. Co., 3 Pa. Law J. 299, 301.

A statute relating to the garnishment of the property or effects of another in the hands or possession of the garnishee means personal property in his possession capable of being seized and sold under execution. Keyes v. Milwaukee & St. P. Ry. Co., 25 Wis. 691, 693.

The word "effects" is defined in Rev. St. art. 3138, subd. 12, as including all personal property and all interest therein; and "property" is defined to include real and personal property, and effects is used in the sense of personal property, in Pasch. Dig. art. 4636, giving a husband authority to sue to recover the effects of his wife. Read v. Allen, 56 Tex. 182, 194.

"Goods," "chattels," and "effects" are terms that in their proper sense and nature are sufficiently large to include and pass the absolute interest in the whole personal estate of the testator; but a will may be so worded that, according to a reasonable construction, it shows that the testator must have intended to use the terms in a limited and restricted sense. Parker v. Marchant, 1 Y. & Col. Ch. 290, 300.

"Effects" includes all personal property and all interest therein. Rev. St. Tex. art. 1895, art. 3270.

#### As offset.

"Effects," as used in a notice or statement of the demand for a mechanic's lien for a certain sum over and above all credits and "effects," is substantially the same as offsets, as used in a statute requiring the notice or statement to state the sum claimed over and above all credits and offsets. Merchant v. Humeston, 7 Pac. 906, 904, 2 Wash. T. 433.

**After-acquired property.**

A will giving all the remainder of testatrix's "effects" to a person designated should be construed to include estate acquired in fee by the testatrix after publication of the will. *Ruckle v. Grafflin*, 39 Atl. 624, 86 Md. 627.

**Choses in action.**

The term "effects" may include choses in action. *Dowdel v. Hamm*, 2 Watts, 61, 65.

Choses in action are not, in the hands of an assignee thereof, goods, "effects," or credits of the assignor, so as to be liable to trustee process. *Lupton v. Cutter*, 25 Mass. (8 Pick.) 298, 300.

**Debts.**

The word "effects," defining things which are subject to garnishment by service upon the person having such effects in his possession or under his control, is made by the statute to include bills of exchange, promissory notes, certificates of deposit, contracts for payment of money, and other written evidence of indebtedness in the hands of the garnishee at the time of service upon him. The things here defined to be effects are all things of material nature and intangible legal obligations. Debts are not mentioned. *Ide v. Harwood*, 30 Minn. 191, 195, 14 N. W. 884.

The term "goods and effects," as used in Code Civ. Proc. § 657, authorizing a sheriff to levy attachments, includes a debt, though incapable of manual delivery. In *State v. Newell*, 1 Mo. 248, it was held that effects in law must mean everything which is subject to the laws of property and ownership, whether real or personal, and of the personality, whether by possession or in action. *Minor v. Gurley*, 80 N. Y. Supp. 596, 597, 39 Misc. Rep. 662.

**Execution.**

An execution in the hands of a sheriff for service is not "goods, effects, or credits" of the execution creditor, within the meaning of the statute empowering a creditor to attach the goods, effects, and credits of his debtor in the hands of a third person, where they may be found, and who for this purpose is considered as a trustee of the defendant. *Sharp v. Clark*, 2 Mass. 91, 93.

**Fixtures.**

Effects are property; goods and chattels; movables, including fixtures. *State v. Harvey*, 42 S. W. 938, 939, 141 Mo. 343; *In re Reimer's Estate*, 28 Atl. 186, 187, 159 Pa. 212.

A declaration in trespass for breaking and entering plaintiff's dwelling house, and taking "goods, chattels, and effects," would include fixtures. Fixtures may be taken in

execution under a f. fa. containing similar words. *Pitt v. Shew*, 4 B. & Ald. 206.

"Effects," as used in an assignment for the benefit of creditors of the assignor's "goods, chattels, and effects," is of broader meaning than the term "goods," and may include fixtures. *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 65.

**Horse or mule.**

"Effects," as used in St. June 1859, c. 2230, providing that all boarding house keepers shall have a lien upon the "baggage and effects" of their guests and boarders, includes the horse of a boarder, and entitled the boarding house keeper to a lien on the boarder's horse for the guest's board, but not for the fare and keeping of the horse. *Cross v. Wilkins*, 43 N. H. 332, 336.

The word "effects" is comprehensive enough to include every article of personal property which the Legislature could have supposed it possible a citizen of the commonwealth would make it a business to buy and sell. It is broad enough to describe every item of the largest estate, except moneys, securities, and land. When, therefore, vendors of "effects of whatsoever kind or nature" are made liable to taxation, a dealer in horses and mules could hardly, on any rational principle, set up a right to exemption. *Commonwealth v. Seltzer* (Pa.) 2 Woodw. Dec. 23, 24.

**Leasehold.**

"Goods and effects," within the meaning of Act June 13, 1836, relating to the service of foreign attachments on the goods and effects of the debtor, cannot be construed to include leaseholds of lands and buildings on leaseholds. The meaning of the words is free from all ambiguity or doubt, whether used in the popular, lexicographical, or legal sense. *Appeal of Vandergrift*, 83 Pa. 126, 129.

Code, § 3069 et seq., giving a landlord a lien on the tenant's goods, furniture, and "effects," does not include a leasehold. *First Nat. Bank v. Consolidated Electric Light Co.*, 12 South. 71, 72, 97 Ala. 465.

**Legacy.**

Rev. St. c. 86, § 36, authorizing the attachment by trustee process of "effects and credits," includes a legacy in the hands of the trustee. *Cummings v. Garvin*, 65 Me. 301, 302.

**Money and securities.**

In Comp. St. c. 83, art. 4, § 2, subd. 8, requiring a state treasurer to pay over to a successor in office and deliver all books and effects of office to him, the word "effects" is broad enough to require the delivery of bonds and other securities belonging to the state

permanent school fund. In re State Treasurer's Settlement, 70 N. W. 532, 539, 51 Neb. 116, 36 L. R. A. 746.

An insurance policy on a vessel covering property designated as "goods, specie, and effects" covers a sum of money advanced by the captain for the benefit of the ship, and for which he charges respondentia interest. *Gregory v. Christie*, 3 Doug. 419.

"Effects," as used in a will giving to testator's brother all his household goods, books, clothing, furniture, etc., that he might desire, the balance of the personal "effects" to be divided among certain others, passes the whole of the testator's residuary estate, consisting of money and securities. It means such funds in the hands of the executor as may be made effective or available for payment of debts and legacies. In re *Reimer's Estate*, 28 Atl. 186, 187, 159 Pa. 212.

#### Negotiable paper.

Negotiable paper is not such property, money, or "effects" as the statute contemplates in describing what species of property may be made the subject of garnishment. This view seems to be based largely upon the provision of the statute, that the property, money, or "effects" which may be reached by garnishment must be in the possession of or due from the person garnished to the defendant in the judgment or decree which forms the basis of the garnishment proceeding at the time the writ was served upon him, and that the maker of negotiable paper cannot be regarded as indebted to the original payee before the maturity of the paper. *Hubbard v. Williams*, 1 Minn. 54, 55 (Gil. 87, 38), 55 Am. Dec. 68.

A note is not "effects," within the meaning of the garnishment law. It is an evidence of debt, and no more. *Moore v. Pillow*, 22 Tenn. (3 Humph.) 448, 449.

The word "effects," as used in a statute relating to obtaining property by false pretenses, embraces a bill of exchange. *State v. Newell*, 1 Mo. 248, 249.

All bills of exchange and promissory notes in the hands of a garnishee at the time of the service of the writ of garnishment shall be deemed "effects," under the provisions of the act relating to garnishment. *Comp. Laws Mich. 1897*, § 10,623.

Bills of exchange and promissory notes not due, in the hands of a garnishee at the time of the service of the summons, shall be deemed "effects" under the provisions of the act relating to proceedings against garnishees. *Comp. Laws Mich. 1897*, § 1011.

#### Share of stock.

A share of stock cannot be regarded as otherwise than "property," nor can it be said

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that it is not "worldly substance." Shares of stock owned by the defendant in attachment, if such certificates have not been issued, are effects, within Rev. St. c. 62, § 5. *Illinois Anglo-American Storage Battery Co. v. Long*, 41 Ill. App. 333, 335.

Rev. St. c. 11, § 9, provides that writs of attachment shall be executed on the debtor's lands, tenements, goods, chattels, rights, credits, moneys, and effects. Held, that the word "effects," as used in such statute, was a general word intending to include property not properly within the descriptions of the other words as used, and that under such word shares of corporate stock were properly attachable. *Union Nat. Bank v. Byram*, 22 N. E. 842, 843, 181 Ill. 92.

#### Ships, etc.

General Admiralty Rule No. 2 allows, in suits in personam, a warrant of arrest, with a clause therein that if the defendant cannot be found to attach his goods and chattels to the amount sued for, or, if such property cannot be found, to attach his credits and effects. Held, that the word "effects" is of very extensive import, and as used in the rule embraces ships and other tangible property. *The Alpena (U. S.)* 7 Fed. 361, 362.

### EFFICIENT.

"Efficient," as used in an instruction in reference to the duty of a master in the selection of fellow workmen, requiring and stating such duty to be the employment of "efficient men," was the equivalent of "competent," and expressed no more than the duty which the law imposed on the employer, and the instruction was proper. *Norfolk & W. R. Co. v. Ampey*, 25 S. E. 226, 232, 93 Va. 108.

"Efficient" machinery is such machinery as is capable of well producing the effect intended to be secured by the use of it for the purpose for which it was made. The word does not necessarily mean new machinery. *Maxwell v. Bastrop Mfg. Co.*, 14 S. W. 85, 86, 77 Tex. 233.

### EFFICIENT CAUSE.

The efficient cause is simply the working cause, or that cause which produces effects or results. *Pullman Palace Car Co. v. Laack*, 32 N. E. 285, 291, 143 Ill. 242, 18 L. R. A. 215.

### EFFORT.

See "Reasonable Effort."

"Effort" means exertion of strength; strenuous endeavor; laborious attempts; struggle directed to the accomplishment of an object. There is no word in the English lan-



guage better understood by the people generally than "effort," and when told in a trial for homicide that an effort must have been made to execute the threats made by the deceased the jury undoubtedly understood the court to mean an attempt. This means something more than a demonstration of an act manifesting an intention. It means an actual attempt to execute the threats. *Miles v. State*, 18 Tex. App. 156, 171.

An agreement to pay to another the amount of notes and accounts transferred to him, in the event that he could not collect the same after making an "effort to collect," does not imply that all the means known to the law should be exhausted before the contract to pay should become absolute or the defendant be authorized to demand payment of the party agreeing. The condition on which his liability depends is certainly well performed if such means of collection by the aid of legal process have been resorted to as are usual. The contract did not impose upon the party the duty of prosecuting suits upon the notes and accounts transferred to him to such an extent as to force the parties liable to their payment to take the oath of insolvency. *Burnett v. Thompson*, 1 Ala. 469, 470.

## EITHER.

In school articles signed by several employers, providing that either party can discontinue the school at the end of the quarter, "either" means the teacher, or a majority of the employers. *Bird v. Thornburgh*, 40 Ky. (1 B. Mon.) 4, 5.

Under the statute the right of action to recover damages for the death of a minor child survives in the father or mother, or "either" of them. If the wife has previous to the death of the child obtained a divorce from her husband, and has the care of the minor children, she can bring the action without his authority. *Wilson v. Banner Lumber Co.*, 32 South. 460, 108 La. 590.

A provision of St. 1864-65, p. 442, requiring a railroad company to maintain a fence on "either or both sides" of its property, simply requires the company to fence its road where it may run through or alongside of the land of private individuals; that is, on either or both sides as necessity may demand. *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110, 116.

### As any.

A testator, having several children, provided by his will that, in case "either" of his children should die leaving living issue, such issue should receive the share of his estate devised to such child so dying. Held, that "either" was used in a sense of "any." *Latoy v. Campbell*, 6 Atl. 300, 301, 42 N. J. Eq.

(15 Stew.) 34. See, also, *In re Broomall's Estate* (Pa.) 2 Lanc. Law Rev. 183, 184, 2 Del. Co. R. 289, 290.

In Laws 1894, c. 314, amending Brooklyn City charter, providing for bids for street cleaning, and that if the acceptance of either proposal be not in the interest of the city all of them shall be rejected, "either" was used in the sense of "any." *People v. Willis*, 39 N. Y. Supp. 987, 989, 6 App. Div. 231.

### As both.

The term "either" may include each or both. *Jackson v. Stewart*, 20 Ga. 120, 124.

One of the definitions of the word "either" is each of two, the one and the other; and hence, as used in an ordinance providing that curbstones were to be set on "either" side of the roadway, meant that such curb should be set on both sides of the roadway. *Chicago & N. P. R. Co. v. City of Chicago*, 49 N. E. 1006, 1007, 172 Ill. 66.

"Either" is used in the sense of one "and" the other of two things, as well as in that one "or" the other. Thus it is common to say "on either hand," "on either side," meaning on each hand or side. *Chidester v. Springfield & I. S. R. Ry. Co.*, 59 Ill. 87, 89.

As used in Act Cong. June 23, 1863, providing that all contracts for service between masters and servants, when either of the contracting parties is of Hawaiian birth, shall be rendered and printed in both the Hawaiian and English languages, the word "either" is a distributive or alternative term. It carries the meaning that, when one of the parties is of Hawaiian birth and the other is not, such contract shall be executed in Hawaiian and English. The negative or excluding force of the word "either" is equal to its affirmative and including force. The term "either" does not include "both," nor does "both," the greater, intend and therefore include the less, "either." *Martin v. Nahoa*, 4 Hawaii, 427, 429.

### One of any number.

"Either," as used in Act 1887, providing that in "either of the foregoing cases such child and its issue shall inherit from its parents respectively, and from their lineal and collateral kindred," etc., includes each and every case previously named. Webster defines "either" as "one or another of any number." The word "either," according to the strictly accurate and authoritative signification of the word, relates to two units or particulars only, but it often in actual use, though inaccurately, refers to some one of many. *Messer v. Jones*, 34 Atl. 177, 179, 88 Me. 349 (citing Cent. Dict.); *Lyon v. Lyon*, 34 Atl. 180, 88 Me. 395.

"Either," as used in a policy insuring "all or either" of the freight buildings at C., ren-

ders the insurers liable if either of the buildings is damaged. *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136, 137, 17 Am. Rep. 72.

The word "either," in an ordinance authorizing a street car company to make extensions on "either of the following named streets," etc., does not mean all, but does mean one or the other of two or more specified things. *Ft. Worth St. Ry. Co. v. Rose-dale St. Ry. Co.*, 4 S. W. 534, 538, 68 Tex. 169.

In a provision that if "either of my sons should die without a lawful heir, the longest liver heirs the whole of both estates," the word "either" signifies one or another of any number, but it is here confined to two by force of the word "both," which signifies two, considered as distinct from others, or by themselves. *Dew v. Barnes*, 54 N. C. 149, 151; *Graham v. Graham*, 23 W. Va. 36, 43, 48 Am. Rep. 364.

#### EITHER PARTY.

The phrase "either party," as used in Act March 8, 1875, § 2, cl. 1, providing for the removal of causes from state to federal courts, and authorizing either party to remove the cause if there shall be a controversy between citizens of different states, means all the plaintiffs or all the defendants. *Maine v. Gilman* (U. S.) 11 Fed. 214, 215.

#### EJECT.

In an instruction in an action for damages alleged to have been caused by putting plaintiff's intestate off from defendant's train, the word "ejected" means that deceased was forcibly put off the train, rather than helped off according to his desire or that he voluntarily left the train. To "eject" a person means to compel him against his desire to leave. *Bohannon's Adm'r v. Southern Ry. Co.* in Kentucky, 65 S. W. 169, 170, 112 Ky. 106.

#### EJECTMENT.

See "Equitable Ejectment."

Originally the action of ejectment "was designed to recover only damages for the wrongful ejection of the plaintiff from the possession of land in which he had a term of years. Later the recovery was extended to the possession of the land. To succeed, the plaintiff was required to prove a lease to himself for a term of years, made by a lessor entitled to the possession and on the land when the lease was made, his entry under the lease, and ouster by the defendant. The action was usually instituted against a person not interested in the land, called the 'casual ejector,' who gave notice of the suit to the actual possessor, and he, on application

to the court, was substituted as defendant. But, as a condition of such substitution, the court required him to stipulate that at the trial he would confess the lease, entry, and ouster alleged by the plaintiff, thus leaving the only fact to be proved by the plaintiff the title of his lessor. If, however, the claim of the applicant was such as would not warrant him in ousting the plaintiff, and yet would justify his own possession, as if he claimed only a joint tenancy with the lessor, then he stipulated to confess ouster of the plaintiff only in case the plaintiff should prove actual ouster of the lessor. If, at the trial, the plaintiff showed such title in his lessor as made the confessed ouster wrongful, or if, when ouster was only conditionally confessed, he showed an actual ouster of the lessor, or a title against which any possession by the defendant was wrongful, then he recovered damages and possession; otherwise his suit failed. Thus the technical issue in the case was always whether the defendant had wrongfully ousted the plaintiff. Under our statute the technical issue remains the same, although presented by a different procedure. The real claimant, the old lessor, is the plaintiff, and his complaint is that the defendant wrongfully deprives him of possession. The defendant is the real counterclaimant, and if he means to defend absolutely he pleads not guilty, and by that plea admits a possession or claim of title which should exclude or oust the plaintiff; while, if he means to defend only for a possession or claim of title which does not exclude the plaintiff—e. g., as joint tenant with him—he must give notice with his plea that he admits the right of the plaintiff to an undivided share of the land and denies actual ouster. *Combs v. Brown*, 29 N. J. Law (5 Dutch.) 36. Then if, at the trial on the simple plea, the plaintiff shows a title against which the defendant's exclusive possession or claim would be wrongful, or, on the plea and notice, he shows an actual ouster, wrongful in view of his admitted right, or a greater right, which makes the defendant's possession a wrongful ouster, the plaintiff will be entitled to judgment; otherwise not." *French v. Robb*, 51 Atl. 509, 510, 67 N. J. Law, 290, 57 L. R. A. 956, 91 Am. St. Rep. 433.

Ejectment was first in reality an action by a lessee against an intruder, commenced by writ. It next became a fiction both as to the lease and the lessee, and was commenced by declaration and notice, and the lessor was the person really interested, and it was then used for the purpose of trying his title, or his right to make a lease. As the lessor could try title, it was but mutual that the tenant should also call to his aid, not only any title which he might have, but the title of another from whom he derived his possession." *Crockett v. Lashbrook*, 21 Ky. (5 T. B. Mon.) 530, 538, 17 Am. Dec. 98.

At common law the action of ejectment was strictly a possessory remedy, but it has now by gradual growth come to be the ordinary method of trying title to lands. *Wilson v. Wightman*, 55 N. Y. Supp. 806, 810, 36 App. Div. 41.

At common law ejectment was a mere possessory action between fictitious parties. The judgment therein did not determine the estate or interest of parties in the property, nor did it conclusively determine the right to possession. But in the majority of the states the common-law action has been pruned of its fiction and made a simple remedy for the recovery of the possession of real property, and the trial of title thereto. *Hoover v. King*, 72 Pac. 880, 881, 43 Or. 281.

An ejectment is an action to try the right of possession to the land in controversy. *Wood v. Grundy* (Md.) 3 Har. & J. 13, 19.

The words "action of ejectment" refer to an action to recover the immediate possession of real property. Code Civ. Proc. N. Y. 1899, § 3343, subd. 20; *Boyd v. Boyd*, 33 N. Y. Supp. 74, 175, 12 Misc. Rep. 119; *Leprell v. Kleinschmidt*, 19 N. E. 812, 814, 112 N. Y. 364; *Risley v. Rice*, 3 N. Y. St. Rep. 168, 169. Hence an action for the recovery of the possession of real property, and damages incidental to a wrongful occupation thereof, comes within such definition. *Leprell v. Kleinschmidt*, 19 N. E. 812, 814, 112 N. Y. 364.

Though the Code abolished many forms of civil action, and provided for an action in civil cases, denominated a "civil action," the term "ejectment" has been properly retained to designate an action brought for the possession of lands, and asking damages for the unlawful detention thereof. *Bernhamer v. Hoffman*, 54 N. E. 132, 133, 23 Ind. App. 34.

"Ejectment," in the state of Pennsylvania, is the remedy where one party claims right of possession to lands which are held by another, a remedy by which the party who claims the right of possession may obtain his possession if he is entitled to it under the law. *Dewaters v. Kuhnle*, 49 Atl. 264, 199 Pa. 439.

The "action of ejectment," as defined and regulated by the Oregon Code of Civil Procedure, c. 4, tit. 1, is a possessory action, and although the estate or interest of the parties in the premises may be ascertained by the verdict therein, yet the plaintiff can only have judgment for the possession wrongfully withheld from him, with damages for such detention, and costs; and the defendant can only have judgment for costs. *Goldsmith v. Smith* (U. S.) 21 Fed. 611, 613.

#### Grounds and elements of action.

Ejectment is a possessory action *ex delicto*, founded on a trespass, actual or sup-

posed, committed by defendant in wrongfully obtaining possession of plaintiff's land. *Henninger v. Boyer*, 10 Pa. Co. Ct. R. 506, 508.

The action of ejectment is a possessory remedy, and can be resorted to only when a right of entry exists. *United States Pipe Line Co. v. Delaware, L. & W. R. R. Co.*, 41 Atl. 759, 762, 62 N. J. Law, 254, 42 L. R. A. 572; *Jackson v. Buel* (N. Y.) 9 Johns. 298, 299; *Aiken v. Benedict* (N. Y.) 39 Barb. 400, 401; *Leprell v. Kleinschmidt*, 1 N. Y. Supp. 821, 822, 49 Hun, 605.

The action of ejectment looks only to the legal title, and cannot be maintained unless the plaintiff has the legal estate in the premises, and an equitable title cannot be set up in this action against the legal title. *Hubbard v. Godfrey*, 47 S. W. 81, 83, 100 Tenn. 150.

Ejectment is a possessory action, to the existence of which the right of possession of the premises on the part of the plaintiff at the commencement of the suit is essential. Title, without right of possession, is not enough, nor can plaintiff recover unless he shows title in himself, irrespective of the validity of defendant's title. *McFarland v. Goodman* (U. S.) 16 Fed. Cas. 90, 91.

Ejectment "is an action to recover the possession of realty, the elements of which are a right of possession in the plaintiff and a possession in the defendant at the time the action is brought, both of which facts must be established to entitle the plaintiff to judgment." *Owen v. Fowler*, 24 Cal. 192, 195.

A plaintiff in ejectment must recover on the strength of his own title, and show in himself a present right to enter and possess, without regard to the character of defendant's possession. When he relies on a conveyance from another, there must be evidence that at the time of the conveyance there resided in the grantor a legal title to the lands. *Baucum v. George*, 65 Ala. 259, 267.

The action of ejectment is, strictly speaking, a possessory action, the plaintiff being required to show and present legal right to the possession of the premises as against the defendant. *Bradshaw v. Ashley*, 21 Sup. Ct. 297, 301, 180 U. S. 59, 45 L. Ed. 423.

Ejectment is a possessory action, and the lessor of the plaintiff must have the right to enter for the purpose of making the lease. Whenever that right is destroyed, the ejectment which is founded on such supposed right must fail. *Pearce v. House*, 4 N. C. 722, 725.

#### Same—Possession by defendant.

Ejectment is a possessory action operating only on the possession, and must be

commenced against the person in possession. *Wilson v. State*, 22 South. 567, 568, 115 Ala. 129.

Ejectment "is a common-law action to recover possession of realty, which can be brought only against the person who at the commencement of the action withholds the possession; that is to say, against the occupant. The action can never be brought against the owner of the paramount title, unless he is also an occupant." *Hawkins v. Reichert*, 28 Cal. 534, 536; *Owen v. Fowler*, 24 Cal. 192, 195.

Ejectment "is a possessory action, and must be brought against the occupant. It determines no rights but those of possession at the time, and it matters not who has or claims to have the title of the premises. It will only lie against a party out of possession claiming title when the premises are unoccupied and his claim is accompanied by acts of ownership, such as inclosure, cultivation and the like." *Garner v. Marshall*, 9 Cal. 268, 270.

Ejectment is a possessory action and determines none but possessory rights, and, as a general rule, must be brought against the person who is in possession and wrongfully withholding the premises. *Chicago & E. I. R. Co. v. Clapp*, 66 N. E. 223, 227, 201 Ill. 418.

#### **Interest or rights recoverable.**

The action of ejectment can be resorted to only where the thing or interest is tangible, so that possession can be delivered. *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 762, 62 N. J. Law, 254, 42 L. R. A. 572; *Jackson v. Buel* (N. Y.) 9 Johns. 298, 299.

By the common law, ejectment will not lie for anything whereon entry cannot be made, or by which the sheriff cannot give possession. Thus an action of ejectment will not lie for the projection of eaves of a building over land. *Leprell v. Kleinschmidt*, 1 N. Y. Supp. 821, 822, 49 Hun, 605; *Alken v. Benedict* (N. Y.) 39 Barb. 400, 401.

Where a grantor in his deed reserved to himself, and his heirs and assigns forever, "the right and privilege of erecting a mill-dam at a certain place described, and to occupy and possess the same without any hindrance or molestation from the grantee and his heirs," it was held that the right reserved was an interest in the land as that an action of ejectment would lie for. *Jackson v. Buel* (N. Y.) 9 Johns. 298, 299.

The owner of land subject to a private easement may maintain ejectment to recover possession, subject to the easement, against the dominant tenant. *Wilson v. Wightman*, 55 N. Y. Supp. 806, 810, 36 App. Div. 41.

#### **As a proceeding in personam.**

The action of ejectment, in the District of Columbia, is held not to be a proceeding in rem, but a proceeding in personam, involving the right to the possession of the property described in the declaration. *Stafan v. Zeust*, 10 App. D. C. 260, 264.

#### **As a real action.**

An action of ejectment has been variously declared to be a personal action, a mixed action, and a real action. In common law the action was strictly a possessory remedy, and in many of the states of the Union it is still regarded as such. Ejectment is a real action in Tennessee, and is to be regarded as a strictly legal remedy. *Hubbard v. Godfrey*, 47 S. W. 81, 83, 100 Tenn. 150.

#### **Unlawful detainer distinguished.**

The action of unlawful detainer and that of ejectment are not the same action or the same kind of action, either in substance or in form. The first is by a person who claims the possession, not only of the real property, and founds his right to recover the possession solely upon a prior possession, constructive or actual, in himself or grantor, and against a person who cannot or has not the right to set up any right of possession as against the plaintiff, and no question of title or estate can be litigated in the case; while the second action is to recover an estate, legal or equitable, in the real property, with the title and the incidental right of possession; and the two cases must be brought in different forums and presented to the courts by very dissimilar pleadings, and hence the pendency of an action of unlawful detainer will not cause an action of ejectment as to the same land to abate. *Buettinger v. Hurley*, 9 Pac. 197-199, 84 Kan. 585.

#### **Use and occupation distinguished.**

Action for use and occupation and the action of ejectment are not the same. In *re Polsgrove*, 5 Pa. (5 Barr) 500, 502.

#### **EJECTMENT (Writ of).**

The technical name of the writ in an action of ejectment is not a "writ of ejectment," although an "ejectment," in its ordinary definition of an expulsion or ouster of the defendant, results from the writ. *Bartley v. Bingham*, 15 South. 592, 593, 34 Fla. 19.

#### **EJECTMENT BILL.**

An "ejectment bill" is one brought merely for the recovery of real property, together with an account of the rents and profits, without setting out any distinct ground of equity jurisdiction. A bill of such descrip-

tion would be demurrable, and receive no countenance in court. *Crane v. Conklin*, 1 N. J. Eq. (Saxt.) 346, 353, 22 Am. Dec. 519.

### EJECTMENT OF THE TERM.

Ejectment of the term "is a mixed action, somewhat between real and personal, in which restitution of the term for years, and damages for the ouster or wrong, are simultaneously recovered." *Hodgkins v. Price*, 137 Mass. 13, 16.

### EJECTOR.

See "Casual Ejector."

### EJIDOS.

"Ejidos" is a term used in the Spanish law to designate common lands located within the limits of a city, pueblo, or town, but is sometimes used to designate common lands without the limits of the town. It is distinguished from "solares," or house lots, and "suertes," or sowing grounds within the limits of the city, pueblo, or village. *Hart v. Burnett*, 15 Cal. 530, 554.

### EJUSDEM GENERIS.

"Ejusdem generis" means of the same kind or species. The words are used to designate a rule of construction that: "When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things 'ejusdem generis'—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms. *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462.

The doctrine of "ejusdem generis" is that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. *Spalding v. People*, 172 Ill. 40, 49, 49 N. E. 993, 995. So also in the construction of wills. *Bills v. Putnam*, 64 N. H. 554, 561, 15 Atl. 138.

The rule "ejusdem generis" ordinarily limits the meaning of general words to things of the same class as those enumerated under them. *Benton v. Benton*, 63 N. H. 289, 295, 56 Am. Rep. 512 (citing 1 Jarm. Wills, 716).

By application of the maxim "ejusdem generis," which is only an illustration or specific application of the broader maxim "noscitur a sociis," general and specific words which are capable of an analogous mean-

ing, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general. *End. Interp. St. § 400*. But it has never been supposed that the rule required the rejection of the general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated. *State v. Williams*, 2 Strob. 474. On the contrary, it must yield to another salutary rule of construction, viz., that every part of a statute should, if possible, be upheld and given its appropriate force. *Misch v. Russell*, 136 Ill. 22, 25, 26 N. E. 528, 529, 12 L. R. A. 125.

"The rule of 'ejusdem generis,' in statutory construction, is by no means a rule of universal application, and its use is to carry out, not to defeat, the legislative intent. When it can be seen that the particular word by which the general word is followed was inserted, not to give a coloring to the general word, but for a distinct object, and then to carry out the purpose of the statute, the general word ought to govern. It is a mistake to allow the 'ejusdem generis' rule to pervert the construction." *State v. Broderick*, 7 Mo. App. 19, 20.

The proper rule in the construction of wills, to which this one of "ejusdem generis," and all others except those founded upon public policy, are not only subordinate but ancillary, is that the intention of the testator—to be ascertained by the particular words used, from the context, and from the general scope and purpose of the instrument—is to prevail and have effect. In an enumeration of particulars, general and comprehensive terms are sometimes used, in the construction of which reason and good sense require that, if you would not violate the intention of the writer, their meaning must be restricted to things of a like nature and description with the particulars among which they are found. This is a rule of intention, and it readily yields where the circumstances show that a reliance upon it would defeat rather than effectuate the intention. *Williams v. Williams*, 18 Tenn. (10 Yerg.) 20, 23, 26.

### EL CANON.

"El canon" is a term used in the Spanish law. "According to *Escríche*, 'el canon' means the annual charge or rent which is paid in recognition of the dominium utile by the person who holds the dominium ntile (*vide Escríche*, verba 'Canon' and 'Pension')."  
*Hart v. Burnett*, 15 Cal. 530, 556.

### ELASTIC.

The word "elastic" is not aptly descriptive of bookcases or file cabinets construct-

ed in sectional parts so that their size may be increased or diminished by adding or taking away sections, but is at the most only suggestive of such fact, which does not preclude its operation as a trade-mark by the manufacturer of such bookcases and cabinets to identify the goods of its manufacture. The word "elastic" may have been used for such a length of time by one as to have acquired a secondary meaning in the trade and with the general public as to identify sectional bookcases and similar articles of its manufacture, and to entitle it to protection as against the use of such word in connection with the goods of other manufacturers, even if not valid as a technical trade-mark. *Globe-Wernicke Co. v. Brown* (U. S.) 121 Fed. 185, 186.

### ELASTIC SEAM.

The words "elastic seam," used to designate a garment having a strip of elastic knitted material inserted at the seams, are wholly descriptive, and cannot be monopolized as a trade-mark. *Scriven v. North* (U. S.) 124 Fed. 894, 895.

### ELATERIUM.

"Elaterium" is the residue deposited by the juice of the fruit of *echallium elaterium*, which is a little fruit resembling somewhat the cucumber, with a hollow interior filled with juice. The fruit is gathered just before it is ripe, because when ripe it breaks in handling. It is cut in two, when the juice flows out, which is allowed to stand until the sediment is deposited at the bottom. The juice is poured off, and the sediment is dried as quickly as possible, to avoid fermentation. The British Pharmacopœia contains the following formula for the preparation of the drug as imported: "Cut the fruit lengthwise, and lightly press out the juice. Strain it through a hair sieve, and set it aside to deposit. Carefully pour off the supernatant liquor, pour the sediment on a linen filter, and dry it on porous tiles, in a warm place." It is imported in little cakes, and varies much in quality. It is not used in this form by the physician. The manufacturer extracts from the cakes their vital principle, which is known as "elaterine." *United States v. Merck* (U. S.) 66 Fed. 251, 252, 13 C. C. A. 432.

### ELDERS.

8 Rev. St. 292, § 3, declares that, on the day of the election of the elders and churchwardens of a religious society, two of the elders or churchwardens shall be chosen to preside as in charge of the election. Held, that the word "elder," as used in such statute, meant a deacon or member of the gov-

erning board, and was not synonymous with the "pastor" or "preacher." *People v. Peck* (N. Y.) 11 Wend. 604, 27 Am. Dec. 104.

### ELDEST.

Testator in 1775 gave to his brother W.'s son N., during his natural life, and to his "eldest male heir," and after his decease to "said male heirs and assigns forever, all and singular my homestead," etc. At the time of making the devise N. had no issue, but he afterward had several children, of whom the third son alone survived him. Held, that the words "eldest male heir" was a distinction of a particular individual, and not nomen collectivum, and that the words "said male heirs" were intended to designate the eldest male heirs who should take in succession after the death of the first remainderman. *Oanedy v. Haskins*, 54 Mass. (18 Metc.) 889, 403, 46 Am. Dec. 739.

A testator gave land to one son "for his life," and to such son's "eldest legitimate son" after his death, and "in default of such issue" the land was given in like manner to another son, and in case the latter had no legitimate male issue it was given to the "offspring about to be born from" testator's wife, and in default of such issue, then to testator's heirs, etc. Held, that the term "eldest legitimate son" was not designatio personæ, but nomen collectivum, creating an estate tail in the eldest son, etc. *Lewis v. Puxley*, 16 Mees. & W. 733, 741.

Testator directed a division of his estate to be made at the expiration of seven years from his death, provided his daughter had then been dead two years, and gave out of the fourth part a sum of \$500 to the legatee, and that the residue should be paid to the trustee, to keep the same invested and to pay the income to S. and B. until the eldest child of S. M. should arrive at the age of 21 years, then to divide it among the children of the said S. M. Held, that the term "eldest child" meant the child who should first arrive at age. *Butler v. Butler* (N. Y.) 1 Hoff. Ch. 344, 347.

### ELECT—ELECTED—ELECTION.

See "Annual Election"; "Equitable Election"; "Free Election"; "General Election"; "Municipal Election"; "National Elections"; "New Election"; "Next Election"; "Popular Election"; "Primary Election"; "Public Election"; "Regular Election"; "Special Election"; "State Election"; "Town Election."

See "Members Elected."

Any election or election law, see "Any."

Bet on election, see "Bet."

First proper election, see "Proper Election."

The primary meaning of the word "election" is choice; the act of choosing. *State v. Tucker*, 54 Ala. 205, 210; *Seaman v. Baughman*, 47 N. W. 1091, 1092, 82 Iowa, 216, 11 L. R. A. 854.

"Election" is defined to be "the choice which several persons collectively make of a person to fill an office or place." *Maynard v. Board of District Canvassers*, 47 N. W. 756, 759, 84 Mich. 228, 11 L. R. A. 332 (quoting *Bouv. Law Dict.*); *State v. Williams*, 58 Pac. 476, 477, 60 Kan. 837; *State ex rel. Nicholls v. City of New Orleans*, 6 South. 592, 597, 41 La. Ann. 156.

The word "election," when standing alone, is defined as the act of choosing; choice; the act of selecting one or more from others. Hence, appropriately, the act of choosing a person to fill an office or employment by any manifestation of preference, as by vote, uplifted hands, or viva voce. *Brown v. Phillips*, 36 N. W. 242, 247, 71 Wis. 239; *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

"Election" means, according to *Bouvier*, choice; the selection of one man from amongst more to discharge the duties in a state, corporation, or society; and *Anderson*, in his *Dictionary*, defines the term as a choosing or selecting; also the condition of having been chosen or selected; choice or selection. *Bowler v. Eisenhood*, 48 N. W. 136, 138, 1 S. D. 577, 12 L. R. A. 705.

The term "election" carries with it the idea of choice, in which all those who are to be affected with the choice participate. *Bouvier*, under the word "election," says that, etymologically, election denotes choice; selection out of the number of those choosing. In common use, however, it has come to denote such a selection made by a distinctly defined body. In *Rap. & L. Law Dict.*, it is said, "Election is the selection of a person by the votes of an entire class." *Wickersham v. Brittan*, 28 Pac. 792, 793, 93 Cal. 84, 15 L. R. A. 106, 108.

"The term 'election,' in its constitutional sense and meaning, is used to designate a selection by the popular voice of a district, county, town, or city, or by some organized body, in contradistinction to the appointment by some single person or officer." *Police Com'rs v. City of Louisville*, 66 Ky. (3 Bush) 597, 602; *Rogers v. Jacob*, 11 S. W. 518, 514, 88 Ky. 502; *Speed v. Crawford*, 60 Ky. (3 Metc.) 207, 209; *Magruder v. Swann*, 25 Md. 173, 213; *State v. Harrison*, 16 N. E. 384, 388, 113 Ind. 434, 3 Am. St. Rep. 663.

The word "election" is not limited in its definition and meaning to the act or process of choosing a person for a public office by a vote of the qualified electors at the time, place, and manner prescribed by law. The *Century Dictionary* defines "election" to

mean a deliberate act of choice; particularly a choice of means for accomplishing a given end; the choice of a person or persons for office of any kind by the voting of a body of qualified or authorized electors. In *Worcester's Dictionary* the word "election" is defined as the act of electing or choosing; power of choosing; free choice; preference; selection. *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

Elections are contrivances of government by which persons called "electors" exercise their will as to who shall exercise the functions of government. *People v. Board of County Canvassers of Onondaga County*, 29 N. E. 327, 334, 129 N. Y. 395, 14 L. R. A. 624.

In statutes relative to elections the term "election" shall apply to the taking of a vote upon a proposed amendment to the Constitution; upon the questions of granting licenses for the sale of intoxicating liquors; and upon any other question by law submitted to the voters. *Rev. Laws Mass. 1902*, p. 104, c. 11, § 1.

The word "election," as used in the article relating to registration and elections in cities with 1,000 inhabitants or over, shall be construed to designate elections had within any city, for the purpose of enabling electors to choose some public officer or officers under the laws of the state or the United States, or to pass any amendment, law, or other public act or proposition submitted to vote by law. *Rev. St. Mo. 1899*, § 7357.

The word "election," as used in the chapter of the Penal Code relating to crimes against the elective franchise, designates only elections had within the state for the purpose of enabling electors, as such, to choose some public officer or officers under the laws of this state, or of the United States. *Rev. Codes N. D. 1899*, § 6892.

The construction of *Laws 1898*, c. 182, p. 373, § 17, enacting that the common council shall be "the judge of elections, return and qualifications of its members," cannot be varied by the presence or absence of punctuation marks, or the use of words either in the singular or the plural, as the expression "election returns and qualifications" has a well-defined and settled meaning in American jurisprudence, and though we find "elections" in the plural, followed by a comma, the term gives to the board of aldermen the power to determine who was elected, and his qualification to membership. *People v. Fornea*, 67 N. E. 216, 217, 175 N. Y. 114.

#### As appoint.

The term "an election" is not, according to its true meaning, necessarily confined to the process by which the people indicate their choice of officers, but may properly and

appropriately be applied to the process by which members of city councils or other legislative bodies choose or elect officers, and is so used in a statute punishing bribery at elections. *Commonwealth v. Root*, 96 Ky. 563, 538, 29 S. W. 351.

The word "elected," as used in Laws 1895, c. 247, § 4, relating to the election of the president of the village of Saratoga Springs, is used in the same sense in which the word "appointed" is used in the constitution, prescribing the mode of election of the officer. *People v. Sturges*, 47 N. Y. Supp. 999, 1001, 21 Misc. Rep. 605; *Id.*, 50 N. Y. Supp. 5, 6, 27 App. Div. 387.

"Elected," as used in Const. art. 4, § 27, providing that the present judges of the circuit courts shall continue to act as judges of the respective circuit courts within the judicial circuits in which they respectively reside until the expiration of the term for which they were respectively elected, and until their successors are elected and qualified, is not synonymous with "appointed," and means chosen by the people. *Magruder v. Swann*, 25 Md. 173, 218.

"Elected," as used in the Constitution, providing that officers shall be entitled to hold until their successors are elected and qualified, means the choosing of an officer by the people at large, or by an organized body, as the Legislature, and hence the terms "elected" and "qualified" should be construed to mean until the successor shall have been designated in whatsoever manner is provided by the Constitution or law creating the office; and, though the terms "elect" and "appoint" are not, in general, synonymous, the term as used in the Constitution applies equally to officers who are to be appointed by the General Assembly as those elected by the people. *State v. Harrison*, 16 N. E. 384, 388, 113 Ind. 434, 3 Am. St. Rep. 663.

Laws 1857, c. 243, providing that three of the commissioners of pilots shall be elected by the members of the Chamber of Commerce, and the other two by presidents and vice presidents of the marine insurance companies of the city of New York represented in the Board of Underwriters of said city, does not mean that such commissioners should be chosen by the ordinary mode of voting by the people, but means "appointed"; the mode of selecting such commissioners being, in legal effect, an appointment. *Sturgis v. Spofford*, 45 N. Y. 446, 449.

How. Ann. St. § 729, provides for filling vacancies in the board of supervisors by appointment. Section 459 authorizes such board, by a vote of two-thirds of all the members elect, to designate a place to which to remove the county seat, and, after a vote of the electors in favor thereof, to establish such county seat. Held, that members of

the board appointed to fill vacancies have the same right as members elected to take part in such proceedings, and to have their votes counted. *Peck v. Berrien County Sup'rs*, 102 Mich. 346, 60 N. W. 985.

The word "elected," employed in Const. art. 15, § 3, which provides that an officer shall hold his office until his successor shall have been elected and qualified, cannot be construed to mean chosen or designated, so as to deprive an incumbent of his office by the appointment of a successor, but means a successor chosen at a regular election. *Kimberlin v. State*, 29 N. E. 773, 130 Ind. 120, 14 L. R. A. 858, 30 Am. St. Rep. 208.

"Discriminating authorities sanction the use of the word 'appointed' in a sense which includes the notion of election by a body, as well as selection by an individual, and also the use of the word 'elected' as applied to those who are chosen by the votes of a body limited in numbers. By way of authoritative definitions, we have the following: *Bouv. Law Dict.*: 'Appointment. The designation of a person by the person or persons having authority therefor to discharge the duties of some office or trust.' 'Election. Choice; selection. The selection of one person from a specified class to discharge certain duties in a state, corporation, or society.' *Cent. Dict.*: 'Appoint. To allot, set apart, or designate, nominate or authoritatively assign, as for use, or to a post or office.' 'Elect. To pick out; select from among a number; to select for an office or employment by a majority or plurality of votes; choose by ballot or any similar method, as to elect a representative or a senator; to elect a president or mayor.' In this connection, an election of an archbishop by the monks of a certain convent is instanced as a proper use of the verb 'to elect.' Under these definitions, the distinction seems to be that election signifies the act of choosing where several participate in the selection. Appointment relates to the bestowal of the office upon the person selected, whether the choosing be the act of one or of many. Where the choice rests in the sole discretion of an individual, the usual authoritative evidence that a selection has been definitely made is in the act of bestowal; hence in such cases the word 'appointment' has come to include the function of selection, as well as the function of authoritatively designating the person selected. That the functions are distinct, however, appears when we come to consider those cases where one has the exclusive function of selection, but the appointment is subject to the approval of others. For instance, the Governor nominates, and, with the advice and consent of the Senate, appoints, certain officers. But where the power of making an appointment resides in a numerous body, the exercise of the power necessitates a previous agreement, by majority of



voices or otherwise, with respect to the person to be chosen, and the choice so made is an election, after which the person selected receives the appointment, and can properly be said to be appointed, although he is the choice of many. Under our system of government, the most familiar example of election is that which is participated in by the people at large. At the same time it requires the use of the phrase, 'popular election,' or 'election by the people,' to clearly express the thought." *Reid v. Gorsuch*, 51 Atl. 457, 459, 67 N. J. Law, 398.

The words "appointment" and "election" represent different tenures. The people elect. The Governor or other functionary appoints. Section 1 of the Statutes of California concerning offices and officers, providing that "there shall be elected or appointed as hereinafter declared the following officers," etc., and the other provisions of the act, use the term "election" as applied to the action of the people in choosing officers, and the term "appointment" as applied to the action of whatever officer or board is vested with the power to fill the given vacancy. Where the officer is chosen by the people, he takes by virtue of his election. Where the office, from any cause, became vacant before the expiration of the term, and it is filled by the choice of the Governor or some other public functionary, the officer chosen takes by virtue of his appointment. In the case of an election to office by the people, the issuance of the commission is a mere ministerial act. *Conger v. Gilmer*, 82 Cal. 75, 78.

The word "election," in the strict sense, undoubtedly means the choice of an officer, in the exercise of which all the qualified electors have an opportunity to participate, while the word "appointment" is understood to mean the selection by one or more persons, who have been commissioned for that purpose, of another, who, by virtue of the choice, represents or may exercise some authority over the persons delegating the power to make the appointment. In *People v. Langdon*, 8 Cal. 1, it was insisted that the words "elected" and "appointed," as used in a section of the California Constitution, were not equivalent expressions of the meaning intended to be imported by the framers of that instrument, but the court said: "Much stress is laid upon the word 'appoint,' as used in this section. This is mere hypercriticism. The word 'appoint' was probably used as a more comprehensive term to convey the idea of a mode of constituting or designating an officer with public election or otherwise. In fact, the words 'elect' and 'appoint' seem to be regarded as synonymous by the convention. The word 'elect' simply means to pick out, to select from among a number, or to make choice of, and is synonymous with the words 'choose,' 'prefer,' 'select,' and was evidently used in this sense

in the Constitution." And the word "elect," as used in Const. art. 15, § 1, declaring that all officers shall hold their office until their successors are elected and qualified, is not limited to offices which are filled by an election of the people, as contradistinguished to those to which appointment is made by the Legislature. *State v. Compson*, 54 Pac. 349, 351, 34 Or. 25.

In the popular sense, an election is a choice which several persons collectively make of a person to fill an office or position, while an appointment is a choice for such office or position by some single officer or person. Where a police judge was selected by the several members of the city council, it was not inappropriate to say that he was elected. *State v. Williams*, 58 Pac. 476, 477, 60 Kan. 837.

An election is the direct choice of all the members of the body from whom the choice can be made, as distinguished from an appointment, which is generally made by one person, or by a limited number, acting with delegated powers. *Wickersham v. Brittan*, 28 Pac. 792, 793, 93 Cal. 34, 15 L. R. A. 106, 108. See, also, *State v. Squire*, 39 Ohio St. 197, 199.

#### As authorized election.

There can be no valid election without some valid authority behind it. A few voters putting tickets in a box does not alone make an election; and where, on the claim that a vacancy existed in the office of alderman, without any order of the common council, or notice that an election was to be held to fill such vacancy, a few voters deposited ballots for an alderman to fill such vacancy, the court held that the person voted for was not elected, saying: "An election implies opportunity to re-elect or choose another, and such was not given. It is a misnomer to call such a proceeding an election." *People v. Crissey*, 91 N. Y. 616, 634, 635.

#### As choice by plurality.

"Election" means the choice of a person for some office by a plurality of votes. *State v. Anderson*, 12 N. E. 656, 659, 45 Ohio St. 196.

One of the cardinal principles on the subject of elections is that the person who receives a majority or plurality of the votes is the person elected. Generally a plurality of the votes of the electors present is sufficient, but in some states a majority of all the votes is required. Each elector has one vote. *Maynard v. Board of Canvassers*, 47 N. W. 756, 760, 84 Mich. 228, 11 L. R. A. 332.

#### As choice by popular election.

An election is the embodiment of the popular will; the expression of the sovereign

power of the people. In re Wheelock, 82 Pa. 297, 299; Stinson v. Sweeney, 30 Pac. 997, 1000, 17 Nev. 309.

The term "elected," generally speaking, imports a popular election. *Ex parte Faulkner*, 1 W. Va. 289, 299.

"Among lexicographers and theologians, the meaning of the word 'elect' is to choose; to take by preference; and there is nothing in its accepted meaning which necessarily signifies a popular election." *Speed v. Crawford*, 60 Ky. (3 Metc.) 207, 210.

"Elected," in its strict sense, means choice by popular vote. *Wickersham v. Brittan*, 15 L. R. A. 106, 108, 93 Cal. 34, 28 Pac. 792; *State v. Compson*, 54 Pac. 349, 351, 34 Or. 25.

The constitutional provision prohibiting the Legislature from passing a local or special law regulating the election of county and township officers means popular election, and therefore it operates to prohibit the making of distinctions between counties and townships in the matter of popular election of their officers. The word "election," in the constitutional provision providing that the Legislature shall provide by law for the election of a board of county commissioners in each county, and the phrase "election by the people," in the clause providing that the Legislature shall provide for the election by the people of sheriffs and other necessary officers, are limited in meaning to popular elections. *State v. Irwin*, 5 Nev. 111, 121.

"Elected," as used in the Constitution, must be received in its ordinary and usual meaning, which carries with it the idea of a vote generally popular, sometimes more restricted, and cannot be held to be the synonym of any other method of filling an office. *State v. Torreyson*, 34 Pac. 870, 872, 21 Nev. 517; *State v. Irwin*, 5 Nev. 111, 120.

The word "election," as used in Const. art. 2, § 6, which provides that all elections by the people shall be by ballot, means a choice of persons for public officers made by the people. *Seaman v. Baughman*, 47 N. W. 1091, 1092, 82 Iowa, 216, 11 L. R. A. 354.

#### **As choice by those qualified.**

Civ. Code, § 315, providing that, upon the application of any person or corporate body aggrieved by an election held by any corporate body, the district court of the district in which such election is held may inquire into such election, etc., means an election by the stockholders, and not the selection of a person to fill a vacancy by the board of directors. *Wickersham v. Brittan*, 28 Pac. 792, 793, 93 Cal. 34, 15 L. R. A. 106, 108.

Const. art. 6, § 10, providing that the General Assembly may provide for the election, for a term not exceeding four years, of such other county or district ministerial and executive officers as shall from time to time be necessary and proper, means a selection of officers by qualified voters at the polls. *Ader v. City of Newport (Ky.)* 6 S. W. 577, 578.

#### **As choice in manner provided by law.**

Where a city charter provided that all officers shall hold their offices until their successors are elected or appointed, the words "elected or appointed" mean selected in the manner provided by law. *State v. Daggett*, 68 Pac. 340, 346, 28 Wash. 1.

The term "election" implies a choice by an electoral body, at the time and substantially in the manner and with the safeguards provided by law, of a qualified person to an office. *Foster v. Scarff*, 15 Ohio St. 532, 534.

#### **As choice of eligible person.**

"Elected," as used in Const. art. 5, § 2, providing that none of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected, means the choosing of a person eligible to be chosen. *State v. Boyd*, 48 N. W. 739, 754, 81 Neb. 682.

An election is the deliberate choice of a majority or plurality of the electoral body. This is evidenced by the votes of the electors. But if a majority of those voting, by mistake of law or fact, happen to cast their vote upon an ineligible candidate, it by no means follows that the next to him on the poll should receive the office. *Lewis v. Boynton*, 55 Pac. 732, 734, 25 Colo. 486 (citing *Saunders v. Haynes*, 13 Cal. 145).

#### **As day's voting.**

The word "election," as used in a statute providing for an election to determine the site of a county seat, and declaring that, if at the first election no place receives a majority, a second election shall be had, and as further used in a statute providing that in no case shall the validity of an election be inquired into, beyond the one last had and on which the proceeding is based, means a day's voting, and is not confined to its meaning to choice or selection, in the sense that no election is had until a result is reached. In re County Seat of Linn County, 15 Kan. 500, 526.

#### **As declared elected.**

The term "election," as generally used, is understood to mean one who has by some legally constituted board been declared elected to an office. The expression "the per

son whose election he intends to contest," in Comp. Laws, § 1489, relating to contests of election, means a person who has been decided or declared to be elected by a board or officer authorized to determine the result of the election—one no longer simply a candidate voted for, or subject to be declared elected, but one so declared or decided to be elected, and who has received, or is found entitled to receive, a certificate of his election. *Bowler v. Eisenhood*, 48 N. W. 136, 138, 1 S. D. 577, 12 L. R. A. 705.

#### As entire proceedings.

An election, under the Constitution, involves every element necessary to the complete ascertainment of the expression of the popular will, embracing the entire range, from the deposit of the ballot by the elector up to the final ascertainment and certification of the result. An election by the people means and includes the perfected ascertainment of such result. *State v. McCoy* (Del.) 43 Atl. 270, 273, 2 Marv. 576.

The word "election," as used in Rev. St. § 3397, providing that, after the result of an election under the local option law has been declared, the election may be tested, and that if it appear that it was illegal or fraudulently conducted, or such a number of voters were denied the privilege of voting as might have changed the result, or the true result of the election cannot be ascertained, "another election shall be ordered," means the act of casting and receiving the ballots from the voters, counting the ballots, and making returns thereon. *State v. Tucker*, 54 Ala. 205, 210. That is the meaning of the word "election" in the ordinary usage, and it must be so construed; there being nothing in the law to suggest that the Legislature intended to use it in a different sense. *Norman v. Thompson*, 72 S. W. 62-64, 96 Tex. 250; *Ex parte Conley* (Tex.) 75 S. W. 301, 302.

#### As inducted into office.

"Election," as used in Rev. St. 1833, c. 24, § 6, respecting appointments to fill vacancies in the office of constable, and providing that the person so appointed shall be qualified to act until the next election of constables, should be construed to mean not only the act of choosing, but the act of choosing and inducting into office. *Waring v. Wilroy*, 32 N. C. 329, 332.

#### As time when ballots were cast.

"Election," as used in Rev. Code, § 162, fixing the number of days after the election within which official bonds must be filed, and as found in different sections regulating elections in the state, meant the time when the ballots were cast, and not when the final choice was made. *State v. Tucker*, 54 Ala. 205, 210.

#### As election on question submitted.

Under Ky. St. tit. "Elections," § 1588, the word "election," whenever used in the chapter in reference to state, district, county, or municipal elections, shall be deemed to include the decision of questions submitted to the qualified voters, as well as the choice of officers therein. *Commonwealth v. Steele*, 97 Ky. 27, 29, 29 S. W. 855.

The word "election," until quite lately, when applied to political speeches, was never used to denote the choice of a principle or a rule of action, but was merely for the purpose of determining a choice of persons. To make the word "election" mean the choice of a state law is to invent for the word a new meaning, which it never previously had. There are very few decisions which militate against this obvious distinction. That a city or town may accept or reject a statutory proposal of a grant of local power is not an exception, for, as we have seen, the power lies in grant; and it is not supposed that any set of persons are bound to accept or use a grant which they refuse to accept, though every one must obey a state law, whether he consents or not. The only exception to the above rule is where the inhabitants of a county are permitted to vote whether there shall be fence laws within its quarters. *Thornton v. Territory*, 17 Pac. 896, 899, 8 Wash. T. 482.

In Const. § 157, providing that no county shall become indebted to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters therein voting at an election to be held for that purpose, the word "election" referred to the proposition upon which the vote is to be taken, and hence the provision does not require the consent of two-thirds of the voters voting at the same time for public officers. *Montgomery County Fiscal Court v. Trimble*, 47 S. W. 773, 774, 104 Ky. 629, 42 L. R. A. 738.

The term "election," as used in Const. art. 7, § 1, providing that every male person possessing the following qualifications shall be entitled to vote at all elections, is not used in its general or comprehensive sense, but in its restricted political sense, meaning public elections for the choice of public officers, and will not include an election to determine the question of an annexation of a town or city. Hence the electors at such election may be required to have different qualifications. *Town of Valverde v. Shattuck*, 34 Pac. 947, 19 Colo. 104, 41 Am. St. Rep. 208.

The term "election," within the meaning of a statute prohibiting bets on elections, does not include a method prescribed by the Legislature to take the sense of the qualified voters of a county on the question of removing the county seat. *Moore v. Commonwealth*, 7 Ky. Law Rep. 292.

**District school meeting.**

The word "election," as used in Const. § 6, art. 2, requiring all elections by the people to be by ballot, refers to a choice of persons for public offices, and has no application to the meetings of electors of a district township for the transaction of the general business of the township. *Seaman v. Baughman*, 82 Iowa, 216, 220, 47 N. W. 1091, 1092, 11 L. R. A. 354.

Where a statute authorizes the election of certain officers at a district school meeting, who are to be elected by the electors qualified to vote thereat as prescribed by statute, such meeting constitutes an election, within the provisions of 1 Hill's Ann. Laws, § 1846, declaring a punishment for a person who shall vote at any legally authorized election, knowing himself not entitled to vote. *State v. Hingley*, 52 Pac. 89, 82 Or. 440.

**Municipal election.**

Const. art. 1, § 1, provides that "all elections shall be by ballot," and that "every male citizen of the United States . . . who has been a resident of the state for one year, and of the legislative district of Baltimore City or of the county in which he may offer to vote, for six months next preceding the election, shall be entitled to vote, in the ward or election district, in which he resides, at all elections hereafter to be held in this state." Baltimore City is the only municipality mentioned as nominee in any part of the Constitution. It provides for the creation of certain offices, state and county, which are filled either by election or by appointment; and we regard it as an unreasonable inference to suppose that municipal elections held within the state (outside the corporate limits of Baltimore City) can be properly termed "elections," under the Constitution, such as state and county elections, or that the framers of the Constitution even contemplated that article 1, § 1, of that instrument, was intended to apply to municipal elections, such as the one now under consideration, which is the mere creature of statute. *Hanna v. Young*, 35 Atl. 674, 675, 84 Md. 179, 84 L. R. A. 55, 57 Am. St. Rep. 396.

**Primary election.**

The word "election," in the act entitled "An act to promote the purity of elections by regulating the conduct thereof," etc., does not mean primary election. *People v. Cavanaugh*, 112 Cal. 674, 676, 44 Pac. 1057, 1058.

The term "election," in Gen. St. c. 47, art. 2, § 1, making it criminal to bet upon the result of an election under the Constitution and laws of the commonwealth or of the United States, does not include a primary election. *Commonwealth v. Helm*, 9 Ky. Law Rep. 532.

A primary election is not an election, so as to render a fraud committed at a primary

election within the common-law offense of fraud at an election. *Woodruff v. State*, 52 Atl. 294, 296, 68 N. J. Law, 89.

Rev. St. 1881, § 2068, making it a crime to sell or give away intoxicating liquors to be drunk as a beverage on a day of election in a town or city where the same may be holden, is not limited to elections between the candidates of the various parties, but includes a primary election held by a political party to select candidates. *State v. Hirsch*, 24 N. E. 1062, 1063, 125 Ind. 207, 9 L. R. A. 170.

Act March 24, 1817, as amended by Act July 2, 1839, providing that the officers having the care of the poor must bring a suit against the stakeholder or party winning in a bet or wager upon the result of any election within this commonwealth, should be construed to mean only elections for public officers, and not to include primary elections for the selection of party candidates to be voted for in the election for the officers. *Commonwealth v. Wells*, 1 Atl. 310, 311, 110 Pa. 463.

The word "election," as used in Const. art. 7, declaring that every male person of the age of 21 years or upwards, belonging to either of the following classes, who shall have resided in the United States one year, and in this state 4 months next preceding any election, shall be entitled to vote at such election, etc., does not include the election of candidates to the position of nominees held pursuant to the primary election law of the state (Laws 1889, c. 349). *State v. Johnson*, 91 N. W. 840, 841, 87 Minn. 221.

**Town meeting.**

A statute authorizing a town to vote with reference to subscribing for the stock of a railroad at any annual or special election meant any lawful assemblage of voters of a town for the purpose of making a choice or determining public questions by vote or ballot. The Legislature intended to use the word "election" according to its general signification, and not in its more restricted sense, and therefore the term included a town meeting at which various public matters of importance to the town were transacted. *Phillips v. Town of Albany*, 28 Wis. 840, 855.

Act March 30, 1869, § 6, providing for the issuance of bonds in aid of a certain railroad company by towns and villages along its route, and that the election to determine such issuance should be held and conducted and return thereof made as provided by law, should be construed to include a town meeting presided over by a moderator, though not held by the supervisor, assessor, and collector as judges of the election. The voting for town officers at annual town meetings in the manner prescribed therefor by the statutes is called an "election," and a special voting in the same manner for the object of issuing bonds in aid of a railroad was an elec-

tion, within the meaning of the act of 1869. *Town of Oregon v. Jennings*, 7 Sup. Ct. 124, 133, 119 U. S. 74, 30 L. Ed. 323.

### ELECTED DOMICILE.

The term "elected domicile" designates the domicile of parties fixed in a contract between them for the purposes of such contract. *Woodworth v. Bank of America*, 19 Johns. 391, 417, 10 Am. Dec. 239.

### ELECTION.

See "Waiver by Election"; "Right of Election."

"Election," as used in a deed conveying certain mine hills and ore banks, and excepting and reserving to the grantor, his heirs and assigns, the right of digging and hauling away a sufficient quantity of iron ore for the supply of any one furnace, at the election of the grantor, his heirs and assigns, at all times thereafter, means election or choice, and is not used in its technical signification, as meaning an obligation imposed on a party to choose between two alternative rights or claims in mines, where there is a clear intention of the person from whom he derives one that he did not enjoy both. *Coleman v. Brooke* (Pa.) 12 Phila. 503, 504.

#### In criminal law.

"Elect," as used in speaking of the right to elect upon one of several counts of an indictment on which a prosecution will be based, implies a knowledge of facts which go to make up two or more offenses; and while the solicitor may, by his own acts and questions, involuntarily effect an election, yet, to hold him to have elected to proceed for a certain offense, he must have learned enough to enable him to individualize the transaction, and then pursue his inquiry with a view to learning the details or particulars of the act or transaction thus individualized. *Jackson v. State*, 10 South. 657, 95 Atl. 17.

#### In equity.

Election is the internal, free, and spontaneous separation of one thing from another, existing in the mind and will. *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133, 144 (citing *Dyer*, 281).

Election, in law, is when a man is left to his own free will to take or do one thing or another, which he pleases. *Arthur v. Nelson* (N. Y.) 1 Dem. Sur. 337, 346.

"Election," as used in its legal sense, is defined to be the choice of one or two rights or things, to each one of which the party chosen has an equal right, but both of which he cannot have. 1 Bouv. Law Dict. *Bhas v. Geer*, 7 Ill. App. (7 Bradw.) 612, 617.

"Election," says Judge Story, "is the obligation imposed on a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both." *Nutt v. Nutt* (Miss.) *Freem.* Oh. 123, 132; *First Nat. Bank v. Holland*, 39 S. E. 126, 130, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898; *Hattersley v. Bissett*, 29 Atl. 187, 189, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532; *Norwood v. Lassiter* (N. C.) 43 S. E. 509, 510; *Gilroy v. Richards* (Tex.) 63 S. W. 664, 666; *Gilman v. Gilman*, 54 Me. 453, 458; *Van Steenwyck v. Washburn*, 17 N. W. 289, 293, 59 Wis. 483, 48 Am. Rep. 532.

In every case the election, therefore, presupposes a plurality of gifts or rights, with an intention, expressed or implied, of the party who has a right to control one or both, or of the law, that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefits of both. *Norwood v. Lassiter*, 43 S. E. 509, 510, 132 N. C. 52; *Gilman v. Gilman*, 54 Me. 453, 458; *Salentine v. Mutual Ben. Life Ins. Co.*, 48 N. W. 855, 856, 79 Wis. 580, 12 L. R. A. 690; *Van Steenwyck v. Washburn*, 17 N. W. 289, 293, 59 Wis. 483, 48 Am. Rep. 532.

An election by the obligor or promisor is not common, and it is usually and oftenest used as a legal term, as the choice of one of two things, to each one of which the party choosing has equal right, but both of which he cannot have. An election will not be compelled until the party has had time and opportunity to become fully informed of the facts affecting its choice. On the failure of a person who has the right to make an election in proper time, the right of election passes over to the opposite party. *Salentine v. Mutual Ben. Life Ins. Co.*, 48 N. W. 855, 856, 79 Wis. 580, 12 L. R. A. 690.

Election need not be made in a moment of time, nor need it be made in words, nor does it require in all cases a surrender, or work a forfeiture. It is not an unbending rule. It is a rule that springs from manifest principles of equity, intended to do justice to all parties concerned. It may be considered as pretty well settled that the doctrine of election is as well satisfied by compensation as by forfeiture. In that case justice is done to all. *Farmington Savings Bank v. Curran*, 44 Atl. 473, 475, 72 Conn. 342.

"An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under an instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same instrument. The doctrine rests upon the principle that a person claiming under an instrument shall not interfere by title paramount to prevent another part of the same

instrument from having effect according to its construction. He cannot accept and reject the same instrument. It is a doctrine which is principally exhibited in cases of wills, but it has been applied also to cases of voluntary deeds, to cases of contracts for value resting upon articles, and to contracts completely executed by conveyance and assignment." *Frierson v. Branch*, 30 Ark. 453, 457 (citing *Bisp. Eq. § 295*); *Fitzhugh v. Hubbard*, 41 Ark. 64, 69.

#### Same—Conclusiveness.

Where an election is once made and completed, the party is concluded. *Bliss v. Geer*, 7 Ill. App. 612, 617; *Lawrence v. Ocean Ins. Co. (N. Y.)* 11 Johns. 241, 261.

The principle of law is that if a man has an election to do or demand one of two things, and he determines his election, it shall be determined forever. *New York Firemen Ins. Co. v. Lawrence (N. Y.)* 14 Johns. 46, 55. In *Garrison v. Marie (N. Y.)* 7 Civ. Proc. R. 113, 121, it is said that, where a person has made an election as to rights, he should not afterwards be permitted to change his position, and set up an inconsistent right. *Hopf v. United States Baking Co.*, 27 N. Y. Supp. 217, 218, 6 Misc. Rep. 158.

#### Same—Ignorance as affecting.

The doctrine of election depends, not on technical rules, but on principles of equity and justice and actual intention. An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So, if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. *Watson v. Watson*, 128 Mass. 152. An election by matters in pais can only be determined by plain and unequivocal acts under a full knowledge of all the circumstances and of the party's rights. *Appeal of Anderson*, 86 Pa. (12 Casey) 476. *Kent* was of the opinion that, to bind one by an election, it must have been an intentional choice of one thing instead of another, and that it must appear to have been with knowledge, and that, where knowledge is not proved, it will not be presumed in order to conclude a party by the supposed election. *Madden v. Louisville, N. O. & T. Ry. Co.*, 66 Miss. 258, 278, 6 South. 181 (citing *Dash v. Van Kleeck*, 7 Johns. 477, 5 Am. Dec. 291).

Election exists when a party has two alternative and inconsistent rights, and is determined by a manifestation of choice; but the fact that a party wrongly supposed he had two such rights, and attempted to choose the one to which he was not entitled, is not enough to prevent his exercising

the other, if entitled to it. *Priest v. Foster*, 38 Atl. 78, 79, 69 Vt. 417.

Election is the internal, free, and spontaneous separation of one thing from another, existing in the mind and will. That designed selection cannot occur if the party be ignorant of his rights. He cannot deliberately select one of two or more remedies if he know of but one to which he is entitled. Therefore an election made by a party under a mistake of facts, or a misconception as to his rights, is not binding in equity. In order to constitute a valid election, the act must be done with a full knowledge of the circumstances of the case, and the right to which the person put to his election was entitled. *Standard Oil Co. v. Hawkins (U. S.)* 74 Fed. 395, 398, 20 C. C. A. 468, 33 L. R. A. 739.

Where a person has actually pursued one of two courses of conduct because he believed he could not successfully pursue the other, that is making an election between them. Election is the choosing between two rights by a person who derives one of them under an instrument in which a clear intention appears that he should not enjoy both. *Appeal of Carter*, 59 Conn. 576, 587, 22 Atl. 320, 321, 322.

#### In law of wills.

Election is where the testator gives what does not belong to him—what belongs to some other person—and gives that person some of his own, whereby a condition is implied that he will depart with his own estate, or not take the bounty. *Appeal of Little (Pa.)* 3 Walk. 225, 228; *Hattersley v. Bissett*, 25 Atl. 332, 333, 50 N. J. Eq. (5 Dick.) 577; *Broome v. Monck*, 10 Ves. 597, 611. It is founded on the apparent intent of the testator that the legatee should surrender some right in exchange for the legacy, and can therefore never arise where the legatee had not at the time of the execution of the will any interest or right in the property devised. *Hattersley v. Bissett*, 25 Atl. 332, 333, 50 N. J. Eq. (5 Dick.) 577.

The principle on which this doctrine rests is for the donee to accept the benefit conferred, while he declines the burden imposed, is to defraud the design of the donor. *Hattersley v. Bissett*, 29 Atl. 187, 189, 51 N. J. Eq. (6 Dick.) 597, 40 Am. St. Rep. 532.

The definition of what is meant by "election under a will" may be thus stated: That every person whom the instrument proposes in any way to benefit must elect whether he will claim under the will or against its provisions. This implies, of course, that the person thus put to election has some rights in regard to the same subject which he could maintain independent of the will. Citing 2 Redf. Wills, 737. Where the testator assumes to dispose of any estate which in

fact belongs to any devisee or legatee under the will, such devisee or legatee must elect to take under the will or against it. *Id.* 740. Sir Wm. Grant defines "election" thus: "When one legatee under a will insists on something by which he would deprive another legatee under the same will of the benefit to which he would be entitled if the first legatee permitted the whole will to operate." *Id.* 741.

"It seems clear that, to constitute a case of election, there must be an actual disposition of the property belonging to the person who is to be put to the election." *Gilman v. Gilman*, 54 Me. 453, 458 (quoting 2 Redf. Wills, 744).

As applied to the law of wills, it simply means that he who takes under a will must conform to all its provisions. He cannot accept a benefit given by the testamentary instrument, and evade its burdens. If he takes a beneficial interest in the estate of the will, equity will hold him to his choice, and it will be conclusively presumed that he intends thereby to ratify and conform to every part of it. In order to put the donee of a benefit under a will to an election, two things are essential: (1) The testator must give property of his own; and (2) he must profess to dispose of property belonging to the donee. The foundation of a doctrine of election rests upon a presumptive intention upon the part of the testator that the donee was not to take a double benefit. *Gilroy v. Richards*, 63 S. W. 664, 666, 26 Tex. Civ. App. 355.

In order to amount to an election to take property in its actual, as contradistinguished from its eventual or destined, state, the act must be such as to absolutely determine and extinguish the converting trust; and hence it would seem to follow that, where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character in regard even to his own share, for, as the act of the whole would be requisite to put an end to the trust, nothing less would suffice to impress upon the property a transmissible quality foreign to that which it has received from testator. *Wayne v. Fouts*, 65 S. W. 471, 474, 108 Tenn. 145.

#### Of remedies.

Election is the choice between two alternative rights or claims. If a statute gives a remedy in the affirmative, without a negative, express or implied, for a matter which was actionable at the common law, the party may sue at common law as well as upon the statute. *Almy v. Harris* (N. Y.) 5 Johns. 175, 176.

The doctrine is well settled that, where there exists an election between inconsistent remedies, the party is confined to the remedy

which he first prefers and adopts. *McNutt v. Hilkins*, 29 N. Y. Supp. 1047, 1049, 80 Hun. 235.

Where plaintiff has a choice between inconsistent remedies—as where one action is founded on affirmance, and the other upon disaffirmance, of a voidable sale or contract—any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties once for all, and the institution of a suit is such decisive act, and in such case constitutes an election. *Welsh v. Carder*, 68 S. W. 580, 581, 95 Mo. App. 41.

To conclude one by an election of remedies, the remedies must be inconsistent. As regards what are known as "consistent remedies," the plaintiff may, without let or hindrance from any rule of law, choose one or all in a given case. He may adopt and select one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and, if not satisfied with the result of that, he may commence and carry through a prosecution of another. *New York Land Imp. Co. v. Chapman*, 118 N. Y. 288, 23 N. E. 187; *Simons v. Fagan* (Neb.) 87 N. W. 21, 23.

The whole doctrine of election is based upon the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies. *F. C. Austin Mfg. Co. v. Decker*, 80 N. W. 312, 314, 109 Iowa, 277.

The term "election" is often used to designate the right to bring an action of assumpsit instead of an action for tort. *Foot v. Foulke*, 67 N. Y. Supp. 368, 370, 55 App. Div. 617.

It is a familiar rule that, when a party has the choice of two remedies, he must make his election between them, and after he has made such election he cannot pursue the other remedy. This election may be made by actions amounting in themselves to a choice of remedies. *Chicago, B. & Q. R. Co. v. Bigley*, 95 N. W. 344, 345, 1 Neb. (Unof.) 225.

#### Of trial by jury.

An election for a trial before a jury is a mere designation of the mode of trial, and has nothing to do with the thing to be tried; and, since a declaration in an action should contain no averments or statements beyond those that are necessary to set forth the cause of action, an election should form no part of it. What is true of a declaration is true also of the pleas. *Baltimore City Pass. Ry. Co. v. Nugent*, 38 Atl. 779, 783, 86 Md. 349, 39 L. R. A. 161.

**Of widow.**

"An election may be express, as where the party elects by some specific and unequivocal act, whereby the intention is clearly indicated, as by the execution of a written instrument declaring the election, or it may be implied from the acts of the party; from his conduct, his acts, or omissions; from his mode of dealing with and treating the property, etc. To raise an inference of election from the party's own conduct, merely, it must appear that he knew of his right to elect, and not merely of the instrument giving such right, and that he had full knowledge of all facts concerning the property. As an election is necessarily a definite choice by the party to take one of the properties and to reject the other, his conduct, in order that an election may be inferred, must evince an intention to elect, and must show such an intention. The intention, however, may be inferred from a series of unequivocal acts. Where a widow is required to elect between a testamentary provision in her favor and her dower, any unequivocal act of dealing with the property given by the will as her own, or the exercise of any unmistakable act of ownership over it, if done with knowledge of her right to elect, and not through a clear mistake as to the condition and manner of the property, will be deemed an election by her to take under the will and to reject her dower." *Burroughs v. De Couts*, 11 Pac. 734, 738, 70 Cal. 361.

The term "election," as used in speaking of the election of a widow to take under a will or the statute, means a choice between two courses of action—acquiescence by the widow in her husband's disposition of his property, or disregard of it and assertion of the rights the law gives her. In *re Cunningham's Estate*, 20 Atl. 714, 715, 137 Pa. 621, 21 Am. St. Rep. 901.

The term "election," when speaking of the election of a widow to take dower or under a will, implies a choice between different things, and it is therefore impossible that there can be an election where the will gives only what without it passes by operation of law to the party. *Ward v. Ward*, 25 N. E. 1012, 1013, 134 Ill. 417.

"Election," as used in Comp. Laws 1879, c. 117, § 41, providing that a widow shall make an election, within 30 days after the service of a citation, whether she will take under the testator's will, or take what she is entitled to under the law of distribution, means a deliberate and intelligent choice; and it is essential that she should act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended by her acts to elect, and these acts must be plain and unequivocal. *Sill v. Sill*, 1 Pac. 556, 562, 81 Kan. 248.

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An election of the widow to take under a will, instead of the provision made for her by statute, does not arise from her taking possession of the personal property bequeathed to her by the will, and also having possession of the real estate. In order that acts of a widow shall be regarded as equivalent to an election to waive dower, it is essential that she act with a full knowledge of all the circumstances and of her rights, and it must appear that she intended by her acts to elect to take the provision which the will gave her. These acts must be plain and unequivocal, and be done with a full knowledge of her rights and the condition of the estate. A mere acquiescence, without a deliberate and intelligent choice, will not be an election. *Sill v. Sill*, 1 Pac. 556, 559, 81 Kan. 248.

**ELECTION BY THE PEOPLE.**

The phrase "election by the people" means an election which is participated in by the people at large. *Reid v. Gorsuch*, 51 Atl. 457, 459, 67 N. J. Law, 396.

The phrase "election by the people," in the clause of the Constitution providing that the Legislature shall provide for the election by the people of sheriffs and other necessary officers, has the same meaning as the word "election" in the clause providing that the Legislature shall provide by law for the election of a board of county commissioners in each county, and is limited to a popular vote. *State v. Irwin*, 5 Nev. 111, 121.

**ELECTION CONTEST.**

See "Contested Elections."

**ELECTION DAY.**

Acts 1892, art. 18, § 10, providing for the punishment of any one who sells, loans, gives, or furnishes any person with intoxicating liquors on election day, means 24 hours, including the period during which the election is actually held, for it is a maxim applicable to every transaction or occurrence that the fraction of a day is not regarded in law, and consequently the sale or gift of liquors at any time during the 24 hours of an election day is a violation of the law, though 4 o'clock p. m. is the time prescribed by statute when voting on an election day shall cease. *Commonwealth v. Murphy*, 23 S. W. 655, 95 Ky. 38. See, also, *Schuck v. State*, 34 N. E. 663, 50 Ohio St. 493.

**ELECTION DISTRICT.**

An election district is defined in the general election law as denoting the territory within which there is a single polling place for all the voters therein. *Otis v. Lane*, 54



Atl. 442, 443, 68 N. J. Law, 656; In re Swain, 23 Atl. 421, 54 N. J. Law (25 Vroom) 82.

In Pennsylvania, from 1799 down to the present time, the election districts, within the meaning of the statutes, have denoted subdivisions of the state's territory, marked out by known boundaries, prearranged and declared by public authority. And the Constitution has taken up the term in the same sense, though without defining it. *Chase v. Miller*, 41 Pa. (5 Wright) 403, 420.

The term "election district," as employed in the Constitution and statutes of Pennsylvania, defining the persons who may vote at an election, may be defined to be any part of the city or county where its boundaries are fixed by law, either by legislative enactments, or by the judgment of the court or other authorities to whom this power is delegated, where the citizens within the boundaries themselves would assemble to vote for public officers, whether their authority is local, or they are to act in governing the affairs of the state or nation. In *re McDaniel's Case*, 8 Pa. Law J. 310, 312, 2 Clark, 82.

#### ELECTION FOR PRESIDENT.

The words "election for president and vice president," in an indictment alleging an election for president and vice president of the United States, and that defendant did bet, hazard, and wager certain property upon said election, include the election in one county of a state, and the indictment is sufficient to sustain the conviction for a bet made upon the result in such county. *Somers v. State*, 37 Tenn. (5 Sneed) 438.

#### ELECTION OFFICER.

As used in Act Cong. May 31, 1870 (16 Stat. 145) § 22, providing that any officer of election at which any representative or delegate in the Congress of the United States shall be voted for, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any state or territory thereof, or violate any duty so imposed, shall be deemed guilty of a crime, and liable to prosecution and punishment therefor, cannot be construed to include the Governor of a state, as these words are apt and usual words to describe the clerks and judges of the election, but not to describe the Governor of a state. Such is not their ordinary or usual meaning. To make them apply to the executive of a state would be a forced and unnatural meaning. We hazard nothing in saying that, in popular use, no one would naturally infer that "officer of election" included the chief executive of a state. *United States v. Clayton* (U. S.) 25 Fed. Cas. 458, 459.

"Election," as used in Act Cong. May 31, 1870, § 22 (16 Stat. 145, c. 114), providing

that it is criminal for any officer of election to fraudulently make any false certificate of the result of any congressional election, should be construed so as not to include the Governor of a state. The words properly mean the clerks and judges of the election, etc. *United States v. Clayton* (U. S.) 25 Fed. Cas. 458, 459.

#### ELECTION RETURNS.

"Election returns," as used in the city charter, giving the aldermen the power to judge of the election returns, clearly limit the power of the board to determine who, from the returns of the election as canvassed by the board of county canvassers and certified to by the board of elections, were properly elected members of the board. *People v. Fornes*, 80 N. Y. Supp. 385, 389, 79 App. Div. 618.

Section 1115, Code Civ. Proc., provides: "When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of such election, file with the county clerk a written statement," etc. The Codes do not in any other place speak of any return day, but several sections in the Political Code direct the precinct officers to transmit to the county clerk certain matters pertaining to the election. The papers to be transmitted must be in packages, and, in section 1278, Pol. Code, are spoken of as "returns." The board is directed to meet on the first Monday after the election to canvass the returns. If the returns have not all been received, the canvass must be postponed from day to day until all the returns have been received, or until six postponements have been had. The canvass shall be had by opening the returns and estimating the votes. Pol. Code, §§ 1278, 1280, 1281. In other sections the election returns are mentioned, so that there can be no doubt as to the meaning of the phrase "election returns." *Carlson v. Burt*, 111 Cal. 129, 131, 43 Pac. 583.

#### ELECTION WITHIN STATE.

An "election held within the state," within the meaning of a statute prohibiting wagers on the result of any public election held within the state, does not include an election for the presidency of the United States, and therefore a wager as to the result of the election in the several states is not within the prohibition of the statute. *Covington v. State*, 14 S. W. 126, 127, 28 Tex. App. 225.

"Election in this state," as used in St. 1823, c. 25, § 2, prohibiting betting on any "election in this state," does not mean exclusively a state election of state officers, but any election held in the state, though for federal officers, and hence includes a presidential election. *Quarles v. State*, 24 Tenn. (5 Humph.) 561.

**ELECTIVE FRANCHISE.**

In *People v. Barber* (N. Y.) 48 Hun, 198, the Supreme Court says: "The elective franchise is not a natural right of the citizen. It is a franchise depending upon the law by which it must be conferred to permit its exercise. It is a political right, to be given or withheld at the exercise of the lawmaking power of the sovereignty." Judge Cooley, in his work on Constitutional Limitations, says: "Participation in the elective franchise is a privilege, rather than a right, and it is granted or denied upon grounds of general policy." Cooley, Const. Lim. (6th Ed.) 752. A law requiring the names of all candidates to be certified and printed on an official ballot, thus preventing electors from writing the names of candidates on the official ballot, was held valid, even though Const. art. 6, § 19, provided that elections should be free and equal, and no power should at any time interfere to prevent the free exercise of the right of suffrage. *Chamberlain v. Wood*, 88 N. W. 109, 110, 15 S. D. 216, 56 L. R. A. 187, 91 Am. St. Rep. 674.

The elective franchise is at once a right and a trust conferred by the people of a state, acting in their supreme and sovereign capacity, upon such members of the body politic as they, in their sovereign discretion, deem should hold and exercise it, having regard to the protection both of private rights and of public interests. Once conferred upon the citizen, it is a franchise in which he has a right of property, which the law protects. But it is a franchise having its origin in the will of the body politic; and is a power held by the citizen in trust to be exercised for the public welfare, and which, in a moral point of view, the citizen has no right to use for his private benefit in opposition to the public interest. Being a franchise, the law protects the right of the citizen in it, but, inasmuch as it is also a trust, the citizen has no right to misuse it, and commits a crime if he sell it. *State v. Staten*, 46 Tenn. (6 Cold.) 233, 255.

The elective franchise is defined to be the right or privilege of a qualified voter to cast his ballot freely in favor of the man of his choice in an election authorized by law to be held. *Parks v. State*, 13 South. 756, 759, 100 Ala. 634.

**ELECTIVE OFFICE.**

In statutes relative to elections, the term "elective office" shall apply to any office to be filled by the voters at any state, city, or town election. Rev. Laws Mass. 1902, p. 104, c. 11, § 1.

**ELECTOR.**

See "Assembly of Electors"; "Qualified Elector."

Electors voting thereat, see "Voting Thereat."

Const. art. 8, § 7, which declares that no elector shall be deprived of the privilege of voting by reason of his name not being registered, means a duly qualified voter. Appeal of Cusick, 20 Atl. 574, 577, 136 Pa. 459, 10 L. R. A. 228.

An elector is one who elects or has the right of choice; a person who has, by law or Constitution, the right of voting for an officer. Webster. One who has the right to make choice of public officers; one who has a right to vote. *Bouv. City of Beardstown v. City of Virginia*, 76 Ill. 84, 89.

In determining the meaning of the word "elector," in St. 1897, p. 455, providing that each member of the board of supervisors must be an elector of the district which he represents, "we must look to the Constitution of the state. An elector is a person possessing the qualifications fixed by the Constitution. The meaning of the word in the statute is that each member of the board of supervisors must have the qualifications for an elector fixed by the Constitution, and a person having such qualifications is eligible for the office, although he cannot vote because he has failed to register as required by statute." *Bergevin v. Curtz*, 59 Pac. 312, 127 Cal. 86 (citing *O'Flaherty v. City of Bridgeport*, 29 Atl. 466, 64 Conn. 159).

The phrase "electors of such city," in Const. 1899, art. 6, § 17, requiring judicial officers of cities not otherwise provided for to be chosen by vote of the electors of the city, is comprehensive enough to include all the persons entitled to vote within the municipality. *People v. Dooley*, 75 N. Y. Supp. 350, 355, 69 App. Div. 512.

The Code provides that those electors who have the right to vote in a precinct have also the right to be present at the counting of the votes in the free, open, and public manner required by law at the polling place appointed and registered for that purpose. Held that, while a candidate has a right to vote in that precinct, if he has not exercised that right, but has voted elsewhere, he is not an elector at that precinct, within the statute, though he may, as any citizen, be present at the public count provided by law; no one being prohibited from such attendance. *United States v. Badinelli* (U. S.) 37 Fed. 188.

"Electors," as used in Const. art. 18, § 9, providing that all city, town, and village officers whose election or appointment is not provided for by the Constitution shall be elected by the electors of such cities, towns, or villages, or of some division thereof, is synonymous with "voters," and means those persons who have the qualifications of electors prescribed by the Constitution. *State v. Tuttle*, 9 N. W. 791, 792, 53 Wis. 45.

Under Laws 1888, c. 525, providing for the acquisition of parks by villages on a ma-

majority vote of the electors of the village, a nontaxpayer may vote, notwithstanding Laws 1870, c. 291 (Gen. Village Act) tit. 2, § 13, providing that only taxpayers shall vote to purchase property; the statute not having assumed to vary the definition of the term "electors," in the natural and accurate sense of the word. *Scott v. Twombly*, 20 App. Div. 535, 537, 46 N. Y. Supp. 699.

From the context of the act, it is apparent that the word "electors," in Act March 28, 1889, amending the charter of the city of Bridgeport (section 11), which provides that, at the annual city meeting on the first Monday of April for the choice of officers, votes shall be received from the electors then registered, means freemen of the city—qualified voters of the city—and some confusion will be avoided in construing the act by remembering that it uses the word "elector" inaccurately throughout. The Constitution has given to the word "elector" a precise, technical meaning, and it is ordinarily used in our legislation with that meaning only. An elector is a person possessing the qualifications fixed by the Constitution, and duly admitted to the privileges secured, and in the manner prescribed, by that instrument. *O'Flaherty v. City of Bridgeport*, 29 Atl. 466, 467, 64 Conn. 159.

The word "electors," as used in the title relating to elections, shall mean electors of president and vice president of the United States. V. S. 1894, 57.

#### **Voter distinguished.**

There is a difference between an elector and a voter. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote. There would be no propriety in saying, in the sense of his having voted, that an elector was a voter at a meeting or election which he did not attend. But in a statute providing that a majority of the legal voters of a school district may determine the money to be levied and collected, if the Legislature had intended a majority of the "qualified electors" of the district, they would have undoubtedly used those words, instead of the words "legal voters." *Sanford v. Prentice*, 28 Wis. 358, 362; *Bergevin v. Curtz*, 59 Pac. 312, 313, 127 Cal. 86.

## **ELECTRIC.**

The term "electric," as used in the phrase "electric smelting," in itself carries the idea of fusing and electrolyzing, both being its well-known functions. *Cowles Electric Smelting & Aluminum Co. v. Lowrey* (U. S.) 79 Fed. 331, 343.

A contract of assignment conveying any and all discoveries and inventions relating to "electric smelting processes" and furnaces

does not embrace processes solely electrolytic. *Lowrey v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 68 Fed. 354, 371.

## **ELECTRIC ARC.**

The flow of electric current over an air gap caused by the interruption of the continuity of the circuit by throwing open a bridge connecting the two stationary terminals connected to the opposite branches of a circuit is called an "electric arc," and is "mainly a stream of metallic vapor" which comes from the fusing and vaporizing of the contacts or of the electrodes, for an electric arc "is the source of an intense heat and light." *Thomson-Houston Electric Co. v. Nassau Electric R. Co.* (U. S.) 107 Fed. 277, 278, 46 C. C. A. 263.

## **ELECTRIC LIGHT PLANT.**

"Plant," as defined in *Houston's Electrical Dictionary*, is a word sometimes used for installation, or for the apparatus required to carry on any manufacturing operation. An "electric plant" includes the steam engines or other prime motors, the generating dynamo or dynamos, the lamps and other electro-receptive devices, and the circuit connected therewith. *Fisher Electric Co. v. Bath Iron Works*, 74 N. W. 493, 494, 116 Mich. 293.

## **Poles.**

In an action for personal injuries caused by the falling of a telegraph pole on which plaintiff was working, it was said that a telegraph pole may properly be regarded as coming within the meaning of the word "plant" as used in the statute providing that a corporation shall be liable for injury to its employes when the injury is suffered by reason of a defect in the condition of the ways, works, plant, tools, and machinery. *Cleveland, C. & St. L. R. Co. v. Scott*, 64 N. E. 896, 900, 29 Ind. App. 519.

## **ELECTRICAL APPARATUS.**

Apparatus of electric company, *see* "Apparatus."

## **ELECTRICAL PLANT.**

In technical parlance, an "electrical plant" consists of dynamos, converters, switchboard, lamps, etc., with the necessary wiring and connections. *John A. Roebling's Sons Co. v. Humboldt Electric Light & Power Co.*, 44 Pac. 568, 112 Cal. 288.

## **ELECTRICITY.**

"Electricity" is defined by the *Imperial Dictionary* as the name given to the series of phenomena exhibited by various sub-

stances, and also to the phenomena themselves. We are totally ignorant of the nature of this cause—whether it be a material agent, or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the power of all bodies, and is capable of motion from one body to another. Electricity, when accumulated in large quantities, becomes an agent capable of producing the most sudden, violent, and destructive effects, as in thunder storms; and even in its quiescent state it is extensively concerned in the operation of nature." *Spensley v. Lancashire Ins. Co.*, 11 N. W. 894, 897, 54 Wis. 433.

"Whatever electricity may be, it seems to be absolutely within the power and under the control of the company that brings it into being. It is compelled by the process employed to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of the physician a soothing remedial agent, and in the hands of the law an instrument of execution, swifter and surer than the headsman's ax. It may be too early to say just what it is. \* \* \* We have no need to decide that question." *Commonwealth v. Northern Electric Light & Power Co.*, 22 Atl. 839, 840, 145 Pa. 105, 14 L. R. A. 107.

### ELECTRODE.

"Electrode," as used in the claim for a patent for an electric-lighting gas-burner, a magnet for turning the gas cock by one electric impulse, combined with a fixed electrode and a movable electrode, normally in contact, and mechanism connecting the armature with the movable electrode, means the platinum or other metal point constituting the poles of the circuit. "The Century Dictionary defines it as a pole of the current from an electric battery, applied generally to the two ends of an open circuit. Webster's International Dictionary gives the following definition: 'The path by which electricity is conveyed into or from a solution or other conducting medium, especially the ends of the wires or conductors leading from the source of electricity, and terminating in the medium traversed by the currents.' All the other definitions agree that electrodes are simply the poles of an open electric circuit, and that the poles are the ends of the two wires, or the points of the wires." *California Electrical Works v. Henzel* (U. S.) 48 Fed. 375, 378.

### ELECTROLYSIS.

"Electrolysis," as used in connection with metallurgical operations, takes place whenever a current of electricity of sufficient quantity and intensity is passed through a chemical compound in a fluid condition as to cause a chemical disruption thereof, the result being that one of the elements will go to the anode, or the place at which the current enters the fluid mass, and the other will go to the cathode, or place where the current leaves it. If the compound treated is metallic, the metal element will gather at the cathode, while the other will go to the anode. *Lowrey v. Cowles Electric Smelting & Aluminum Co.* (U. S.) 68 Fed. 354, 366.

### ELECTRO-METALLURGY.

"Electro-metallurgy" is a term characterizing all processes in which electricity is applied to the working of metals. Electrotyping and electroplating are branches of electro-metallurgy. *Edison Electric Light Co. v. Westinghouse* (U. S.) 55 Fed. 490, 508.

### ELEMOSYNARY.

Charitable synonymous, see "Charity."

"Eleemosynary" means, according to Blackstone, something constituted for the perpetual distribution of alms or bounty of the founder. *Cresson v. Cresson* (U. S.) 6 Fed. Cas. 807, 809.

Eleemosynary corporations "are such as are constituted for the perpetual distribution of the free alms and bounty of the founder, in such manner as he has directed; and in this class are ranged hospitals for the relief of poor and impotent persons, and colleges for the promotion of learning and piety, and the support of persons engaged in literary pursuits." *Dartmouth College Trustees v. Woodward*, 17 U. S. (4 Wheat.) 518, 667, 4 L. Ed. 629 (quoting Bl. Comm.); *Trustees of Phillips Academy v. King*, 12 Mass. 546, 557; *Robertson v. Bullions* (N. Y.) 9 Barb. 64, 89; *Beekman v. People* (N. Y.) 27 Barb. 260, 306; *Williams v. Williams*, 8 N. Y. (4 Seld.) 525, 533; *Board of Education v. Bakewell*, 10 N. E. 378, 381, 122 Ill. 339; *American Asylum v. Phoenix Bank*, 4 Conn. 172, 177, 10 Am. Dec. 112.

An "eleemosynary corporation" is a private charity constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations. *Allen v. McKean* (U. S.) 1 Fed. Cas. 489, 497 (citing 2 Kent, Comm. [2d Ed.] Lecture 23, p. 274); *People v. Fitch*, 47 N. E. 983, 988, 154 N. Y. 14, 38 L. R. A. 591.

In *Angel & Ames on Corporations*, it is said: "Eleemosynary corporations are such as are instituted upon a principle of charity, their object being the perpetual distribution of the bounty of the founder of them to such persons as he has directed. Of this kind are hospitals for the relief of the impotent, indigent, and sick, or deaf and dumb. And of this kind also are all colleges and academies which are founded where assistance is given to the members thereof in order to enable them to prosecute their studies or devotion with ease and assiduity." Section 39. Morawetz, in his work on *Corporations*, says: "The distinguishing feature of charitable corporations is that they are formed for the administration of charitable trusts, and not for the profit of the corporators themselves." Section 4. An institution for the blind, incorporated for the purpose of instructing children who were born blind, or who may have become blind by disease or accident, and affording an asylum for other blind persons, and which was authorized by subsequent acts of the Legislature to receive certain indigent blind persons whose expenses should be paid by the state, and which received certain moneys from the state for the enlarging and improving of its buildings, though partially educational, is also to some extent a charitable or "eleemosynary" institution. *People v. Fitch*, 47 N. E. 983, 988, 154 N. Y. 14, 88 L. R. A. 591.

In the case of *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 641, 642, 4 L. Ed. 629, Marshall, C. J., said that a college which was founded to promote the spreading of Christian knowledge among the savages was an "eleemosynary institution incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty," and further on he says that the "consideration of the gifts of the donors was the perpetual application of the fund to its object in the mode prescribed by them." *Williams v. Williams*, 8 N. Y. (4 Seld.) 525, 533.

The establishment of an institution for the dissemination of learning has always been considered a charity. *American Asylum v. Phoenix Bank*, 4 Conn. 172, 177, 10 Am. Dec. 112.

Blackstone says that the universities of Cambridge and Oxford are not eleemosynary corporations, though stipends are annexed to particular magistrates and professors, any more than any other corporations where the acting officers have standing salaries, for these are rewards pro opere et labore, not charitable donations only, since every stipend is preceded by service and duty. Those institutions are considered of this kind where the plan is one of bounty, charity, and benevolence to others, not those which are for the use of, and beneficial and make return to,

the donors. *Robertson v. Bullions* (N. Y.) 9 Barb. 64, 89.

Where a trust was created for the furthering of an educational institution, it was contended that it was void as creating a perpetuity which did not come within the exception of the Constitution forbidding perpetuity except for "eleemosynary" purposes. It was argued that "eleemosynary" pertains exclusively to almsgiving; that alms are given to the poor; and that consequently the Constitution never meant to permit perpetuities for strictly educational purposes. But the court said: "It is quite true that the word 'eleemosynary' comes to us from a Greek word meaning alms. But while it is always interesting to note the origin and first meanings of words, this knowledge is frequently more curious than valuable. Words by use are sometimes degraded, sometimes ennobled, sometimes narrowed in meaning, sometimes broadened. And 'eleemosynary' has come in the law to be interchangeable with the word 'charitable,' thus including an educational institution." *People v. Cogswell*, 45 Pac. 270, 271, 118 Cal. 129, 35 L. R. A. 269.

The term "eleemosynary" includes a charitable purpose (*People v. Cogswell*, 118 Cal. 129, 130, 45 Pac. 270, 35 L. R. A. 269), as used in Const. art. 20, § 9, providing that no perpetuity shall be allowed except for eleemosynary purposes. In *re Gay's Estate*, 71 Pac. 707, 708, 138 Cal. 552, 94 Am. St. Rep. 70.

#### ELEEMOSYNARY CHARITY.

The term "eleemosynary charity" includes a bequest for the establishment of an orphan asylum and a hospital for sick and infirm persons, which is unsectarian and not limited by any religious restrictions or limitations. If the bequest is so limited, it is not such a charity. *Attorney General v. Moore's Ex'rs*, 19 N. J. Eq. (4 C. El. Green) 503, 506.

#### ELEGIT.

By the writ of "elegit" authorized by ancient statute, the sheriff is commanded to take the personal property of a debtor and to appraise the same, and to deliver it at its appraised value to the creditor, and also to deliver to the creditor formerly one-half, and now by recent statute the whole of the judgment debtor's freehold estate of which he was seised at the time of the docketing of the judgment. *North American Fire Ins. Co. v. Graham*, 7 N. Y. Super. Ct. (5 Sandf.) 197, 200.

#### ELEMENTARY SCHOOL

An "elementary school" is a school in which instruction and training are given in

spelling, reading, writing, arithmetic, English grammar and composition, geography, and history of the United States, including civil government and physiology. *Bates' Ann. St. Ohio 1904, § 4007—1.*

## ELEMENTS.

Strictly speaking, "elements" are the ultimate, indecomposable parts, which unite to form anything, as gases which form air and water are elements respectively of those substances. *Van Wormer v. Crane, 16 N. W. 686, 687, 51 Mich. 363, 47 Am. Rep. 582.*

A lease provided that the tenants covenanted to repair the premises, but that damages by the elements or acts of Providence were excepted from its operation, and it was contended that damages by the "elements" had a different signification than the term "acts of Providence" or "acts of God"; but the court held that those acts are to be regarded in the legal sense as an act of God which did not happen through human agency, such as storms, lightning, tempests, but that if injury is sustained in any way through the intervention of man it is not an act of God, and that since the elements are means through which God acts, the damage by the elements was synonymous with and a correlative term with "act of God" or "act of Providence" as used in the laws. *Polack v. Ploche, 35 Cal. 416, 423, 95 Am. Dec. 115.*

"Damage by the elements," as the term is ordinarily used in the exception in a lessee's covenant to keep in repair, means injuries to buildings by wind, rain, frost, and heat, and all the ordinary decay from natural causes. Anciently it was supposed there were four elements of material things—earth, air, fire, and water; and, when it came to be known that this classification had no scientific basis, the term had found a place in common speech which it still retains. As so understood the phrase "damage by the elements" would include any damage from purely natural causes, as a destruction by fire. *Van Wormer v. Crane, 16 N. W. 686, 687, 51 Mich. 363, 47 Am. Rep. 582.*

As used in a lease providing that, where the leased building shall be destroyed or so injured by the elements or other cause as to be untenable, the lessee shall not be liable for further rent, "elements or other cause" means some sudden and unexpected injury, and does not refer to mere decay. *Hatch v. Stamper, 42 Conn. 28, 30.*

A lease providing that the premises shall be rendered in good condition, etc., damages by the "elements" excepted, refers to some sudden, unusual, or unexpected action of the elements, such as floods, tornadoes, or the like, and does not include the percolation of water through sidewalks. *Harris v. Corlies,*

*41 N. W. 940, 941, 40 Minn. 106, 2 L. R. A. 349.*

"Damage by the elements" is the equivalent of the phrase "act of God"; hence, where a warehouseman contracted to deliver wheat, "damages by the elements excepted," it was no defense for his failure to deliver that the warehouse had been partly destroyed by fire of incendiary origin without negligence on his part. *Pope v. Farmers' Union & Milling Co., 62 Pac. 384, 130 Cal. 139.*

## ELEVATED RAILROAD.

As a street railroad, see "Street Railroad."

An "elevated railroad," properly speaking, is one which is placed above the surface of the street which is used by the general public. *State v. Superior Court of King County, 70 Pac. 484, 485, 30 Wash. 232.*

## ELEVATOR.

See "Floating Elevator"; "Through Elevators."

As common carrier of passengers, see "Common Carrier of Passengers."

The term "elevators" is used to designate warehouses for the storage and ready shipment of grain. *Erie County v. Erie & W. Transp. Co., 87 Pa. 484, 487.*

Under a policy insuring a "steam power elevator building and additions, with porches and platforms attached," a warehouse standing within 2½ feet of the elevator building and about the same size as the elevator, and fastened to the elevator by strips of board nailed upon each building, and used exclusively for storing grain, which was first received into the elevator and then spouted into the warehouse through two spouts which extended from one building to the other, and was taken from the warehouse by a conveyor running under the warehouse and elevator, no grain being received into or discharged from the warehouse except through the elevator, and there being no means of entrance into the warehouse except through a window, which was reached by a ladder or by cleats nailed onto the side of the building, such warehouse was in effect merely a bin of the elevator building, and covered by the policy. *Cargill v. Millers' & Mfrs.' Mut. Ins. Co., 22 N. W. 6, 33 Minn. 90.*

## ELEVEN O'CLOCK.

Where a notice of a sale under a trust deed stated that the sale would take place at the hour of "eleven o'clock" of a certain day, and the sale was not made at 11 o'clock,

but at half past 11, it was apt time under the notice, inasmuch as 11 o'clock should be construed to mean until it was 12. *McGovern v. Mutual Life Ins. Co.*, 109 Ill. 151, 155.

## ELIGIBLE.

"Eligible" is defined "by law and other standard lexicographers thus: Black: 'Capable of being chosen; competency to hold office.' Bouvier and Anderson: 'This term relates to the capacity of holding, as well as that of being elected to, an office.' Abbott: 'The term "eligible to office" relates to the capacity of holding as well as the capacity of being elected.' 19 Am. & Eng. Enc. Law, 897: 'Capacity of being chosen, implying competency to hold office, if chosen.' Worcester: 'Legally qualified; capable of being legally chosen.' Webster: 'That may be selected; legally qualified to be elected to hold office.' Some law-writers define the word as legally qualified; as eligible to office; legally qualified to hold office; electible; proper to be chosen; qualified to be elected." *Demaree v. Scates*, 32 Pac. 1123, 1124, 50 Kan. 275, 20 L. R. A. 97, 34 Am. St. Rep. 118.

The term "eligible," as applied to candidates for office, means capable of being chosen, the subject of selection or choice; and also implying competency to hold the office, if chosen. *Carroll v. Green*, 47 N. E. 223, 224, 148 Ind. 362.

The word "eligible," in Const. art. 14, § 8, refers to the capacity to be elected or chosen to office as well as to hold office. *State v. Moores*, 73 N. W. 299, 304, 52 Neb. 770.

Const. art. 4, § 9, declares that no person holding any lucrative office under the government of the United States or in power shall be eligible to any civil office of profit under the state. Held, that the word "eligible" meant both incapable of being legally chosen and incapable of legally holding. *State v. Clarke*, 3 Nev. 566, 570.

### As applicable to appointive offices.

"Eligible," as used in Const. art. 4, § 9, providing that no person holding any lucrative office under the government of the United States or any other power shall be eligible to any civil office of profit under the state, refers not only to elective officers, but to appointed officers as well. It includes capacity to hold office as well as to be elected to an office, and there is no distinction between elective and appointive offices. If the incumbent is ineligible to hold an office, it can make no difference whether he obtained it in the first instance by election or appointment. *State v. Clarke*, 31 Pac. 545, 546, 21 Nev. 333, 18 L. R. A. 313, 37 Am. St. Rep. 517.

### As capable of being chosen.

"Eligible," as used in Const. art. 7, § 7, providing that every person entitled to vote at any election shall be eligible to any office which now is or may hereafter be elective, means proper to be chosen, qualified to be elected. *Taylor v. Sullivan*, 47 N. W. 802, 803, 45 Minn. 309, 11 L. R. A. 272, 22 Am. St. Rep. 729.

Etymologically, the meaning of "eligible" is capable of being chosen, and therefore denotes a condition existing at the time of choosing, whether by election or by appointment. This is the accurate meaning of the term, and the primary definition given by all lexicographers. But in some dictionaries a secondary definition is given of the word, as legally qualified. It must also be conceded that often, not only colloquially, but also in judicial opinions, the word is used in this latter sense. In *Searcy v. Grow*, 15 Cal. 118, the Constitution providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil office of profit under the state, it was held that the election of a postmaster to the office of a sheriff was not rendered valid by his resignation as postmaster before commencement of the term as sheriff. It was said that we understand that the term "eligible" means capable of being chosen; the subject of selection or choice. And as used in the statute providing that no county treasurer, superintendent of the poor, school commissioner, etc., shall be eligible to the office of supervisor of any town or ward in this state, the word "eligible" will be taken in its meaning as capable of election and appointment. So that no one can be elected supervisor unless he is eligible at the time of his election. *People v. Purdy*, 47 N. Y. Supp. 601, 602, 21 App. Div. 68.

"Eligible," as used in Const. art. 5, § 2, providing that no person shall be eligible to the office of Governor who shall not have attained the age of 30 years and been for 2 years next preceding his election a citizen of the United States and of the state, and that none of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected, means "qualified to be chosen, legally qualified for election or appointment." *State v. Boyd*, 48 N. W. 739, 745, 31 Neb. 682.

### As capable of holding office.

The word "eligible," as used in Gen. St. 1889, p. 1622, providing that persons holding any state, county, township, or city office, or any employer, officer, or stockholder in any railroad in which the county owns stock, shall not be eligible to the office of county commissioner, means legally qualified; that is, capable of holding the office. It does not

mean eligible to be elected to the office of county commissioner at the date of the election, but eligible or legally qualified to hold the office after the election; that is, at the commencement of the term of office. *Demaree v. Scates*, 32 Pac. 1123, 1124, 50 Kan. 275, 20 L. R. A. 97, 34 Am. St. Rep. 113.

Const. art. 7, § 16, declares no person elected to any judicial office shall, during the term for which he is elected, be eligible to any office of trust or profit under the state other than a judicial one. Held, that the word "eligible" means legally qualified, and the ineligibility referred to the right and fitness to be inducted into and discharge the duties of an office other than a judicial one, and did not refer to the right to be voted for. *Smith v. Moore*, 90 Ind. 294, 297.

"Eligible to any office," as used in Const. art. 10, § 2, providing that no holder of public moneys shall be eligible to any office until he shall have paid over any moneys in his hands, means eligible to hold the office, and does not refer to the election. If a person is eligible to hold the office when the time for induction into office arrives, he may take the office though not eligible to hold the office when elected. The words "eligible to any office" refer to the capacity to hold the office; the term "eligible" means legally qualified. *Shuck v. State*, 35 N. E. 993, 995, 136 Ind. 63.

"Eligible," as used in Rev. St. c. 24, par. 34, declaring that no person shall be eligible to the office of alderman if he be in arrears of any tax or liability due the city, means legally qualified, and refers to the office, and not to the election. And hence, though one be disqualified at the time of his election, he may take the office if the disqualification be removed before the commencement of the term. *People v. Hamilton*, 24 Ill. App. 609, 612 (citing *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489).

The word "eligible" is variously defined as "proper to be chosen," "legally qualified as eligible to office." Primarily the word, which is from the Latin "eligere" (to elect), means "capable of being elected," or, if we may temporarily coin a word, "eligible" means "electible." As used in Const. § 100, providing that no person shall be eligible to the office of clerk unless he shall have procured from a judge of the Court of Appeals a certificate that he has been examined by the clerk of his court and that he is qualified for the office, the words "eligible to the office" mean legally qualified to hold the office. *Kirkpatrick v. Brownfield*, 31 S. W. 137, 138, 97 Ky. 558, 29 L. R. A. 703, 53 Am. St. Rep. 422.

"Eligible," as used in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States or any other power shall be eligible to any civil

office of profit under the state, means eligible to hold office as well as to be elected to office, and disqualifies a person from holding an office under the state after he had received and entered on the duties under a lucrative federal appointment. *People v. Leonard*, 14 Pac. 853, 73 Cal. 230.

#### Qualified distinguished.

The word "eligible," when used in speaking of a candidate for office as being "eligible," means capable of being chosen, while "qualified" means the performance of the acts which the person chosen is required to perform before he can enter into office. *Bradley v. Clark*, 65 Pac. 395, 396, 133 Cal. 196; *State v. Bemenderfer*, 96 Ind. 374, 376.

### ELISOR.

An "elisor" is a person appointed to perform certain duties pertaining to certain officers when the latter are disqualified. He was originally confined to the duty of returning a jury in the event of such disqualification, but in some states his duties are extended to the service of other process, but only in the event of the disqualification of some other officer. If the sheriff be not an indifferent person, as if he be a party to the suit, or be related, either by blood or affinity, to either of the parties, he is not then trusted to return the jury, but the venire shall be directed to the coroners, who in this, as in many other instances, are the substitutes of the sheriff to execute process when he is deemed an improper person. If any exception lies to the coroners, the venire shall be directed to two clerks of the court, or two persons of the county, named by the court, and sworn. And these two, who are called "ellsors" or "electors," shall indifferently name the jury, etc. *Bruner v. Superior Court of City and County of San Francisco*, 28 Pac. 341, 343, 92 Cal. 239.

### ELIZA.

"Eliza" is a commonly used abbreviation of "Elizabeth," and judicial notice will be taken of such fact. *Goodell v. Hall*, 37 S. E. 725, 112 Ga. 435.

### ELLEN.

The name "Ellen" is one universally applied to females only, and indicates that the person to whom it is applied is a female. *Taylor v. Commonwealth (Va.)* 20 Grat. 825, 828.

"Ellen" is not commonly used as meaning the same as "Helen," nor is it an abbreviation or corruption of "Helen." They have been generally known and recognized as different and distinct, and are not com-



monly or indiscriminately used as the same. *Thomas v. Desney*, 10 N. W. 815, 816, 57 Iowa, 58.

## ELOIGNMENT.

"Eloignement" is the taking away beyond the jurisdiction of a court, or the concealing of the object matter. *Garneau v. Port Blakeley Mill Co.*, 36 Pac. 463, 465, 8 Wash. 467.

## ELOPEMENT.

To constitute an "elopement" which will forfeit a wife's right of dower, she must not only leave the husband, but go beyond his actual control. Hence a wife did not forfeit her dower by living in adultery during the life of her husband while he was absent, where it did not appear that she had left her husband and departed and dwelt with the adulterer, for there was no "elopement." *Cogswell v. Tibbetts*, 3 N. H. 41, 42.

## ELSEWHERE.

"Elsewhere" as used in shipping articles for a voyage from Boston to the Pacific, Indian, and Chinese Oceans, or elsewhere on a trading voyage, is an indefinite expression, and cannot control or extend the meaning of the other certain description of the voyage, or constitute of itself a sufficient description. *Brown v. Jones* (U. S.), 4 Fed. Cas. 405.

A devise of all the testator's lands in Littleton, Marston, and Millbrook, or "elsewhere," passed lands of greater value in another county. The word "elsewhere" was the most significant, sensible, and comprehensive word that could be used for that purpose, and was equivalent to naming the lands. *Chester v. Chester*, 3 P. Wms. 56, 61.

### As ejusdem generis.

"Elsewhere," as used in an ordinance making it criminal to make, aid, maintain, or assist in any improper noise, riot, disturbance, or breach of the peace in the streets or highways, or elsewhere within the city, is to be construed in connection with the words "streets and highways," and must be regarded as "signifying places ejusdem generis; namely, parks, squares, and places frequented by the public." *State v. City of Camden*, 19 Atl. 539, 540, 52 N. J. Law (23 Vroom) 289.

The word "elsewhere," as used in Pen. Code, § 240, subd. 2, punishing a person who entices an unmarried female "into a house of ill fame or of assignation or elsewhere for the purpose" of prostitution, means a place similar in character to a house of ill fame or of assignation. *State v. McCrum*, 38 Minn. 154, 156, 86 N. W. 102.

### As without.

"Elsewhere," as used in a memorandum of association of a company providing that its object was to purchase or otherwise acquire and work in mines, minerals and mining rights, lands, hereditaments, and chattels in the state of Missouri or elsewhere, means elsewhere than in the state of Missouri, and therefore the business in the purchase and operation of mines is not restricted to Missouri. *Missouri Lead Mining & Smelting Co. v. Reinhard*, 21 S. W. 488, 490, 114 Mo. 218, 35 Am. St. Rep. 744.

## EMANCIPATION.

Emancipation is an act by which a person who was once in the power of another is rendered free. *Town of Fremont v. Town of Sandown*, 56 N. H. 300, 303 (citing *Bouv. Law Dict.*).

Emancipation, under the pauper law, exists when the minor contracts a new relation inconsistent with being a part of the family. *Town of Sherburne v. Town of Hartland*, 37 Vt. 528, 529; *Wells v. Westhaven*, 5 Vt. 322, 326; *Town of Tunbridge v. Town of Eden*, 39 Vt. 17, 20.

A child is not emancipated by separation from his parents until he is of age, has married, or has contracted a relation inconsistent with the relation of parent and child, and by which, therefore, the parent loses all authority over him. *Overseers of Poor of Bradford v. Overseers of Poor of Lunenburg*, 5 Vt. 481, 490 (citing *Rex v. Inhabitants of Edgworth*, 3 Term R. 353).

To "emancipate" is to release, to set free. It need not be evidenced by any formal or required act. It may be proven by direct proof or by circumstances. To free a child for all the period of minority from care and custody, control and service, would be a general emancipation; but to free him from only a part of the period of minority, or from only a part of the parents' lives, would be limited. *Porter v. Powell*, 44 N. W. 295, 297, 79 Iowa, 151, 7 L. R. A. 176, 18 Am. St. Rep. 353.

"Emancipation" is the act by which he who was not free, but under the control of another, is set at liberty and made his own master; thus, the release of a child from the duty to serve and obey his parent. It is a general rule that the emancipation of a child is when he leaves his father's house to seek his own fortune. *Overseers of Poor of Alexandria Tp. v. Overseers of Poor of Bethlehem Tp.*, 16 N. J. Law (1 Har.) 119, 123, 81 Am. Dec. 229.

The right of action for a minor's services is presumed to be in the father. But the father may voluntarily relinquish this right to the child. This is called "emancipation."

This agreement may be expressed, or implied from the circumstances. Thus, where it appeared that a father told his son that he could have all he made, the emancipation was express. *In re Dunavant* (U. S.) 96 Fed. 542, 547.

An agreement by a father with his minor child to relinquish to the child the right which he would otherwise have in his services, and authorizing those employing him to pay him his wages, constitutes emancipation. *Varney v. Young*, 11 Vt. 258, 259.

#### Becoming of age.

It is a general rule that attaining the age of 21 years is not ipso facto emancipation of a child from his father, although at that age a child may emancipate himself by separating from his father. *Overseers of Poor of Alexandria Tp. v. Overseers of Poor of Bethlehem Tp.*, 16 N. J. Law (1 Har.) 119, 123.

#### Consent to adoption.

The new relation inconsistent with the relation of parent and child which constitutes emancipation may be contracted by the minor by consent of his parents, as in case of marriage, or, if the minor be an infant, the new relation may be contracted by his parents for the infant. "In order to constitute emancipation of an infant, it must appear that his parents have absolutely transferred all their right to the care and control of the infant and all their right to his services, and that the person to whom such rights are transferred has accepted the infant as his own and agreed to stand in loco parentis. It should clearly appear that such was the intention of the parties. Where parents gave a pauper about 18 months old to a suitable person to keep as his own child, the gift being absolute, depending on no condition or contingency, the breach or happening of which would restore the child to his natural parents, or revive their right to his services or their right to the control of his person, the donee receiving the child for the purpose and with the intention of keeping him as his own child, and continuing to keep and care for him for about four years, during which time the infant was a member of his family and subject to his care, control, and authority, there was an emancipation of such child." *Town of Tunbridge v. Town of Eden*, 39 Vt. 17, 20.

#### Consent to enlistment.

The consent of a father to his minor son's enlistment into the military service of the government is a virtual emancipation or discharge of the minor from all obligations of service or obedience to the father, so long, at least, as the enlistment contract exists. *Baker v. Baker*, 41 Vt. 55, 57.

#### Gift of earnings.

"The significance of the word 'emancipation' is not exact, and is used sometimes to signify the mere gift by a father to his son of the latter's earnings, and sometimes to signify the complete severance, so far as legal rights and liabilities extend, of the parental relationship." The mere gift by a father to a son of the son's earnings does not operate as a complete severance of all the mutual rights and duties arising out of the relationship of parent and child, so as to relieve the father from liability for the son's act. *Dunks v. Grey* (U. S.) 3 Fed. 862, 865.

#### Living separate.

A mere residence with another, separate from the family of the parent, is not emancipation, nor is a minor's living separate from his mother from the age of 16 until he was 21, emancipation. *Town of Sherburne v. Town of Hartland*, 37 Vt. 528, 529.

#### Marriage.

Marriage emancipates the child, for it is a new relation inconsistent with subjection to the control and care of the parent. The husband becomes the head of a new family. His new relations to his wife and children create obligations and duties which require him to be master of himself, his time, his labor, earnings, and conduct. He can no longer be subject to the control of his parents. *Town of Sherburne v. Town of Hartland*, 37 Vt. 528, 529.

The marriage of a minor daughter is an emancipation from the power of her parents, for thereby her husband became seised of any estate of inheritance belonging to her, acquired the power to sue for and reduce to possession choses in action due her, became answerable for her debts contracted before coverture, became bound to maintain her with necessaries, and became liable for her torts committed during coverture, and was entitled to her society and the benefit of her services to the entire exclusion of her father. *Town of Fremont v. Town of Sandown*, 56 N. H. 300, 303.

## EMBANKMENT.

"Embankment," in its common, usual, and accepted meaning, imports a ridge of earth of sufficient height and base to form a serious obstruction to a highway, if raised across its passage. *State v. Day*, 52 Ind. 483, 485.

Embankments, except for retaining walls, are normally made of earth, not rock. *Curley v. Chosen Freeholders of Hudson County*, 49 Atl. 471, 473, 66 N. J. Law, 401.

#### As part of bridge.

See "Bridge."

**Levee synonyms.**

"Embankment" is defined to be "an artificial bank or mound of earth." Webster. It is not synonymous with the term "levee." Every levee is an embankment, but every embankment is not a levee. *State ex rel. City of New Orleans v. New Orleans & N. O. R. Co.*, 7 South. 226, 228, 42 La. Ann. 138.

**Ties of railroad included.**

In General Railroad Law Feb. 19, 1849 (P. L. 83) § 10, providing that, whenever any company shall locate its road in and on any street or alley in any city or borough, ample compensation shall be made to the owners of lots fronting on such street or alley for any damages sustained by reason of any embankment made in the construction of such road, "embankment," should be construed to include the ties used by the railroad company in the construction of such railway, and the ballasting or filling in between the same. *Pittsburgh, V. & C. R. Co. v. Rose*, 74 Pa. (24 P. F. Smith) 362, 363.

**EMBARGO.**

"Embargo" is defined to be a prohibition to sail. *The William King*, 15 U. S. (2 Wheat.) 148, 153, 4 L. Ed. 206.

An "embargo" is a restraint and detention by public authority. *Delano v. Bedford Ins. Co.*, 10 Mass. 347, 351, 6 Am. Dec. 132.

An "embargo" is as much a restraint and detention, although it amounts to nothing more than a legal prohibition against the sailing of the vessel, as if she were taken into the custody of the officers of the government, and were deprived of all the means of removing from the wharf. *King v. Delaware Ins. Co.* (U. S.) 14 Fed. Cas. 516, 518.

"Embargo," *ex vi termini*, means only a temporary suspension of trade. A general and permanent prohibition of trade would not be an embargo. An embargo is not required to be definite as to time on the face of the act. It is frequently otherwise. *McBride v. Marine Ins. Co.* (N. Y.) 5 Johns. 299, 308.

**EMBARRASSED.**

The word "embarrassed," in its application to a man's financial condition or standing, ordinarily means incumbered with debt; beset with urgent claims and demands; unable to meet his pecuniary engagements, etc. It is substantially of the same meaning as the words "bad circumstances," "insolvent," "unworthy of credit," and is libelous. *Hayes v. Press Co.*, 18 Atl. 331, 332, 127 Pa. 642, 5 L. R. A. 643, 14 Am. St. Rep. 874.

**EMBEZZLE—EMBEZZLEMENT.**

As used in Gen. St. c. 118, § 107, providing for the commitment to jail by a judge of

insolvent persons who have refused to submit themselves to an examination on oath on a complaint made to him on oath that they were suspected of having fraudulently concealed, embezzled, and conveyed away the money, goods, effects, and estate of an insolvent debtor, "embezzled" cannot be construed as referring to a criminal embezzlement. Its meaning is rather to be found in the words with which it is connected, and as importing an act which is a violation of a civil right, and not the technical offense of embezzlement in the statute. *Sawin v. Martin*, 93 Mass. (11 Allen) 439, 440.

The terms "larceny" and "embezzlement" in a bond conditioned to reimburse an employer for such pecuniary loss as he may sustain by any act of fraud or dishonesty, amounting to larceny or embezzlement, committed by a designated employé, are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employé to pay over to his employer, or account to him for, any money, securities, or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employé. *Champion Ice Mfg. & Cold-Storage Co. v. American Bonding & Trust Co.*, 75 S. W. 197, 198, 25 Ky. Law Rep. 239.

The word "embezzlement," as used in a bond insuring a firm against any pecuniary loss from the fraudulent or dishonest acts of its agents amounting to embezzlement, means embezzlement as defined in the criminal law, and therefore, unless embezzlement is proven against the agent, the sureties on the bond are not liable for his acts. *Reed v. Fidelity & Casualty Co.*, 42 Atl. 294, 189 Pa. 596.

Embezzlement is the fraudulent application by one of the money intrusted to his care by another. Thus, to say of a railway conductor that he failed to ring up the fares collected, does not necessarily imply that he embezzled the money. *Pittsburgh, A. & M. Pass. Ry. Co. v. McCurdy*, 8 Atl. 230, 232, 114 Pa. 554, 60 Am. St. Rep. 363.

**As breach of trust.**

"Embezzlement" is defined in Bouvier's Law Dictionary as "the fraudulent removing and secreting the personal property with which the party has been intrusted, for the purpose of applying it to his own use." *People v. Belden*, 37 Cal. 51, 53.

Embezzlement is the fraudulent appropriating to one's own use the money or goods intrusted to one's care and control by another. *Fagnan v. Knox*, 40 N. Y. Super. Ct. (8 Jones & S.) 41, 49.

"Embezzle" means the appropriation to one's self by a breach of trust of the property or money of another. The term necessarily imports fraud or breach of trust." *Alleghany*

County Sup'rs v. Van Campen (N. Y.) 3 Wend. 48, 58.

"Embezzle" means to appropriate fraudulently to one's own use; to apply to one's private use by a breach of trust, as to embezzle public money. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 197, 62 Am. St. Rep. 644.

The act of embezzlement consists of a fraudulent misappropriation by one of another's goods to his own use, or at least to depriving the true owner of them. *Foster v. State* (Del.) 43 Atl. 265, 267, 2 Pennewill, 111.

Embezzlement is where one fraudulently appropriates the property of another intrusted to his care, or fraudulently misapplies it, instead of applying it to its own proper purpose. *State v. Foster* (Del.) 40 Atl. 939, 942, 1 Pennewill, 289.

"Embezzlement," in its technical sense, most usually means a felonious appropriation by a servant of his master's property while it is in his keeping. And, where an act of Congress uses the word "embezzlement," it will be construed in its technical signification. *United States v. Greve* (U. S.) 65 Fed. 488, 489.

The word "embezzle" has a well-defined meaning. In the *Century Dictionary* it is defined as the act to steal slyly; to appropriate fraudulently to one's own use, as what is intrusted to one's care; apply to one's private use by a breach of trust, as a clerk or servant who misapplies his master's money or valuables. It is also defined as larceny by clerk or servant or agent; appropriation to one's own use of anything belonging to another, whether rightfully or wrongly in the possession of the taker; theft. *State v. Trolson*, 32 Pac. 930, 931, 21 Nev. 419.

"Embezzlement" is defined as the act of fraudulently appropriating to one's own use what is intrusted to the party's care and management. *Chaplin v. Lee*, 18 Neb. 440, 443, 25 N. W. 609 (quoting *Webst. Dict.*); *McAleer v. State*, 64 N. W. 358, 359, 46 Neb. 116; *State v. Yeiter*, 88 Pac. 320, 322, 54 Kan. 277; *Taylor v. Kneeland* (Mich.) 1 Doug. 67, 72.

"Embezzlement" is the fraudulent appropriation of property by a person to whom it has been intrusted. *People v. Westlake*, 57 Pac. 465, 466, 124 Cal. 452; *Pen. Code Cal.* § 503; *Popple v. McMahon*, 65 Pac. 571, 572, 133 Cal. 278; *People v. Treadwell*, 10 Pac. 502, 509, 69 Cal. 226; *People v. De Coursey*, 61 Cal. 134, 135; *Gordon v. Eans*, 11 S. W. 64, 67, 97 Mo. 587; *In re Grin* (U. S.) 112 Fed. 790, 796; *Ex parte Hibbs* (U. S.) 26 Fed. 421, 434; *United States v. Harper* (U. S.) 33 Fed. 471, 474; *United States v. McClure* (U. S.) 107 Fed. 268, 271; *Moore v.*

*United States*, 16 Sup. Ct. 294, 295, 160 U. S. 268, 40 L. Ed. 422; *Mills v. State*, 73 N. W. 761, 764, 53 Neb. 263; *McAleer v. State*, 64 N. W. 358, 359, 46 Neb. 116; *Commonwealth v. Clifford*, 27 S. W. 811, 96 Ky. 4; *State v. Davis* (Del.) 50 Atl. 99, 3 Pennewill, 220; *State v. Winstandley*, 58 N. E. 71, 72, 155 Ind. 290; *Colip v. State*, 55 N. E. 789, 741, 153 Ind. 584, 74 Am. St. Rep. 322; *People v. Hill*, 3 Pac. 75, 79, 3 Utah, 334; *State v. Wolff*, 34 La. Ann. 1153, 1154; *State v. Collins*, 61 N. W. 467, 4 N. D. 433; *Commonwealth v. Scott* (Pa.) 3 C. P. Rep. 98, 100; *Golden v. State*, 2 S. W. 531, 537, 22 Tex. App. 1.

"Embezzlement" is defined as the fraudulent appropriation or conversion of the property of another by any one who is intrusted with the possession. *Metropolitan Life Ins. Co. v. Miller* (Ky.) 71 S. W. 921, 922.

"Embezzlement" may be defined to be the appropriation to one's own use or benefit of property or moneys intrusted to him by another, such as the embezzlement by clerks, servants, and agents of their employer's money or property. 4 Bl. Comm. 230, 231. Under this definition the debt created by the conversion to an agent's own use of money received by him on a note taken for collection is a "debt created by embezzlement," within the meaning of section 33 of the bankruptcy act of 1867, providing that a discharge from bankruptcy shall not relieve the bankrupt from a debt created by embezzlement. *Fulton v. Hammond* (U. S.) 11 Fed. 291, 293.

Embezzlement involves two general ingredients or elements: First, a breach of trust or duty in respect to the moneys, property, and effects in the party's possession belonging to another; and, second, the wrongful appropriation thereof to his own use. *United States v. Harper* (U. S.) 33 Fed. 471, 474.

The essential elements of embezzlement are the fiduciary relation arising where one intrusts property to another, and the fraudulent appropriation of the property by the latter. *People v. Gordon*, 65 Pac. 746, 747, 133 Cal. 328.

The word "embezzle" implies the moral turpitude of a breach of trust equal to felonious taking. *State v. Stevenson*, 39 Atl. 471, 472, 91 Me. 107.

"Embezzlement" does not seem to have had any technical meaning at common law, and has been used to signify every kind of stealing; but when used in statutes it is almost, if not quite universally, confined to the misappropriation of property by those to whose care it has been confided as officers or agents. *People v. McKinney*, 10 Mich. 54, 109, 110.

"Embezzlement" is a species of larceny, and the term is applicable to cases of furtive and fraudulent appropriation by clerks, servants, or carriers of property coming into their possession by virtue of their employment. *People v. Burr* (N. Y.) 41 How. Prac. 293 294.

By the provision of Pen. Code, § 508, every clerk, agent, or servant of any person, who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement. *People v. Tomlinson*, 5 Pac. 509, 66 Cal. 344; *People v. Gallagher*, 35 Pac. 80, 100 Cal. 468. There are four positions of fact to be made out under this statute. (1) That the party was such a clerk, agent, or servant; (2) that he received the property of his principal; (3) that he received it in the course of his employment; (4) that he converted it to his own use with intent to steal. *In re Grin* (U. S.) 112 Fed. 790, 799.

To constitute the crime of embezzlement, the owner must be deprived of the property by an adverse use or holding. *Chaplin v. Lee*, 18 Neb. 440, 443, 25 N. W. 609.

**Same—By bank officer.**

The word "embezzle," in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], providing that every president, director, cashier, etc., of any banking association who embezzles any moneys or makes any false entry with intent to injure or defraud the association or any person shall be deemed guilty, etc., is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which is some breach of confidence or trust. *United States v. Conant* (U. S.) 25 Fed. Cas. 591.

The crime of embezzlement is a species of larceny. It is applicable to the unlawful conversion of property by clerks, agents, and servants acting in a fiduciary or trust capacity, and, under the United States statutes, by a president, director, cashier, teller, clerk, or agent of a national banking association. *United States v. Harper* (U. S.) 33 Fed. 471, 474; *Same v. Lee* (U. S.) 12 Fed. 816, 818.

As used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], providing that every president, director, cashier, teller, clerk, or agent of any association who embezzles any of the moneys, funds, or credits of the association shall be deemed guilty of a misdemeanor, "embezzlement" means a crime which a person has the opportunity to commit by reason of some office or employment, which may include in its signification some breach of trust—some misuse of an opportunity of that

sort. *United States v. Conant* (U. S.) 25 Fed. Cas. 591.

Embezzlement is the unlawful conversion by the officer of a bank, to his own use, of funds intrusted to him, with intent to injure or defraud the bank. *United States v. Youtsey* (U. S.) 91 Fed. 864, 867.

**Same—By public officer.**

If any person charged with the safe-keeping of public money converts the same to his own use, or loans any portion of such money, he shall be guilty of embezzlement. St. 1881, p. 82. *State v. Nevin*, 7 Pac. 650, 653, 19 Nev. 162, 3 Am. St. Rep. 873.

"Embezzlement" is defined in Rev. St. 1881, § 1942, to include conversion to one's own use, or that of another, of public funds intrusted to him. *Winchester Electric Light Co. v. Veal*, 41 N. E. 334, 145 Ind. 506.

The offense of "embezzlement" by a disbursing officer of the United States, as defined in Rev. St. § 5488 [U. S. Comp. St. 1901, p. 3703], is broader than that defined in either the first, fourth, or ninth paragraph of the sixtieth article of war, and means such an offense as is generally understood where one having the money of another in his custody appropriates it to his own use with felonious intent, intending to deprive the true owner thereof. *Carter v. McClaughry* (U. S.) 105 Fed. 614, 619.

"Embezzle," as used in Crimes Act, § 148, providing for the punishment of any person holding an office of trust and profit under authority of the state, or any public or private corporation existing by the laws thereof, who shall embezzle any of the money, property, or securities committed to his keeping, with intent to defraud, means "to fraudulently appropriate to one's own use the property of another. It means a breach of trust." *State v. Lyon*, 45 N. J. Law (16 Vroom) 272, 274.

Pen. Code, § 504, declares that every officer, and every deputy clerk or servant of such officer, who fraudulently appropriates to any use or purpose not in the due and lawful execution of his trust any property which he has in his possession or under his control by virtue of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement. *People v. Cobler*, 41 Pac. 401, 403, 108 Cal. 538. Under such statute the fact that the officer charged with embezzlement of moneys of an association is a member of such association does not relieve the act from being an embezzlement. *People v. Mahlman*, 23 Pac. 145, 82 Cal. 585.

Embezzlement only occurs when an agent or servant converts to his own use property intrusted to his care and posses-

sion by his principal or employer. Thus where a postmaster issued postal money orders to a fictitious person, payable at a bank, and wrote to the bank in the name of such person directing that the money be collected and forwarded to him at another place in a registered package, and intercepted such package and appropriated the proceeds, he was not guilty of embezzlement, since the United States had never intrusted him with the money he obtained from the several postmasters on these false orders, or in any way gave him the possession thereof. *Ex parte Hibbs* (U. S.) 26 Fed. 421, 434.

By Hill's Ann. St. & Codes Wash. p. 918, § 1771, it is provided that any bailee who wrongfully converts to his own use the money or property of another delivered or intrusted to his care or control shall be deemed guilty of larceny and punished accordingly, this offense is generally called "embezzlement," and was not known at common law. *United States v. Clark* (U. S.) 76 Fed. 560, 561.

#### **As common-law offense.**

The crime of embezzlement is a statutory offense, and was unknown to common law. It is said that in the common-law definition of "larceny" there were two gaps through which, in the expansion of business, many criminals escaped. The first of these gaps was caused by the rule that, to sustain a charge of larceny, it was necessary that the stolen goods should have been at some time in the prosecutor's possession. The second was in the assumption that, when possession was acquired by a bailee, no subsequent fraudulent conversion constituted larceny while the bailment lasted. It was to meet these defects in the common law that statutes have been passed in most, if not all, of the states of our Union, in some of which an offense is created known as "embezzlement larceny," and in others, as in our own statute, designating the offense as "embezzlement." *People v. Gallagher*, 85 Pac. 80, 100 Cal. 466.

The first appearance of the crime of embezzlement is in St. 21 Hen. VIII, c. 7, which makes the conversion of property of a master by a servant embezzlement. This statute has undergone an immense amount of legislative patchwork both in England and this country, until finally the offense of conversion or embezzlement by a bailee has been evolved. *United States v. Clark* (U. S.) 76 Fed. 560, 561.

Embezzlement is an offense created by statute, in order to provide for deficiencies in the law of larceny. Embezzlement is not a common-law offense. The first statute on the subject was of the time of Henry the Eighth, in which the descriptive words were, "did embezzle or otherwise convert the money to

his own use." *State v. Wolff*, 34 La. Ann. 1153, 1154.

Embezzlement was a felony at common law, of the same grade as larceny. That was when a servant fraudulently converted to his own use his master's goods of the value of 40 shillings, not having the actual possession, but only the care and oversight, of the goods. By St. 21 Hen. VIII, c. 7, the offense was extended to all cases of fraudulent conversion by a servant of the master's goods of the value of 40 shillings. This statute was enforced at the time of the settlement of our colonies, and so presumably became a part of the common law of this country. It was repealed in the time of George the Fourth. *United States v. Cadwallader* (U. S.) 59 Fed. 677, 680.

All authorities treat embezzlement as akin to larceny, and the statutory offense of embezzlement mainly originates in a necessity which resulted from the inapplicability of the common law of larceny to breaches of trust by persons occupying fiduciary relations. *Golden v. State*, 22 Tex. App. 14, 15, 2 S. W. 531, 537.

Embezzlement is the statutory expansion of common-law larceny made to prevent a failure of justice that would occur under the technical rules that the law had applied to larceny. It covers cases where the property which is the subject of the offense comes into the possession of the defendant without any technical trespass; in other words, where property is intrusted to the party. *State v. Collins*, 61 N. W. 467, 4 N. D. 433.

Embezzlement is a sort of statutory larceny committed by servants and other like persons where there is a trust reposed, and therefore no trespass, so that the act could not be larceny at the common law. *State v. Trolson*, 32 Pac. 930, 931, 21 Nev. 419; *Commonwealth v. Clifford*, 27 S. W. 811, 96 Ky. 4.

#### **As descriptive of offense.**

The word "embezzle" is defined as to appropriate or divert falsely to one's own use, as money and goods intrusted to one's care and control officially or by another; so that a complaint charging that a person "embezzled" money which had been intrusted to him charges all the elements necessary to constitute embezzlement, the word "embezzlement" having a significant meaning entirely descriptive of the offense. In *re Grin* (U. S.) 112 Fed. 790, 796; *State v. Trolson*, 32 Pac. 930, 931, 21 Nev. 419.

Embezzlement is purely a statutory offense, being unknown to common law, and in the statute of Oregon the acts which are generally included in embezzlement are termed "larceny," so that an indictment which states that defendant was guilty of "embezzlement" does not define the offense. In *re Richter* (U. S.) 100 Fed. 295, 297.

Embezzlement is the fraudulent removing and secreting of personal property, with which the party has been intrusted, for the purpose of applying it to his own use; so that a statement, in an order of arrest, that it was for a conversion of money embezzled or fraudulently misapplied by defendant while attorney for plaintiff's testator, merely gives a definition of the offense, and does not constitute a variance with a complaint alleging facts sufficient to constitute embezzlement. *Quail v. Nelson*, 56 N. Y. Supp. 865, 867, 89 App. Div. 18.

In *United States v. Northway*, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664, the word "embezzle" was recognized as having a settled technical meaning of its own, like the words "steal, take, and carry away," as used to define the offense of larceny; and it was said that an allegation that a person "did embezzle and convert to his own use" sufficiently alleged that the moneys had come into the possession of the accused in his official character, so that he held them in trust for the use and benefit of the association, and hence sufficiently described the offense of embezzlement. But where an indictment charges the embezzlement of a certain sum of money belonging to the United States by defendant, a post-office employé, if the words charging the defendant with being such an employé are material, it must be averred that the money embezzled came into his hands by virtue of such employment, and the word "embezzle" is not sufficient for that purpose. *Moore v. United States*, 16 Sup. Ct. 294, 295, 160 U. S. 268, 40 L. Ed. 422.

"Embezzle," with or without the usual addition, "convert to his use," finds its definition in the text-books, and is of constant use in the statutes for the punishment of crimes. The words have a technical and popular significance, and plainly convey the wrongful appropriation of the property of another by the party intrusted with or who has possession of it under some trust, duty, or office." With this significance, couched in the appropriate technical terms, "embezzle" alone, and with "convert to his own use," is to be found in the crimes act of the United States, and notably in the familiar sections of the Revised Statutes dealing with the officials of national banks, as well as in our own Criminal Code. Rev. St. U. S. §§ 5209, 5439, 5453 [U. S. Comp. St. 1901, pp. 3497, 3675, 3681]; Rev. St. 1870, § 907; Pierce & King's Revisory Legislation of 1852, p. 198; Acts 1855, No. 120, § 83, p. 143; Rev. St. 1856, p. 149, § 84; Rev. St. 1870, p. 179. *State v. Nicholls*, 23 South. 980, 981, 50 La. Ann. 699 (citing *Rosc. Cr. Ev.* p. 438; 2 Whart. Cr. Law, § 1907; *United States v. Britton*, 107 U. S. 655, 666, 2 Sup. Ct. 512, 27 L. Ed. 520; *Same v. Northway*, 120 U. S. 327, 334, 7 Sup. Ct. 580, 30 L. Ed. 664; *Moore v. United States*, 160 U. S. 268, 16 Sup. Ct. 294, 40 L. Ed. 422).

The word "embezzlement" of itself implies a fraudulent and unlawful intention on the part of the person charged. No one can "lawfully" or "honestly" embezzle money or other property, and hence the use of the word "embezzle" in an indictment against employés of the Post-Office Department, charging them with embezzling and secreting valuable letters, is sufficient to charge the offense, and it is not necessary to allege that the same was done with a fraudulent intent. *United States v. Atkinson* (U. S.) 34 Fed. 316, 317.

#### As fraudulently convert.

The word "embezzle" and the words "fraudulently convert to his own use" mean the same thing, as used in Cr. Code, § 80, providing that if any officer, etc., embezzles or fraudulently converts to his own use, etc., he shall be imprisoned in the penitentiary. *Spalding v. People*, 49 N. E. 993, 998, 172 Ill. 40.

The words "embezzle" and "fraudulently convert" are synonymous. *Metropolitan Life Ins. Co. v. Miller* (Ky.) 71 S. W. 921, 922.

The word "embezzled," as used in an indictment charging that the defendant fraudulently embezzled and converted a certain sum of money, is synonymous with the word "converted" as there used. *State v. Jamison*, 38 N. W. 508, 509, 74 Iowa, 602.

"Embezzle" includes in its meaning appropriation to one's own use, so that the use of that word in an indictment or information contains within itself the charge that defendant appropriated the money or property to his own use. Hence it is proper to connect the word "embezzle" with the phrase "converted to his own use" by the copulative "and." *Mills v. State*, 73 N. W. 761, 764, 53 Neb. 263.

The terms "shall embezzle" and "convert to his own use," found in Cr. Code, § 121, are synonymous. For an agent to convert to his own use is made embezzlement by this statute. *Hamilton v. State*, 64 N. Y. 965, 966, 46 Neb. 284.

#### As infamous crime.

"Embezzlement" is not an "infamous crime" within the intention of the fifth amendment of the Constitution of the United States. *United States v. Rellley* (U. S.) 20 Fed. 46; *Same v. Baugh* (U. S.) 1 Fed. 784, 787.

The crime of embezzlement and making false entries by the president of a national bank is an infamous crime. *United States v. Dewalt*, 9 Sup. Ct. 111, 128 U. S. 393, 32 L. Ed. 485; *Same v. Cadwallader* (U. S.) 59 Fed. 677, 679.

#### Intent to defraud.

The two essential elements of embezzlement are (1) the appropriation of the prop-

erty by the bailee, agent, or officer to his own use, or that of some other person than the true owner; (2) such appropriation must have been made with the intent to deprive or defraud the true owner of the property, or of the use or benefit thereof. If the agent or officer does with the property lawfully in his possession, custody, or control what a person must intend to do with property unlawfully taken by him in order to be guilty of common-law larceny, then such agent or officer is guilty of statutory larceny, formerly called "embezzlement." In other words, to constitute the statutory crime, the appropriation of the property must be made with the same intent to deprive the owner of it with which the taking must be done to constitute larceny at common law. *State v. Kortgaard*, 64 N. W. 51, 53, 62 Minn. 7.

The word "embezzle," in embezzlement laws, means "the failure to pay over the money by the agent, after it is collected, with the felonious intent at the time of the commission to appropriate it to the agent's use and to deprive the owner of it. Criminal intent is essential to the crime." *State v. Reilly*, 4 Mo. App. 392, 396.

A prosecution for embezzlement cannot be sustained unless the wrongdoer had an intent to convert the property to his own use, and the question of intent is one for the jury. *People v. Galland*, 22 N. W. 81, 55 Mich. 628.

To constitute embezzlement, the conversion must be something more than an honest mistake, so that where, under a construction of a contract, the person was entitled to the use of the money until the time of settlement, his use thereof would not constitute embezzlement, even though such construction was a mistaken one. *State v. Wallick*, 54 N. W. 246, 248, 87 Iowa, 369.

Before the offense of embezzlement can be made out, it must distinctly appear that the respondent has acted with a felonious intent and made an intentional wrong disposal, indicating a design to cheat and deceive the owner. A mere failure to pay over money is not enough if that intent is not plainly apparent. *People v. Hurst*, 28 N. W. 838, 839, 62 Mich. 276.

An essential element in the offense of embezzlement is a fraudulent intent. *People v. Treadwell*, 10 Pac. 502, 509, 69 Cal. 226.

In order to constitute embezzlement, an intent to feloniously appropriate the property at the time of the appropriation is essential, and if the appropriation is made upon the belief, honestly entertained by the accused, that he has lawful title or right to appropriate it, the act is not criminal. *Beaty v. State*, 82 Ind. 228, 232; *State v. Smith*, 16 South. 938, 941, 47 La. Ann. 432; *Gordon v. Eans*, 11 S. W. 64, 65, 97 Mo. 587.

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As used in St. 1857, c. 233, declaring that if any person to whom any money, goods, or other property which may be the subject of larceny shall have been delivered shall "embezzle" or secrete with intent to embezzle such money, goods, or property, he shall be deemed to have committed the crime of simple larceny, cannot be construed to apply to the fraudulent conversion to one's own use of money paid or property delivered through mistake, for there is no breach of a trust or violation of a confidence intentionally reposed by one party and voluntarily assumed by the other, which is essential to the crime of embezzlement. "Embezzle" is applied to persons having in their possession, by virtue of their occupation or employment, the money or property of another which has been fraudulently converted in violation of a trust reposed in them." *Commonwealth v. Hays*, 80 Mass. (14 Gray) 62, 64, 74 Am. Dec. 662.

Pen. Code, § 507, defining "embezzlement," does not require an intent to steal to constitute the crime, but makes him guilty who fraudulently converts the same, or the proceeds thereof, to his own use. *People v. Jackson*, 71 Pac. 566, 567, 138 Cal. 462.

The definition of the word "embezzlement" is given by Bouvier as "the fraudulent appropriation to one's own use of the money or goods intrusted to one's care by another," and, as the word "embezzled" implies a fraudulent intent, the addition of the word "fraudulent" is mere surplusage, and would not enlarge or restrict the signification of the word. *Grin v. Shine*, 23 Sup. Ct. 98, 102, 187 U. S. 181, 47 L. Ed. 130.

The fraudulent intent may be consummated in any manner capable of effecting it. *Golden v. State*, 22 Tex. App. 14, 15, 2 S. W. 531, 537.

To constitute the offense, there must be a criminal intent, but where the money of the principal is knowingly used by the agent in violation of his duty, it is none the less embezzlement because of an intent at the time to restore it. *Metropolitan Life Ins. Co. v. Miller (Ky.)* 71 S. W. 921, 922.

There can be no embezzlement under our statutes where there is no intent to defraud. There are cases where one uses the money of another as he has no right to use it, and thereby converts and appropriates it to his own use, in which the statute will infer a fraudulent intent and punish the act as an embezzlement. But where money was deposited or taken into a bank under the practice of years, and by an arrangement of a city treasury the money ceased to be the property of the treasurer and became the property of the bank, the loss of the money by the failure of the bank did not constitute embezzlement. *People v. Wadsworth*, 30 N. W. 99, 101, 63 Mich. 500.



**Lawful possession or custody.**

"Embezzlement" is where one fraudulently appropriates the property of another, intrusted to his care, or fraudulently misapplies it, instead of applying it to its proper purpose. And it is necessary for the state to prove that the property actually came into the custody of the defendant as bailee, and, while being so in his custody as bailee, he embezzled or fraudulently misapplied or converted it to his own use. *State v. Davis* (Del.) 50 Atl. 99, 3 Pennewill, 220.

"Embezzlement" implies the fraudulent appropriation or conversion of the property of another by one who has the rightful possession or is intrusted with it. *Vansant v. State*, 53 Atl. 711, 713, 96 Md. 110.

In order to constitute this crime it is necessary that this property, money, or effects embezzled should have previously come lawfully into possession or custody of the party charged with such offense, and that while so in his possession or custody, held for the use and benefit of the real owner, he unlawfully converted the same to his own use. In other words, there must be an actual and lawful possession or custody of the property of another by virtue of such trust, duty, agency, or ultimate permit to the person charged, and while lawfully in the possession or custody of such property the person must unlawfully convert the same to his own use in order to constitute the crime of embezzlement. *United States v. Harper* (U. S.) 33 Fed. 471, 474. See, also, *Same v. Lee* (U. S.) 12 Fed. 816, 818.

In the statutory embezzlement there is no felonious taking, for the thing comes to the servant by delivery thereof from the master or a third person; so that the question is, by what act, after it is received, does the servant commit embezzlement? We may infer from the authorities, and from the reasons inherent in the question, that, if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing less is sufficient. *State v. Rigall*, 70 S. W. 150, 151, 169 Mo. 659.

**Nature of possession.**

While the statute uses the word "embezzle," and thereby refers us to the ordinary acceptation of the term for its definition, it expressly requires that the thing embezzled must have come into the possession and care of the servant by virtue of his employment. It is not sufficient that he was intrusted with it, but it must have been in his capacity as a servant. *McAleer v. State*, 64 N. W. 358, 359, 46 Neb. 116.

To constitute the crime of embezzlement, it is not necessary to show that the party

charged receive the money by virtue of his employment, nor that he had authority to receive it; but if it was received in the name or on the account of the master or employer, then it is "embezzlement" within the statute. *Denton v. State*, 26 Atl. 1022, 1023, 77 Md. 527.

The term "embezzlement," in *Burns' Rev. St. 1894*, § 2022, declaring that any agent or employé having access to, control, or possession of money belonging to the employer shall be guilty of embezzlement if he appropriates the same, imports that such agent must have control, as agent, of the money so appropriated, and such fact must be stated in the indictment. *State v. Winstandley*, 58 N. E. 71, 72, 155 Ind. 290. He must be in possession by reason of some special trust imposed. *Colip v. State*, 55 N. E. 739, 741, 153 Ind. 584, 74 Am. St. Rep. 322.

Under Ky. St. § 1203, providing that if any carrier or other person to whom money or other property which may be the subject of larceny may be delivered to carry for hire, or any other person who may be intrusted with such property, embezzles or fraudulently converts it to his own use before delivery at the place or to the person to whom the same shall be delivered, he shall be punished, etc. To constitute embezzlement the money appropriated need not be intrusted to the accused by the owner thereof, and it is sufficient if the money was consigned to his employer, who intrusted it to him. *Commonwealth v. Clifford*, 27 S. W. 811, 96 Ky. 4.

**Property subject.**

It is embezzlement for a township treasurer to misappropriate his trust funds to his private purposes, and to fraudulently refuse to account for them. He is as guilty as though he had made a similar misuse of specific coins or bills which he had no right to exchange for their equivalents. Of course, there may be losses and failures to pay, or even to account, where the failure is due to misfortune or other cause not criminal. But where the demand is criminal, the misuse of a fund belonging to the public, though changing its form constantly, is just as clearly an embezzlement of the property of the public as if any specific chattel had been so misapplied. *People v. Bringard*, 39 Mich. 22, 24, 25, 33 Am. Rep. 344.

**Series of acts.**

Embezzlement may and most often does consist of many acts done in a series of years, and the fact at last disclosed that the employer's money and funds are embezzled is the crime against which the statute has been leveled, so that the prosecution should not be compelled to elect from which one of the many acts of a series that constitutes the

corpus delicti it will attempt to found the prosecution. *Willis v. State*, 33 South. 226, 234, 134 Ala. 429.

#### Time and place as elements.

Embezzlement is a crime in every state of the Union, and neither time nor place are essential elements in the crime. *Ex parte Pearce*, 23 S. W. 15, 17, 32 Tex. Cr. R. 301.

#### False charge.

For conviction of the offense of embezzlement, it is essential that the prosecution establish the propositions: (1) That the accused was the clerk, agent, servant, or apprentice of a private person; (2) that the money or property came into his possession by virtue of his employment; (3) that he embezzled or fraudulently converted it to his own use, or fraudulently secreted it with the intention to convert it to his own use. Hence where a traveling salesman, under a contract whereby his employer was to pay his expenses, in his account rendered for expenses made a false charge for a meal, he was not guilty of embezzlement, there being no evidence that the employer advanced the money, or that defendant collected money out of which it was paid. *Grider v. State*, 32 South. 254, 133 Ala. 188.

#### Fraudulent banking.

Although the term "embezzlement" in *Burns' Rev. St.* 1894, § 2031, declaring every officer of an incorporated bank guilty of embezzlement who fraudulently receives money from a person not indebted thereto when the bank is insolvent, etc., is an inapt naming of the crime defined in this statute, and the offense aimed at is really fraudulent banking; nevertheless it does not follow that the rules of pleading applicable to embezzlement are not controlling. *State v. Winstandley*, 57 N. E. 109, 154 Ind. 443.

#### Larceny distinguished.

"Embezzlement" is a broader term than "larceny," but is not exclusive of it. *State v. Sullivan*, 21 South. 688, 689, 49 La. Ann. 197, 62 Am. St. Rep. 644.

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of property was lawful or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking. *Moore v. United States*, 16 Sup. Ct. 294, 295, 160 U. S. 268, 40 L. Ed. 422; *United States v. Lee* (U. S.) 12 Fed. 816, 818; *Same v. Harper* (U. S.) 33 Fed. 471, 474.

Embezzlement differs from larceny in this: that the latter implies a wrongful tak-

ing from another's possession, but embezzlement denotes a wrongful appropriation of what is already in the wrongdoer's possession. *State v. Yeiter*, 54 Kan. 277, 283, 39 Pac. 320, 322 (citing *Maxw. Cr. Proc.* 120-122); *Chaplin v. Lee*, 18 Neb. 440, 443, 25 N. W. 609.

"Embezzlement is a species of larceny. It is distinguished from 'larceny,' properly so called, as being committed with respect to property which is not at the time in the actual possession of the owner." *People v. Burr* (N. Y.) 41 How. Prac. 293, 294; *People v. Perini*, 29 Pac. 1027, 1028, 94 Cal. 573.

The gist of common-law larceny, as distinguished from embezzlement, is the felonious taking of what is another's, with the simultaneous intent in the taker of misappropriating it; while in statutory embezzlement there is no felonious taking, for the thing comes to the servant by delivery either from the master or a third person. *Spalding v. People*, 49 N. E. 993, 998, 172 Ill. 40.

Embezzlement is a fraudulent appropriation of such property as the statute makes the subject of embezzlement under the circumstances, in the statute pointed out, by the person embezzling to the injury of the owner thereof. *Bish. Cr. Law*, § 332. The embezzlement statutes were passed to provide for cases which larceny at common law did not include, so that nothing that is larceny at common law is included in the embezzlement statutes, and nothing that is included in the embezzlement statutes is larceny at common law. The embezzlement statutes may generally be divided into two classes: First, those meeting the case of servants and clerks appropriating their master's property before it reaches his possession; and, secondly, those meeting the cases of trustees and bailees appropriating goods of which they obtained possession bona fide. *Griffin v. State*, 4 Tex. App. 390, 409.

The distinction between "larceny" and the statutory crime of "embezzlement" is sometimes hard to draw. The definition of the latter offense in *Pen. Code*, § 503, is very broad, being the fraudulent appropriation of property by a person to whom it has been intrusted. Where the property has been taken forcibly or furtively, or when the possession is gained by a trick or artifice, and the owner had no intent to yield possession and intrust the property to another, in such cases there is no embezzlement. *People v. Johnson*, 27 Pac. 663, 664, 91 Cal. 265.

#### Misapplication distinguished.

"Embezzlement" and "misapplication" are not convertible terms. "Misapplication" is the broader, and covers "embezzlement." So that where, in an indictment for wilfully misapplying funds, a count charges defendant with misapplying the assets which were in

his actual possession, which would be embezzlement, he was properly convicted. *Jewett v. United States* (U. S.) 100 Fed. 832, 840, 41 C. C. A. 88, 53 L. R. A. 568.

"Embezzle" may mean to appropriate to one's own use, but it also embraces the meaning of "to misappropriate," so that, where the indictment charged that defendant did convert to his own use and embezzle a check, an instruction that defendant was guilty if he received the check and misapplied it fraudulently, whether he converted it to his own use or not, was proper. The statute renders it indictable to embezzle or fraudulently convert to one's own use. This indicates that these acts are not necessarily and strictly synonymous. *State v. Foust*, 19 S. E. 275, 114 N. C. 842.

As used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], punishing the president, cashier, or agent of any national bank who shall embezzle or willfully misapply any of its funds, the words "embezzle" and "willfully misapply" are not synonymous. In order to misapply the funds of a bank, it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully and afterwards criminally misapply them, or by virtue of his official relation to the bank he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of willful misapplication. *United States v. Northway*, 7 Sup. Ct. 580, 583, 120 U. S. 327, 30 L. Ed. 664.

"Embezzlement," as commonly understood, is a breach of trust, to the embezzler's own use. As used in the statute relating to embezzlement of the funds of a national bank, it is a breach of trust by the officers or agents of the association to their own use, or the word may be used to describe the willful misapplication of the moneys, funds, or credits of the association. *United States v. McClure* (U. S.) 107 Fed. 268, 271.

The fifty-fifth section of the national banking act of 1864 provides for the punishment of those who "embezzle, abstract and willfully misapply" the funds of the bank "with intent to injure or defraud the association." Held, that the word "embezzle," and perhaps also the word "abstract," refers to acts done for the benefit of the actor as against the bank, while the word "misapply" covers acts having no relation to pecuniary profit or advantage of the doer thereof. *United States v. Taintor* (U. S.) 28 Fed. Cas. 7, 9.

#### Misapplication of credits.

Where an officer of a bank so arranged his scheme that credits given to his bank on the security of its property pledged as

collateral with two New York banks were converted by payment of the drafts of his bank against such credit so that the money was diverted from the treasury of his bank into his own possession, he "embezzled" the money in the ordinary sense of the term, so that a statement in a proof of loss under a fidelity insurance policy that he embezzled the money was sufficient, though technically he did not embezzle the money. *American Surety Co. v. Pauly* (U. S.) 72 Fed. 484, 486, 18 C. C. A. 657.

#### Robbery distinguished.

"Robbery" and "stealing" imply a wrongful taking of another's goods, while "embezzlement" denotes the wrongful appropriation of what rightfully came into one's possession. *Taylor v. Kneeland* (Mich.) 1 Doug. 67, 72.

#### Theft distinguished.

The terms "theft" and "embezzlement" cannot characterize the same act, because they are repugnant to and irreconcilable with each other. *United States v. Thomas* (U. S.) 69 Fed. 588, 590.

Embezzlement is a crime unknown to the common law, but depends entirely on statutory enactments. It is a sort of statutory larceny, and, though kindred to theft, it is a separate and distinct offense. Theft involves the idea of unlawful acquisition, whereas embezzlement is a fraudulent conversion of personal property after its possession has been unlawfully acquired. *State v. Harmon*, 18 S. W. 128, 132, 106 Mo. 635.

Theft is the fraudulent taking of personal property under certain designated circumstances, and necessarily involves the idea of unlawful acquisition, thereby differing from embezzlement, which is the fraudulent conversion of similar property after its possession has been lawfully acquired. *Simco v. State*, 8 Tex. App. 406, 407.

"Theft," as distinguished from "embezzlement," is taking property of another from the possession of the owner with intent to defraud. "Embezzlement," as distinguished from "theft," is taking property of another in the possession of the accused with intent to defraud. The crimes are essentially the same, but most unfortunately are, for the purposes of prosecution, entirely distinct. The one demands, as an essential element, a trespass, a breach of technical possession; the other cannot be committed unless the element of trespass or breach of technical possession is absent. The former is a crime at common law; the latter is a statutory offense." *State v. Hanley*, 39 Atl. 148, 149, 70 Conn. 265.

## EMBLEM.

See "Appropriate Emblem or Design."

## EMBLEMENTS.

A crop left growing on the premises by an outgoing tenant is an "emblemment." *Wood v. Noack*, 54 N. W. 785, 84 Wis. 398.

When a tenant holding for an uncertain time sows the land, he is entitled to the crop as "emblements." *Davis v. Brocklebank*, 9 N. H. 73, 74; *Whitmarsh v. Cutting* (N. Y.) 10 Johns. 360, 361. Where that is certain, there exists no title to emblements. *Whitmarsh v. Cutting* (N. Y.) 10 Johns. 360, 361.

In order to entitle one claiming to be a tenant, or his legal representative, to emblements, the following facts must appear: The existence of a tenancy of uncertain duration; second, a termination of the tenancy by the act of God or the act of the lessor; third, that the crop was planted by the tenant, or some one claiming under him, during the right of occupancy. *Miller v. Wohlford*, 119 Ind. 305, 309, 21 N. E. 894.

By the term "emblements" is understood the crops growing upon land, and by "crops" is here meant the products of the earth which grow yearly, and are raised by annual expense or labor, and by great manurance and industry, such as grain; but not fruits which grow on trees, which are not to be planted yearly, and grasses and the like, though they are annual. *Cottle v. Spitzer*, 4 Pac. 435, 436, 65 Cal. 456, 52 Am. Rep. 305.

The common law has established a distinction between the right to emblements and the cost of plowing and manuring the ground, so that the determination of an estate at will would give to the lessee his emblements, but not any compensation for these improvements. He might be ousted of the possession before the crop was in the ground, and wholly lose the expense of plowing and manuring the land, though, if he was ousted afterwards, he would be entitled to the emblements. The doctrine of emblements is founded on the clearest equity and the soundest policy, and ought to receive a liberal encouragement. Compensation for preparing the ground for seed is not indemnity for the loss of the crop, which includes the loss of the seed, the labor of sowing and nursing it, and the hopes of the laborer and his family of a fruitful harvest. *Stewart v. Doughty* (N. Y.) 9 Johns. 108, 112.

The term "emblements" is used to designate corn, cotton, and other like products, not the spontaneous growth of the earth, but produced annually by labor and industry. *Walker v. State*, 20 South. 612, 613, 111 Ala. 29. Vegetable chattels called "emblements" are the growth of the earth produced annually, not spontaneously, but by labor and industry. *Reiff v. Reiff*, 64 Pa. (14 P. F. Smith) 184, 185.

The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit that is produced by labor. *Owens v. Lewis*, 46 Ind. 488, 508, 15 Am. Rep. 295.

### Fruits and trees.

Emblements are the annual product or fruit of things sown or planted. Hops, berries, and the like are emblements, but the roots and bushes from which they grow are perennial, and not strictly emblements. *Hamilton v. Austin* (N. Y.) 36 Hun, 138, 142.

While all emblements are produced by manurance and labor of the owner, and are called "fructus industriales" for that reason, the manner as well as the purpose of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." Thus, at common law, those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, are termed "emblements"; but blackberries, while grown on bushes, do not come within the meaning of such term. *Sparrow v. Pond*, 52 N. W. 36, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. Rep. 571.

"Emblements" do not include fruit which grows on trees which are not planted yearly, grass, and the like. It only includes those crops which grow yearly, and are raised annually by expense and labor or great industry. The fruits and products of the earth other than emblements, while they are hanging by the roots, are a part of the reality. As soon as they are gathered they are personal estate. *Rogers v. Elliott*, 59 N. H. 201, 202, 47 Am. Rep. 192.

### Grass.

"Emblements" do not include grass, which is not an annual crop. *Perley v. Chase*, 11 Atl. 418, 419, 79 Me. 519.

The term "emblements," in 2 Rev. St. 1876, p. 505, § 34, which requires administrators to take possession of and to inventory the emblements and annual crops, whether severed or not from the land, raised by labor, etc., does not include uncut grass growing in a field, but such grass descends with the land to the heir. The distinction between annual crops, merely vegetable productions of the soil, raised by labor bestowed during the year, and trees, fruits, and grass, which are to a greater or less extent of spontaneous growth, may be said to be well recognized and firmly established by the authorities. *Evans v. Hardy*, 76 Ind. 527, 531.

Crops are divided into two kinds, fructus industriales and fructus naturales, the material difference being that the latter are the part of the crop which does not go to the outgoing tenant as emblements, nor to the personal representative as against the heir. This division is only made in favor of the landlord, and not against him. In *Reiff v. Reiff*, 64 Pa. (14 P. F. Smith) 134, it was held in favor of the landowner that, when the tenant for life died during the year, the grass uncut, even when cultivated grass ready for cutting, went to the owner of the reversion, and not as emblements to the lessees of the land. *State v. Crook*, 44 S. E. 32, 33, 132 N. C. 1053.

#### Increase of stock.

The hirer of a farm, with the stock upon it, for a year, is the owner of the natural increase of the stock raised during that time. *Woods v. Charlton*, 62 N. H. 649.

### EMBOLISM.

See "Cerebral Embolism."

### EMBRACE.

Within the meaning of Railroad Law, § 104, requiring street railroad companies leasing their lines to carry passengers for one fare to any point or portion of any railroad "embraced" in such contract, roads built or acquired after such lease are not included, as they cannot be said to be "embraced in such contract" when they are not in existence. *Mendoza v. Metropolitan St. Ry. Co.*, 62 N. Y. Supp. 580, 582, 48 App. Div. 62.

In Rev. St. § 2275 [U. S. Comp. St. 1901, p. 1381], relating to the selection of indemnity lands in lieu of school lands by a state, and providing that where any state is entitled to certain sections for school uses, on which settlers have located, or where they are reserved to any territory, notwithstanding they may be embraced within a military, Indian, or other reservation, the selection of lands in lieu thereof as indemnity shall be a waiver of its right to such sections, the word "embraced" is a synonym of "included." As defined by lexicographers and as commonly used, it has, among others, the two meanings ascribed to the word "include," the first of which accords with its etymology from "claudere." To "shut" is "to confine within; to shut up; to hold, as the shell of a nut 'includes' the kernel; a pearl is 'included' in a shell." *Webst. Dict.* The second and derivative meaning is to "comprehend, as a genus the species; the whole a part." Webster defines the word "embraced" thus: "To encircle; to encompass; to surround or inclose; to include, as parts of a whole, or as subordinate divi-

sions of a part; to comprehend; as, natural philosophy 'embraces' many sciences." The statute speaks of the school sections "embraced" within a reservation, not within the exterior boundary of a reservation, the word "embraced" meaning that the school section was a constituent part of the reservation. *Hibberd v. Slack* (U. S.) 84 Fed. 571, 578.

#### Unchastity imported.

The "embracing" of a man and woman does not necessarily indicate unchastity. It is regarded as appropriate and is of common occurrence among relatives and friends, upon meeting or taking their departure from each other, but the circumstances may be such that the statement that a man and a woman were "embracing" each other may impute unchastity and be slanderous. *Mason v. Stratton*, 1 N. Y. Supp. 511, 512, 49 Hun, 806.

### EMBRACERY.

"Embracery" consists of all such practices as tend corruptly to influence a juror. *State v. Williams*, 136 Mo. 298, 305, 88 S. W. 75.

"Embracery" consists in an attempt to influence a jury corruptly, whether done by persuasion or bribery. Remarks made by a witness to a juror respecting the nature of the case and the nature and character of the evidence offered on the trial, or the principles on which the jury ought to decide the case under their consideration, obviously calculated to influence the juror in favor of one party and against the other, amount to "embracery." *Grannis v. Branden* (Conn.) 5 Day, 260, 274, 5 Am. Dec. 143.

"Embracery" is where one attempts to corrupt, or influence, or instruct a jury, or any way to incline them to be more favorable to the one side or the other, by money, letters, promises, threats, or persuasions, except only by the strength of evidence and the arguments of counsel in open court at the trial of the cause." *Brown v. Beauchamp*, 21 Ky. (5 T. B. Mon.) 413, 415, 17 Am. Dec. 81.

"Embracery" consists in such practices as tend to unduly influence the administration of justice by improperly working upon the minds of the jurors. To constitute the offense there must be an attempt to carry into effect the corrupt purpose. To form the purpose, and give it expression merely in words, is not sufficient. *State v. Brown*, 95 N. C. 685, 686.

"Embracery" is an attempt to influence a juror or jurors corruptly to one side by threats or menaces, or by promises, pressure, entreaties, money entertainments, and the like. *Mills' Ann. St. Colo.* 1891, § 1297.

**Influencing grand juror.**

The definition of the crime of "embracery" given in section 75 of the Penal Code is as follows: "A person who influences or attempts to influence improperly a juror in a civil or criminal action or proceeding, or one drawn or summoned to attend to such a juror in respect to his verdict or decision in any case or matter pending or about to be brought before him in any case, is guilty of a misdemeanor." An attempt to influence a grand juror to prevent a certain prosecution is sufficient to sustain a conviction under the statute. *People v. Glen*, 71 N. Y. Supp. 893, 894, 64 App. Div. 167.

**Unsuccessful attempt.**

The crime of embracery is made up of the attempt to influence a juror. Upon such attempt being made, whether successful or not, the crime is consummate. The corpus delicti—the body, essence and substance of the offense—being the corrupt attempt, it is wholly immaterial whether the would-be corrupter gains his point or not, or whether the juror thus approached gives any verdict or not, or whether the verdict be true or false. *State v. Williams*, 88 S. W. 75, 77, 136 Mo. 293.

Any attempt or effort corruptly to influence a juror, whether it be successful or not, is embracery. The crime may be committed though the object of the embracer be not accomplished, and his only act consists of an attempt to carry out a corrupt purpose. There is no such an offense as an "attempt to commit an embracery," as the act itself is but an attempt. *State v. Sales*, 2 Nev. 268, 270.

**EMBROIDERY.**

Tariff Act Oct. 1, 1890, Schedule J, par. 373, provides for a certain tariff upon "embroidered and hemstitched" handkerchiefs. Held, that the handkerchiefs referred to must be both embroidered and hemstitched, and it was not intended to refer to those handkerchiefs which were either embroidered or hemstitched. In re Gribbon (U. S.) 53 Fed. 78, 80.

"Embroidery," as used in Tariff Act Oct. 1, 1890, par. 373, does not include a fabric made on a loom with a Jacquard attachment, and which is not known in the trade as "embroidery," or an article of wearing apparel embroidered by hand or machine. In re Fellheimer (U. S.) 66 Fed. 720, 721.

**EMERGENCY.**

Other emergency, see "Other."

Webster defines the word "emergency" as "any event or occasional combination

of circumstances which calls for immediate action or remedy; pressing necessity; exigency." An emergency requiring the building of a bridge, arising before and continuing after an emergency act went into effect, is an "emergency" within the act. *People v. Supervisors*, 21 Ill. App. 271, 274.

An emergency is a "sudden or unexpected happening; an unforeseen occurrence or condition." Cent. Dict. Under Laws 1897, c. 378, § 618, providing that in case of emergency a park commissioner may purchase articles immediately required, without calling for competition, at an expense not exceeding \$1,000 during any one month, a person who, in an immediate possibility of frost, furnished material to be used on a greenhouse in a public park, on an order of the superintendent of parks, may recover the same from the city. The emergency arose because of the fact that a heavy frost would probably have destroyed defendant's plants if plaintiff had not furnished the material. *Sheehan v. City of New York*, 75 N. Y. Supp. 802, 803, 37 Misc. Rep. 432.

Under Acts April 8, 1876, and April 1, 1878, making the practice of medicine without a license, except gratuitously and in case of emergency, a misdemeanor, an "emergency" is a case in which the ordinary medical practitioners of the schools provided for by the statute, who are provided with the proper diplomas and have submitted themselves to the proper examination, are not readily obtainable. This is an "emergency," as where the exigency is of so pressing a character that some kind of action must be taken before such parties can be found or procured. Where a party is satisfied that another school of physicians or another individual can render him more efficient aid, more beneficial services, than another, and he therefore seeks his aid, that is not an "emergency." *People v. Lee Wah*, 11 Pac. 851, 71 Cal. 80.

**EMIGRANT.**

An "emigrant" is one who emigrates or quits one country or region to settle in another; one who quits his country for any lawful reason, with a design to settle elsewhere, and takes his family with him. *Williams v. Fears*, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685; *Varner v. State*, 36 S. E. 93, 110 Ga. 595; *Woodson v. State*, 40 S. E. 1013, 1014, 114 Ga. 844.

**EMIGRANT AGENT.**

An "emigrant agent," within the meaning of a Georgia statute imposing a tax upon each emigrant agent doing business within the state, means persons engaged in hiring laborers to be employed beyond the limit of the state. *State v. Hunt*, 40 S. E. 216, 129 N. C. 686, 85 Am. St. Rep. 758; *Williams v.*

Fears, 21 Sup. Ct. 128, 129, 179 U. S. 270, 45 L. Ed. 186; *Id.*, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685; *Varner v. State*, 110 Ga. 595, 36 S. E. 93.

One who comes into the state and employs on his own behalf laborers to work for him outside the state is not an "emigrant agent," and not subject to a tax. *Theus v. State*, 89 S. E. 918, 114 Ga. 53.

An "emigrant agent," is defined by the emigrant act, 22 St. at Large, p. 812, as any person engaged in hiring laborers or soliciting emigrants in this state to be employed beyond the limits of the state. *State v. Napier*, 41 S. E. 13, 15, 63 S. C. 60.

#### EMIGRANT LABORERS.

"Emigrant laborers," as used in the representation that a ship "will carry emigrant laborers not over forty," applies to men only, and is not violated though, with their wives and children, that number is exceeded. *Richards v. Hayward*, 2 Man. & G. 574, 590.

#### EMIGRANT PASSENGERS.

The expression "emigrant passengers," as used in Act Cong. March 2, 1882, regulating the number of emigrant passengers to be carried by ships in a certain territory, is restricted to passengers other than cabin passengers. It is common knowledge that the great bulk of emigrant travel from foreign countries is transatlantic. The conditions of this travel are such that emigrant passengers are exposed to the danger of overcrowding, a danger that is aggravated by the length of the voyage, but which does not exist in short and coastwise voyages. *The Danube* (U. S.) 55 Fed. 993, 995.

#### EMIGRATE.

To "emigrate" is to remove from one country or state to another for the purpose of residence. *Williams v. Fears*, 110 Ga. 584, 586, 35 S. E. 699, 50 L. R. A. 685 (quoting *Webst. Internat. Dict.*).

#### EMINENT DOMAIN.

Right of, as franchise, see "Franchise."

Eminent domain is the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which appertain to its citizens in common, and to appropriate and control individual property for the public benefit as the public safety, necessity, convenience, or welfare may demand. *Cherokee Nation v. Southern Kan. R. Co.* (U. S.) 33 Fed. 900, 905 (quoting *Cooley, Const. Lim.*); *People v. Humphrey*, 23 Mich. 471, 475, 9 Am. Rep. 94;

*Portage Tp. v. Van Hoesen*, 49 N. W. 894, 895, 87 Mich. 536, 14 L. R. A. 114.

The right to take private property for public use without the consent of the owner is called "eminent domain." *Consumers' Gas Trust Co. v. Harless*, 181 Ind. 446, 450, 29 N. E. 1062, 15 L. R. A. 505; *City of Madison v. Daley* (U. S.) 58 Fed. 751, 753.

"Eminent domain is the right to resume possession of private property for public use." *Beekman v. Saratoga & S. R. Co.* (N. Y.) 3 Paige, 45, 73, 22 Am. Dec. 679; *Bloodgood v. Mohawk & H. R. Co.* (N. Y.) 18 Wend. 9, 11, 13, 31 Am. Dec. 313; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155 (Gil. 139); *Forney v. Fremont, E. & M. V. R. Co.*, 36 N. W. 806, 808, 23 Neb. 465.

Eminent domain is the right of a government to take and appropriate private property to public use whenever the exigency requires it. *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85; *Commonwealth v. Bearse*, 132 Mass. 542, 547, 42 Am. Rep. 450; *State v. Griffin*, 89 Atl. 260, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139; *Forney v. Fremont, E. & M. V. R. Co.*, 36 N. W. 806, 808, 23 Neb. 465.

"Eminent domain" embraces only cases where, by the authority of the state and for public good, the property of the individual is taken without his consent for the purpose of being devoted to some particular use. *Newburyport Water Co. v. City of Newburyport* (U. S.) 103 Fed. 584, 587.

"Eminent domain" is defined to be the sovereign power vested in the state to take private property for public use. *Groff v. Bird-in-Hand Turnpike Co.*, 18 Atl. 431, 128 Pa. 621, 5 L. R. A. 661; *Baltimore & F. Turnpike Road v. Baltimore, O. & E. M. Pass. R. Co.*, 31 Atl. 854, 855, 81 Md. 247; *Jockheck v. Shawnee County Com'rs*, 37 Pac. 621, 625, 53 Kan. 780; *Forney v. Fremont, E. & M. V. R. Co.*, 36 N. W. 806, 808, 23 Neb. 465; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 163 (Gil. 139, 146), (citing 1 Redf. R. R. § 63); *State v. Jacksonville Terminal Co.*, 27 South. 225, 237, 41 Fla. 377; *American Print Works v. Lawrence*, 21 N. J. Law (1 Zab.) 248, 257; *Hale v. Lawrence*, 21 N. J. Law (1 Zab.) 714, 728, 47 Am. Dec. 190; *Buffalo & N. Y. C. R. Co. v. Brainard*, 9 N. Y. (5 Seld.) 100.

The power of "eminent domain" is the public power of buying what is necessary for public use. *Varney v. Manchester*, 58 N. H. 430, 432, 40 Am. Rep. 592.

It may be defined as that superior right of property pertaining to sovereignty by which private property acquired by its citizens under its protection may be taken or its use controlled for the public benefit, without regard to the wishes of its owner. *Cherokee*

*Nation v. Southern Kan. R. Co.* (U. S.) 33 Fed. 900, 905 (citing *Cooley*, Const. Lim. pp. 523, 524).

The right of eminent domain is a right which a government possesses of taking the property of its subjects for necessary public uses at a fair valuation. *Southwest Pennsylvania Pipe Lines v. Directors of Poor*, 1 Pa. Co. Ct. R. 460, 462 (citing *Bouv. Law Dict.*).

The right belonging to the society or to the sovereign of disposing, in cases of necessity and for the public safety, of all the wealth contained in the state, is called the "eminent domain." *Jones v. Walker*, 13 Fed. Cas. 1059, 1066 (citing *Vatt. Law Nat.*); *Jockheck v. Shawnee County*, 37 Pac. 621, 625, 53 Kan. 780; *Caldwell v. State* (Ala.) 1 Stew. & P. 827, 379; *Stark v. McGowen* (S. C.) 1 Nott. & McC. 387, 392.

The right of disposing of part of the property of individuals for the public good in a state is what is called "eminent domain." *Lindsay v. East Bay St. Com'rs* (S. C.) 2 Bay, 38, 45.

The right of eminent domain is a right of a civilized state to take private property for public use, and in order to promote the general welfare. It is called "eminent domain" because it is superior to all private rights, and is an exercise of the sovereign authority, which of necessity resides in all governments for the common benefit and welfare of their citizens. *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 21 Atl. 989, 142 Pa. 580.

The right of eminent domain is the right of the sovereignty to use the property of its members for the public good or public necessity. In the civil law the right is termed "dominium eminens." *Gilmer v. Lime Point*, 18 Cal. 229, 250.

The right to take private property for public use, or of eminent domain, is a reserved right attached to every man's land, and paramount to his right of ownership. The right consists of two elements—the right to take, and the right to judge of and to determine the exigency and necessity for taking it. They are both and equally vested in the legislature. *Bouv. Law Dict.* says: "It belongs to the legislature to decide what improvements are of sufficient importance to justify the exercise of the right of eminent domain." *Todd v. Austin*, 34 Conn. 78, 88.

The right of eminent domain is the right of a state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good; thus, in time of war or insurrection, the proper authorities may possess and hold any part of the territory of the state for the common safety;

and in time of peace the legislature may authorize the appropriation of the same to public purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel. *Civ. Code Ga.* 1895, § 3052.

#### As attribute of sovereignty.

In every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power, denominated the "eminent domain" of the states, is, as its name imports, paramount to all private rights invested under the government. This power and this duty are to be exerted, not only in the highest acts of sovereignty, and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. *State v. Desledener*, 7 Tex. 76, 99 (citing *West River Bridge Co. v. Dix*, 47 U. S. [6 How.] 531, 12 L. Ed. 535).

The right of eminent domain appertains to every independent government. It requires no constitutional recognition. It is an attribute of sovereignty. The provision found in the constitutions of our various states providing for just compensation for private property taken or damaged for public use is a limitation only on the exercise of that right. *Southern Illinois & M. Bridge Co. v. Stone*, 78 S. W. 453, 456, 174 Mo. 1, 63 L. R. A. 301.

The right of eminent domain is an incident of sovereignty, and exists in every government. Private mischief, rather than public, must, of necessity, be endured. *Symonds v. City of Cincinnati*, 14 Ohio, 147, 174, 45 Am. Dec. 529. This right is inherent in government, and is perhaps inseparable from the idea of sovereignty. *Gilmer v. Lime Point*, 18 Cal. 229, 250.

The right of eminent domain does not comprehend all, but only is among the prerogatives of majesty. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 640, 9 L. Ed. 773, 938.

The power of eminent domain is not created by constitution or statute. It is an inherent attribute of sovereignty. It existed in the sovereign long before the adoption of any constitution. *Kennebec Water Dist. v. City of Waterville*, 52 Atl. 774, 777, 96 Me. 234.

The right of eminent domain is an exercise of the highest act of sovereignty. It can only be called into existence by the authority of the legislature, and must be exercised in the mode and by the tribunal provided by law. *City of Madison v. Daley* (U. S.) 58 Fed. 751, 753.



The right of eminent domain is a high prerogative of sovereignty, which cannot be exercised without an expressed grant or one necessarily implied. To take private property for public use is in derogation of private rights. The necessity of taking private property for public use must be determined by the person or tribunal designated by law for that purpose. This right of taking private property for public use existed at common law. *Park Com'rs of Louisville v. Du Pont*, 62 S. W. 891, 892, 110 Ky. 743.

Eminent domain is one of the highest attributes of sovereignty. By it the sovereign power, state or federal, is enabled to take private property and appropriate it to public use. But, subject to this sovereign power, private ownership is absolute, and such absolute ownership is safeguarded by a twofold constitutional protection, viz., it can only be taken away by due process of law, and then on payment of just compensation. It is also true that the sovereign state or nation can, by virtue of its superior dominion or eminent domain, reappropriate to an additional or secondary public use property it has once set apart to public use; for it must be apparent that the sovereign power cannot, by dedicating property to one use, preclude itself from rededicating the same property to some other public use. It will therefore be apparent that the federal government in promoting federal constitutional powers, and the state in its sphere, have the sovereign right to appropriate private property to public use, and to reappropriate property once set apart to public uses to other and additional ones. *Western Union Tel. Co. v. Pennsylvania R. Co.* (U. S.) 120 Fed. 362, 370, 371.

In holding that the right of eminent domain existed in the United States government, and could be exercised within the state so far as necessary to the enjoyment of the powers conferred upon the federal government by the constitution, it was said by Mr. Justice Strong that "no one doubts the existence in the state governments of the right of eminent domain,—a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being, not out of the tenure by which lands are held. It may be exercised though the lands are not held by grant from the government either mediately or immediately, and independent of the consideration whether they would escheat to the government in case of a failure of heirs. The right is an offspring of political necessity, and it is inseparable from sovereignty unless denied to it by its fundamental law. But it is no more necessary for the exercise of the powers of a state government than for the federal government. That government is as sovereign within its sphere as the states are within theirs. True, its sphere is

limited; certain subjects only are committed to it; but its power over those subjects is as full and complete as the power of the states to which their sovereignty extends. The powers invested by the Constitution in the general government command for their exercise the acquisition of lands in all the states. These are needed for forts, armories, and arsenals, for navy yards, lighthouses, for customhouses, post offices, and court-houses, and other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of the state prohibiting a sale to the federal government, the constitutional grants of power may be rendered nugatory, and the government dependent for practical existence upon the will of the state, or even upon that of a private citizen." *Kohl v. United States*, 91 U. S. 367, 371, 23 L. Ed. 449.

It is a right which pertains to no other power than sovereignty, and does not come out of the tenure by which lands are held. *Cherokee Nation v. Southern Kan. R. Co.* (U. S.) 33 Fed. 900, 905.

The power of eminent domain, or, in other words, the power to take private property for public use, is in the state. All property is subject to this power. It is a power recognized under the Constitution and law of the land. *Fort St. Union Depot Co. v. Backus*, 61 N. W. 787, 789, 103 Mich. 556.

#### Same—Exercise by corporations, etc.

The right of eminent domain belongs alone to the sovereign. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 450, 29 N. E. 1062, 15 L. R. A. 505. It embraces all cases where, by the authority of the state and for the public good, the property of the individual is taken without his consent, for the purpose of being devoted to some particular use, either by the state in its sovereign capacity, or by a corporation, public or private, or by a private citizen, to whom such right has been granted by the state. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 450, 29 N. E. 1062, 15 L. R. A. 505.

The state as a sovereign possesses eminent domain as a necessary attribute of sovereignty, and there is no reason why the Legislature, representing the state, may not enact laws by which "eminent domain" may be exercised by a private corporation; for there is nothing in the term which implies any restriction as to the manner in which this power of the sovereignty to take private property for public uses may be exercised. *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155, 163 (Gil. 139, 146).

The property may be appropriated by the legislature, or the power of appropriating it may be conferred upon private corporations,

to be exercised by them in the execution of works in which the public is interested. *Southern Illinois & M. Bridge Co. v. Stone*, 73 S. W. 453, 456, 174 Mo. 1, 63 L. R. A. 801.

#### Compensation.

The power of eminent domain is the right to take private property for public use, compensation therefor first having been made. *City of Belleville v. Hallowell*, 21 Pac. 105, 107, 41 Kan. 192.

Eminent domain is the right to resume the possession of private property for public use, on paying a just compensation therefor. *Bloodgood v. Mohawk & H. R. R. Co.* (N. Y.) 18 Wend. 9, 11, 13, 31 Am. Dec. 313. Eminent domain is the power of compelling a landowner to sell it for public purposes. In re Opinion of the Justices, 33 Atl. 1076, 1077, 68 N. H. 629.

A payment either made, or by the agreement of the parties to be made, is an essential part of the legal idea of a purchase, whether voluntary or compulsory. Voluntary and without payment, it is a donation; compulsory and without payment, it is a robbery. *Orr v. Quimby*, 54 N. H. 590, 611.

Eminent domain is the right of the government to take and appropriate private property to public use whenever the public exigency requires it, which can be done only on condition providing a reasonable compensation therefor. *State v. Griffin*, 39 Atl. 260, 69 N. H. 1, 41 L. R. A. 177, 76 Am. St. Rep. 139; *Commonwealth v. Bearse*, 182 Mass. 542, 547, 42 Am. Rep. 450; *Forney v. Fremont, E. & M. V. R. Co.*, 36 N. W. 800, 808, 23 Neb. 465; *Wells v. Somerset & K. R. Co.*, 47 Me. 345, 347. The obligation to make compensation, however, follows this right, as the shadow does the substance, and is concomitant with it. It is not in all countries a legal obligation, but it is an obligation of natural equity and justice everywhere. It is, however, incorporated in our organic law that compensation in money shall be made to the owner whenever his property is appropriated for the public welfare. That just, full, and adequate compensation must be made and in money is certain; more cannot be required. *Symonds v. City of Cincinnati*, 14 Ohio, 147, 174, 45 Am. Dec. 529.

The limit to the right of eminent domain in this state is that no man's property shall be taken by law without just compensation, nor, except in case of the state, without such compensation first assessed and tendered. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 450, 29 N. E. 1062, 15 L. R. A. 505.

#### Extent of power.

The power of eminent domain is a prerogative of sovereignty. It is limited only

by the public exigency upon which it is founded. All kinds of property are alike subject to it. Property once taken for public use may be taken for a different use whenever, in the judgment of the legislature, the public exigency therefor exists. *Indianapolis & V. R. Co. v. Indianapolis & M. Rapid Transit Co. (Ind.)* 67 N. E. 1013, 1014 (citing *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561; *City of Terre Haute v. Evansville & T. H. R. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189).

The state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests. *Clark v. Cambridge & A. Irr. & Imp. Co.*, 64 N. W. 239, 241, 45 Neb. 798.

#### Public use or necessity.

It has its foundation in the imperative law of necessity, which alone justifies and limits its exercise. The states of the Union cannot exercise this right within their territorial limits for purposes which, under the division of powers between the United States and the individual states, are within the sphere of the sovereignty of the United States. Such purposes, though to be accomplished within the territorial limits of a state, are beyond the scope of the eminent domain of such state. The right of eminent domain in every sovereignty exists only for its own purposes. *People v. Humphrey*, 23 Mich. 471, 475, 9 Am. Rep. 94.

Eminent domain is the right of the government to appropriate private property to public uses in case of necessity. *Hale v. Lawrence*, 21 N. J. Law (1 Zab.) 714, 728, 47 Am. Dec. 190.

The right of eminent domain is to be exercised only when the public necessities or convenience require it. *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 450, 29 N. E. 1062, 15 L. R. A. 505.

The right of eminent domain, or inherent sovereign power, gives the legislature the control of private property for public use, and as a general rule it rests in the wisdom of the legislature to determine what is a public use. *City of Pittsburgh v. Scott*, 1 Pa. (1 Barr) 309, 314.

Eminent domain is the power to take private property for public use. This right may be exercised when required for the public good in the construction of a railroad, by-road, canal, or the like. The right of eminent domain, however, does not permit the sovereign power to take the property of one citizen and transfer it to another, even for full compensation. In other words, the right of eminent domain gives to the legislature the control of private property for public uses, and for public uses only. *Forney v.*

Fremont, E. & M. V. R. Co., 36 N. W. 806, 808, 23 Neb. 465.

The right of eminent domain can only be invoked for the compulsory taking or the enforced appropriation of private property when some public exigency requires the exercise of that sovereign right. *Blackman v. Halves*, 72 Ind. 515, 518. Nor will the legislative declaration that the use for which authority is given to exercise the right to seize the property of the individual is a public use, make it a public use. *Great Western Natural Gas & Oil Co. v. Hawkins*, 68 N. E. 765, 768, 30 Ind. App. 557.

"Although the sovereign power in free governments may appropriate all the property, public as well as private, for public purposes, making compensation therefor, yet it has never been understood, at least never in our republic, that the sovereign power can take the private property of A. and give it to B. by the right of eminent domain, or that it can take it at all, except for public purposes, or that it can take it for public purposes without the duty and responsibility of making compensation for the sacrifice of the private property, and one for the good of the whole." *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 640, 9 L. Ed. 773, 938.

"The right of eminent domain does not imply a right, in the exercise of the power, to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest will in no way be promoted by such transfer. And if the legislature should attempt thus to transfer the property of one individual to another, where there could be no pretense of benefit to the public by such exchange, it would probably be a violation of the contract by which the land was granted by the government to the individual, or to those under whom he claimed title, and repugnant to the Constitution of the United States." *Beekman v. Saratoga & S. R. Co.* (N. Y.) 3 Paige, 45, 73, 22 Am. Dec. 679.

The right of eminent domain is the right to take private property for public uses when needed to execute the powers conferred by the Constitution, and is possessed by the United States without the consent of the state. *Ft. Leavenworth R. Co. v. Lowe*, 5 Sup. Ct. 995, 998, 114 U. S. 525, 29 L. Ed. 264.

When the use is determined to be a public one, the necessity or expediency of appropriating any particular property is not a subject of judicial inquiry. *Southern Illinois & M. Bridge Co. v. Stone*, 73 S. W. 453, 456, 174 Mo. 1, 63 L. R. A. 301.

#### **Due process of law affecting.**

It is not necessary for the legislature, in the exercise of the right of "eminent do-

main," either directly or indirectly, through public officers or agents, to invest the proceedings with the forms or substance of judicial process. It may allow the owner to intervene and participate in the discussion before the officer or board to whom the power of determining whether the appropriation shall be made in a particular case, or it may provide that the officers shall act upon their own views of propriety and duty without the aid of a forensic contest. The appropriation of the property is an act of public administration, and the form and manner of its performance is such as the legislature shall in its discretion prescribe. Therefore the constitutional provision which declares that no citizen shall be deprived of his property without due process of law has no application to proceedings for the condemnation of property under the exercise of the right of eminent domain. *People v. Smith*, 21 N. Y. 595, 599.

#### **As an estate.**

Eminent domain is not of the nature of any estate or interest in property reserved or otherwise acquired, but simply a power to appropriate enough property as the public interests require, and which pertains to sovereignty as a necessary consonant and inextinguishable attribute. *Jockheck v. Shawnee County*, 37 Pac. 621, 625, 53 Kan. 780.

#### **Police power distinguished.**

See, also, "Police Power."

Eminent domain does not include the right to regulate property devoted to the use in which the public has an interest, but such regulation falls within the police power of the state. *State v. Jacksonville Terminal Co.*, 27 South. 221, 223, 41 Fla. 363.

The destruction of a building to prevent the spread of a conflagration rests upon the ground of private, and not public, necessity, and hence is not the exercise of the right of eminent domain. *American Print Works v. Lawrence*, 21 N. J. Law (1 Zab.) 248, 257.

#### **Taxation distinguished.**

See, also, "Tax—Taxation."

Eminent domain is the right of the sovereignty to use the property of its members for the public good or public necessity, and, though in a broad sense it includes the right of levying taxes on private property, the term, in its modern acceptance, applies especially to the taking of some particular private property for some particular public use. *Gilmer v. Lime Point*, 18 Cal. 229, 251.

The exercise of the power of assessments for grading, paving, opening, widening, or vacating streets and other purposes for which, within proper limits, they may be authorized, is not by way of eminent do-

main, but referable solely to the taxing power. In re Vacation of Center St., 8 Atl. 56, 59, 115 Pa. 247.

## EMIT.

"Emit," as used in United States Constitution, providing that no state shall emit bills of credit, means issue. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 316, 9 L. Ed. 709, 928.

The word "emit," in the constitutional provision declaring that no state shall emit bills of credit, means "an emission of paper; a putting off, putting out, putting forth, or issuing bills by a state for the payment of money at some time, by some person, and on credit." *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 328, 9 L. Ed. 709, 928.

To emit bills of credit is to issue paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. *Craig v. Missouri*, 29 U. S. (4 Pet.) 410, 418, 7 L. Ed. 903; *Ramsey v. Cox*, 26 Ark. 386, 369 (citing 4 Kent, Comm. 408; 2 Story, Const. Lim. §§ 1358-1370; *Craig v. Missouri*, 29 U. S. [4 Pet.] 431, 7 L. Ed. 903). And it does not mean those contracts by which a state binds itself to pay money at a future day for services actually received or for money borrowed for present use. *Craig v. Missouri*, 29 U. S. (4 Pet.) 410, 432, 7 L. Ed. 903; *Houston & T. C. R. Co. v. Texas*, 20 Sup. Ct. 545, 552, 177 U. S. 66, 44 L. Ed. 672.

## EMOLUMENT.

Emolument is the profit arising from office or employment; that which is received as compensation for services, or which is annexed to the possession of office, as salary, fees, and perquisites. *Reals v. Smith*, 56 P. 690, 692, 8 Wyo. 159; *Apple v. Crawford County*, 105 Pa. 300, 303, 51 Am. Rep. 205, 14 Wkly. Notes Cas. 322, 324, 41 Leg. Int. 322; *Vansant v. State*, 53 Atl. 711, 714, 96 Md. 110; *Town of Bruce v. Dickey*, 6 N. E. 435, 439, 116 Ill. 527.

"Emolument," as used in Comp. Laws, § 6803, providing that every executive officer who asks or receives any emolument, excepting such as is authorized by law, for doing any official act, is guilty of a misdemeanor, includes the word "fee," and also the word "compensation." *State v. Bauer*, 47 N. W. 378, 379, 1 N. D. 273.

"Emoluments," as used in Act Cong. April 30, 1802, providing that when the actual emoluments of any collector exceed a certain sum the excess should be accounted for, necessarily embraces in the limitation the fees as well as the commissions belonging to the

office. The argument would be quite as strong in favor of excluding "commissions" as in the case of "fees," as the one can in no more appropriate sense be regarded as emoluments of office than the other. These terms denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other, and are so used and understood by Congress in the several compensation acts. They also are distinguishable from the term "emoluments," that being more comprehensive and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office. *Hoyt v. United States*, 51 U. S. (10 How.) 109, 135, 18 L. Ed. 348, 576.

### Board of prisoners.

Const. art. 3, § 13, declares that no law shall extend the term of any public office, or increase or diminish the salary of the officer, or emoluments of his office, after his election or appointment. Held, that the word "emolument" imported more than salary or fees, embracing all the profits derived from an office, which would include the compensation provided to be paid to a sheriff for the boarding of prisoners; and hence, the amount having been fixed at a certain sum per diem, the Legislature had no power, during the sheriff's term of office, to provide that the compensation for such service should rest in the discretion of a majority of the judges of the court of quarter sessions. *Apple v. Crawford County*, 105 Pa. 300, 303, 51 Am. Rep. 205, 14 Wkly. Notes Cas. 322, 324; *Id.*, 41 Leg. Int. 322.

### Exemption from military duty.

The word "emolument" means profit or advantage, and may, in our opinion, comprehend an exemption from military duty, as the term is used in the federal statute prescribing the oath to be taken by those who are employed in the care or carriage of the mail, and declaring that such oath shall be taken before they enter upon their duties, or become entitled to receive the emoluments of their offices. *Twombly v. Pinkham*, 8 N. H. 370, 376.

### Interest on official deposits.

The term "emoluments," as used in a statute providing that county treasurers shall receive as their compensation an annual salary, to be paid out of the fees, commissions, and emoluments in their offices, was clearly intended to be taken in a general and comprehensive sense, so as to embrace all other proper receipts of the office not included within the terms "fees" or "commissions" as defined and understood. To hold that "emolument" as used in this connection means any accretion, increment, gain, or profit to the office is in accord with common sense and common usage as well as with the established rules for the interpretation of the English language and

for the construction of statutes. Such emoluments do not include interest on money deposited by the treasurer without the consent of the county commissioners, as the statute forbids the deriving of benefit by any officer from the deposit of public funds in his charge. *Arapahoe County Com'rs v. Hall*, 49 Pac. 370, 371, 372, 9 Colo. App. 538.

The term "emoluments," as used in Code, art. 17, § 14, making the bond of the clerk of court liable for the "emoluments of his office," includes interest drawn by him on license fees deposited in bank. *Vansant v. State*, 53 Atl. 711, 714, 96 Md. 110.

## EMOTIONAL INSANITY.

The term "emotional insanity," or "mania transitoria," applies to the case of one in the possession of his ordinary reasoning faculties who allows his passions to convert him into a temporary maniac. *Mutual Life Ins. Co. v. Terry*, 82 U. S. (15 Wall.) 580, 583, 21 L. Ed. 236.

It is not error to state, in a charge in a criminal case upon the defense of insanity, that the law rejects the doctrine of what is called emotional insanity, which begins on the eve of the criminal act, and leaves off when it is committed. *People v. Kernaghan*, 14 Pac. 566, 568, 72 Cal. 609.

## EMPANEL.

See "Impanel."

## EMPIRICISM.

"Empiricism" is defined as a practice of medicine founded on mere experience, without the aid of science or the knowledge of principles. *Nelson v. State Board of Health*, 57 S. W. 501, 503, 108 Ky. 769, 22 Ky. Law Rep. 488, 50 L. R. A. 383.

Where defendant was engaged in the practice of magnetic healing without license provided by the statute, it may be presumed that he was engaged in "empiricism," which is defined as a practice of medicine, using that term in its popular sense, founded on mere experience, without the aid of science or a knowledge of its principles. *Parks v. State*, 64 N. E. 862, 868, 159 Ind. 211, 59 L. R. A. 190.

## EMPLOY.

Under the constitution of the Methodist Church, giving the president of the annual conference, during its recess, power to employ such ministers and preachers as are duly recommended, the president of the conference has power to station a minister in a par-

ticular church during a recess of the conference without the consent of such church. *Robinson v. Cocheu*, 46 N. Y. Supp. 55, 57, 18 App. Div. 825.

Act Feb. 28, 1887, requires all railroad engineers to be examined as to color blindness, and requires the railroad employing them to pay the expenses of such examination. In construing the statute, it was held that the provision relating to employing had no reference to the mere contract under which the services were performed, so as to affect a contract of hiring made in another state, but that it relates to and regulates the services procured to be performed for the corporation. Its meaning in the statute is to make use of; to intrust with some agency or duty; making use of; intrusting with some agency or duty. *Nashville, C. & St. L. Ry. Co. v. State*, 3 South. 702, 703, 83 Ala. 71 (citing *Worcester's Dict.*).

In a United States statute providing for a forfeiture by any person building, fitting out, or otherwise preparing or sending away any ship; or causing any of certain acts to be done with intent to employ such ship or vessel for the purpose of procuring any negroes to be transported as slaves, "to employ" is not equivalent to, and synonymous with, "should be employed," as used in an indictment averring the fitting out of a vessel with the intent that it should be employed in such trade. *United States v. Gooding*, 25 U. S. (12 Wheat.) 460, 476, 6 L. Ed. 693.

### Compensation implied.

In St. 1890, c. 437, § 2, providing that whoever contracts to buy or sell securities or commodities on credit or margin, with no intention to perform the contract by actual receipt or delivery, or whoever employs another so to buy or sell in his behalf, may sue for and recover from the other party to the contract any payment made thereon, the term "employ" implies services rendered or to be rendered for compensation, and is nearly or quite synonymous with "hire," though, as said by the authors of the *Standard Dictionary*, a word of more dignity than that. Where, therefore, one, without compensation, and without any understanding or agreement that he shall receive compensation, renders a service to another as a friendly act, and for his accommodation, it cannot be fairly said that the party receiving the benefit of the service employs the other, and the party rendering the service cannot be fairly said to be employed by the other; nor can it make any difference that the service is rendered at the request of the party receiving the benefit of it. What is done under such circumstances is more in the nature of a favor done by one person to another, than of an employment of one by the other. *Bingham v. Scott*, 58 N. E. 687, 689, 177 Mass. 208.

"Employ" means to use as an instrument or means of effecting an object. It is a word of a more enlarged signification than the word "hire." A man hired to labor is employed, but a man may be employed in work who is not hired. Materials are employed for building lots, but they are not hired. A man who does his own work, or the work of another, is employed in it, although he receives no wages. *McCluskey v. Cromwell*, 11 N. Y. (1 Kern.) 593, 605.

A statute provided for the recording of an assignment for future earnings in the town where the assignor is employed, when not a resident of this state. It is held that the word "employed" indicates that the assignment contemplated by the statute was an assignment of wages owned under a contract of hiring by one employed, and not assignments of contracts. *Abbott v. Davidson*, 25 Atl. 839, 840, 18 R. L. 91.

The term "employ" has a different meaning at times than to have one work for hire. It sometimes means to use, to occupy; to intrust; and hence, in an action upon a partnership liability of defendant as a member and officer of an unincorporated association to recover premiums awarded by it, he having acted as a judge of the races at the fair, an instruction speaking of his acts at the fair as those of an employé was not faulty or misleading, though there was no evidence that he was working for hire. *Murray v. Walker*, 48 N. W. 1075, 1077, 83 Iowa, 202.

"Employ" means ordinarily to use; to have in service; to cause to be engaged in doing something; and hence, as used in Code, § 1125, providing that the city council shall detail and employ from two to four special policemen for each precinct at any special election, it does not imply an obligation to pay for the services rendered. *Mousseau v. City of Sioux City*, 84 N. W. 1027, 1028, 113 Iowa, 246.

#### Contract required.

A charter of a city providing that the board of education shall have power to employ and dismiss teachers means nothing more than that the board was clothed with power to contract with suitable persons to engage in the work of teaching in the public schools of the city at a fixed salary or compensation, so that where the board had, immediately after balloting for a teacher, refused to declare her elected, no contract of employment existed. *Malloy v. Board of Education of City of San Jose*, 36 Pac. 948, 949, 102 Cal. 642.

"Employ" carries with it the idea, and almost the essence, of a contract, when used to the effect that a person has been employed. *United States v. Nourse* (U. S.) 27 Fed. Cas. 192, 195.

#### As applicable to skilled labor or profession.

To employ "is to engage or use another as an agent or substitute in transacting business or the performance of some services. It may be skilled labor, or the service of the scientist or professional man, as well as servile or unskilled manual labor." *Gurney v. Atlantic & G. W. R. Co.*, 53 N. Y. 858, 371.

#### EMPLOYE.

See "Co-employé"; "Railroad Employé."

Webster defines the word "employé" as one who is employed. The word, although of French derivation, was long since transplanted and adopted as an English, or at least an American, word. In this country it is of such common use, that its meaning is not at all uncertain. Thus the use of the term in describing defendant as an employé, in an indictment under Rev. St. Ind. 1881, § 1944, defining and prescribing the punishment for embezzlement by an officer, agent, attorney, clerk, servant, or employé, is not bad, upon a motion to quash, although the indictment does not state the position held by the defendant, or the capacity in which he was engaged. *Ritter v. State*, 12 N. E. 501, 502, 111 Ind. 324; *Nichols v. State*, 63 N. E. 783, 785, 28 Ind. App. 674.

An employé is a person who is employed; one who works for wages or a salary. In re *Cortland Mfg. Co.*, 45 N. Y. Supp. 630, 631, 21 Misc. Rep. 226.

An employé is one who works for an employer; a person working for salary or wage. The word is applied to any one so working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a government or corporation, or to domestic servants. *Palmer v. Van Santvoord*, 47 N. E. 915, 153 N. Y. 612, 38 L. R. A. 402.

The term "laborer" is no more comprehensive than the term "employé," and does not include a more extensive class of services than such word. The term refers to those in regular and continued service. Within the ordinary acceptance of the term, one who is engaged to render service in a particular transaction is not an employé. The word implies continued service, and includes those employed for a single transaction. *Brick Co. v. Norfolk & O. V. R. Co.* (U. S.) 86 Fed. 725, 738, 32 C. C. A. 31 (citing *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. 405, 34 L. Ed. 1023); *Clark v. Renninger*, 42 Atl. 928, 929, 89 Md. 66, 44 L. R. A. 413; *Lewis v. Fisher*, 80 Atl. 608, 609, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327.

Employés are generally considered as embracing laborers and servants, and those

occupying other inferior positions (citing *People v. Board of Police*, 75 N. Y. 38, 39), and as used in Act Feb. 20, 1891, § 1, providing for liens for claims of laborers and employes, "employé" is synonymous with "laborer," and will not include the owner of a threshing machine, for work done thereby. *Johnston v. Barrills*, 41 Pac. 656, 658, 27 Or. 251, 50 Am. St. Rep. 717.

The act of 1897, referring to wages of the employé of an insolvent corporation, states that the term "employé" means "a mechanic, workman or laborer, who works for another for hire." *Cochran v. A. S. Baker Co.*, 61 N. Y. Supp. 724, 30 Misc. Rep. 48.

There is no distinction between the terms "laborer" and "employé," as regards the element of personal service. *Farmer v. St. Croix Power Co.*, 93 N. W. 830, 834, 117 Wis. 76.

#### Agent.

The terms "clerk, servant, or employé," within the meaning of a statute making it criminal for any clerk, servant, or other person in the employ of another to embezzle moneys received by virtue of such employment, do not include an independent agent for the solicitation of newspaper subscriptions and jobwork, who is charged on the books of the newspaper company at a definite price with the papers and bills of jobwork sent him, and therefore his collection and appropriation of the moneys paid him for the same only render him liable as a debtor. *Commonwealth v. Behle* (Pa.) 1 Lack. Leg. N. 303.

#### Attorney.

A lawyer employed by a railroad company on a yearly salary, payable monthly, is not an employé, within the meaning of Sand. & H. Dig. § 1425, providing that no preference shall be allowed among the creditors of insolvent corporations, except for the wages and salaries of laborers and employes. *Latta v. Lonsdale*, 107 Fed. 535, 47 C. C. A. 1, 52 L. R. A. 479.

In an order appointing a receiver of a railroad, authorizing him to pay out of the income, besides the current expenses and charges, all wages due to employes at the date of the order for services within 90 days theretofore, "employés" means regular employes employed generally, and not for a particular act, and includes a lawyer at a fixed salary per month. *Finance Co. of Pennsylvania v. Charleston, C. & O. R. Co.* (U. S.) 52 Fed. 526, 527.

An attorney retained on a salary is not an employé, within Laws 1892, c. 688, § 54, imposing on stockholders a personal liability for corporate debts to employes. *Bristol v. Smith*, 53 N. E. 42, 43, 158 N. Y. 157; Same

*v. Kretz*, 49 N. Y. Supp. 404, 406, 22 Misc. Rep. 55.

An attorney employed in a single suit is not within the meaning of the word "employé." *Louisville, E. & St. L. R. Co. v. Wilson*, 11 Sup. Ct. 405, 407, 138 U. S. 501, 34 L. Ed. 1023.

An order of court directing a receiver of a railroad to pay debts to the laborers and employes of the corporation is to be construed as meaning all persons employed by and rendering services for the corporation, and hence to include an attorney rendering legal services for the corporation. *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 353, 366.

"Employé," as used in Gen. Laws, c. 249, § 42, enacting that no person shall be charged as trustee for any funds which are held by him in the capacity of clerk, cashier, or other employé of the principal defendant, and which have been received in the ordinary course of such employment, does not include an attorney collecting money for such principal defendant. The sense in which the Legislature used the word "employé" in this statute is readily ascertained by the application of the familiar rule of statutory construction that, where general words follow particular ones, they are to be construed as applicable to persons or things of the same general character or class with those specified. The application of the general term "employé" after "clerk" and "cashier" brings this case exactly within the rule; and, besides, it must be borne in mind that, if the Legislature had intended to include all employes, there was no occasion to make any enumeration whatever. *Wheeler v. Joslin*, 63 N. H. 164, 166.

#### Attorney for special service.

Within the ordinary acceptance of the term, one who is engaged to render services in a particular transaction is not an employé. The term "employé" implies continuity of service, and excludes those employed for a special and single transaction. An attorney of an individual retained for a single suit is not his employé. It is true, he was engaged to render services, but his engagement is rather that of a contractor than that of an employé. *Clark v. Renninger*, 42 Atl. 928, 929, 89 Md. 66, 44 L. R. A. 413.

An order appointing a receiver for a railroad company, and authorizing him to pay out of the income the wages of employes that may have been earned within a certain period, does not include the wages of counsel employed for a special purpose. *Louisville, E. & St. L. R. Co. v. Wilson*, 11 Sup. Ct. 405, 407, 138 U. S. 501, 34 L. Ed. 1023, 1025.

"Employé," as used in Code, art. 47, § 15, providing that all moneys due and owing

from a person or corporation making an assignment for the benefit of creditors, for wages or salaries to clerks, servants, or employes, should first be paid in full out of such property or estate, cannot be construed to include an attorney at law. The word "employé," though generally and ordinarily quite comprehensive, cannot be given a wider meaning than the cognate words, "clerks and servants," with which it is associated, but must be restricted in its signification so as to include only persons who perform the same kind of service that is due from clerks or servants. A statute which treats of persons of an inferior rank cannot by any general word be so extended as to embrace a superior. The class first mentioned is to be taken as the most comprehensive. "*Specialia generalibus derogant*." The more general word, "employé," must, by reason of its association and collocation with the words "clerks" and "servants," be restricted to a meaning synonymous with their meaning, and it cannot include a person of a higher grade of service than the more limited terms embrace. The term "employé" refers to those in regular and continual service. Within the ordinary acceptation of the term, one who is engaged to render service in a particular transaction is not an employé. *Lewis v. Fisher*, 30 Atl. 608, 609, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327.

#### Bookkeeper.

"Employee" is derived from the French word "employé," and means one who is employed, and, as used in Laws 1885, c. 376, § 1, providing that the wages of employees of an insolvent corporation shall be preferred to other claims, is used in its broad sense of all who are employed, and hence would include a bookkeeper. *People v. Beveridge Brewing Co.*, 36 N. Y. Supp. 525, 526, 91 Hun, 313; *In re Stryker*, 53 N. E. 525, 158 N. Y. 526, 70 Am. St. Rep. 489; *Id.*, 26 N. Y. Supp. 209, 212, 73 Hun, 327.

"Employé," as used in Laws 1885, c. 376, is the correlative of "employer," and hence one who is employed to assist the general manager of a corporation to assist in keeping its books, and to clean the office and ship goods, is within the statute. *Brown v. A. B. C. Fence Co.*, 5 N. Y. Supp. 95, 96, 52 Hun, 151.

"Employés," as used in 22 St. at Large S. C. p. 502, giving to employes of factories, mines, etc., a lien for their wages or salaries, does not include the bookkeeper of a mining company. *Malcomson v. Wappoo Mills* (U. S.) 86 Fed. 192, 198.

#### Civil engineer.

An employé is one whose time and skill are occupied in the business of his employer. A civil engineer of a railroad company, trav-

eling on duty for his company upon a pass, such as is usual for employes to travel on over the line of the road, and who is injured by reason of a wreck while so traveling, is an "employé," and not a passenger, so as not to be entitled to recover for injuries received. *Texas & P. R. Co. v. Smith* (U. S.), 67 Fed. 524, 527, 14 C. C. A. 509, 31 L. R. A. 321.

#### Collector.

Rev. St. § 1944, provides that any agent, clerk, servant, or employé who shall appropriate moneys in his control belonging to his employer is guilty of embezzlement. Section 1945 provides that attorneys and persons engaged in making collections for others, who, having under their control moneys belonging to their employer or client, on reasonable demand refuse to pay over the same, are guilty of embezzlement. An indictment charged that the accused, being the employé, clerk, servant, and collector of a certain firm, for the collecting and keeping of the accounts of bills and accounts due belonging to such firm, received and took into his possession from the moneys of such firm a certain sum; and it was held not bad for uncertainty as to which crime was charged, as the words "collector" and "collecting" did not charge a crime under section 1945, so as to make a demand necessary; that section applying to persons in the nature of independent contractors, not servants or employes. If a person engaged in making collections for others is a collector, by an equally fair interpretation a clerk, servant, employé, or keeper of accounts so engaged may be collectors, and a collector may be servant, clerk, employé, and keeper of accounts. Construing the words used in the indictment in their usual acceptation in common language, the charge placed the accused in the class designated in section 1944 by describing him as a clerk, servant, employé, collector, and keeper of accounts. These terms are readily interchangeable and overlying, and in this instance derive a common character and meaning from their relative position in and formation of the entire sentence. In 2 Bish. Cr. Law, § 333, he suggests that, in every relation on which embezzlement may be predicated, the position of the person embezzling must have a correlative; that is, there cannot be a clerk without an employer, a servant without a master, an agent without a principal. In Gillett, Cr. Law, citing from Wharton, the author says: "The term 'servant' may include employes, cashiers, collectors. A person has been held a clerk who was employed to keep accounts and pay moneys thereon. The word 'employé' means a person employed. In general, the term 'agent' designates those employments where the persons exercising them are not under the immediate control of



the superior." *State v. Sarils*, 34 N. E. 1129, 1130, 135 Ind. 193.

#### Contractor.

Webster defines "employé" as one who is employed; a "contractor," as one who contracts to do anything. Those definitions are very general, but they obviously suggest, applied specifically, that an employé is one who is employed to perform personal services, and a contractor one who engages to do a particular thing; the idea of personal service not being a necessary element in the bargain. In the *Standard Dictionary* it is said that an employé is a person who is employed; one who works for wages or a salary, or who is engaged in the service of another; a contractor is one who executes plans under a contract; a subcontractor is one who contracts with the principal contractor to do work embraced in the latter's contract; that is, obviously, one who contracts to execute some integral part of the work covered by the scheme of the principal contract. By the *Century Dictionary* we are informed that an employé is one who works for an employer; a person working for a salary or wages; usually clerks, workmen, laborers, etc.; that a contractor is one who contracts to furnish supplies, or to construct work or erect buildings, or perform any work or service, at a certain price or rate; that a subcontractor is one who takes a part or the whole of the work from the principal contractor. Thus it will be seen, without any extended analysis of the various lexical definitions, that the significant element in the relation of an employé and his employer, specifically considered, is personal service, while the significant element in such relation between a contractor and his principal is the work, as an entirety, to be performed by him. *Farmer v. St. Croix Power Co.*, 93 N. W. 830, 834, 117 Wis. 76.

Contractors who have entire control of the work to be done, and were in no way subject to the control or direction of the person with whom they contracted, while performing the work they contracted to do for them, are not laborers, in the sense that they were earning wages of some person for the work to be done by them. To constitute laborers or employés, who can be said to be earning wages of an employer, they must be holding such a relation to the employer that he can direct and control them in and about the work which they are doing for him. It does not include the owner of a steam wood factory, who, under contract with another, who furnishes rough planks, manufactures such planks for the latter. *Lang v. Simmons*, 25 N. W. 650, 652, 64 Wis. 525.

Under Acts 1854, c. 23, which exempts from attachment the wages or hire of a "laborer or other employé," in the hands of their employers, a builder who contracts, for

the consideration of 5 per cent. on the entire amount of the cost of the building, to erect, superintend, and otherwise direct the erection of the building, is included. "A laborer, when engaged in services under a contract for compensation, is an employé; but, after designating 'laborer' in the statute, there is added 'or other employé.' Surely in this was meant more than a laborer, or else why, after using that word, add those which follow? If they only mean persons who are included within the meaning of the word 'laborer,' they are mere tautology and useless." *Moore v. Heaney*, 14 Md. 558, 562.

The term "employés" indicates persons hired to work for wages as the employer may direct, and does not embrace the case of the employment of a person carrying on a distinct trade or calling to perform services independent of the control of the employer. *Campfield v. Lang* (U. S.) 25 Fed. 128, 131.

In Revision, p. 188, providing that, in case of the insolvency of any corporation, the laborers in the employ thereof shall have a preferred lien upon the assets thereof for the amount of wages due them, respectively, and the word "laborers" shall be construed to include all persons doing labor or service, of whatever character, for, or as workmen or employés in the regular employ of, such corporations, "employés" means only the persons who actually perform the labor or service, and does not include a person furnishing the labor or service of others under contract to do the whole business of a corporation, or of a particular branch of it, as the latter is a contractor, and not an employé. *Lehigh Coal & Navigation Co. v. Central R. Co. of New Jersey*, 29 N. J. Eq. (2 Stew.) 252, 255.

An "employé," as the term is used in Rev. St. Ind. § 5286, giving employés of corporations a lien upon the corporation property, is a person "bound in some degree, at least, to the duties of a servant, and not a mere contractor, bound only to produce, or cause to be produced, a certain result." *Vane v. Newcombe*, 10 Sup. Ct. 60, 63, 132 U. S. 220, 33 L. Ed. 310.

An independent contractor to mine phosphate rock at a certain price per ton, employing others to do the work, is not a laborer or employé, within Act S. C. March 5, 1897, providing for laborers' liens. *Malcomson v. Wappoo Mills* (U. S.) 85 Fed. 907, 911.

The term "employés," as used in Act Ky. March 20, 1876, § 1, providing that when the property of any railroad company or any manufacturing establishment shall in any wise come to be distributed among the creditors, the employés of said company, owner or operator of such business, shall have a lien on so much of such property and effects

as may have been embarked in such business, cannot be construed to include contractors supplying laborers and teams for the construction and repair of a railroad; being paid for the same by the day, and either party having the right to stop work at the end of any day. *Tod v. Kentucky Union R. Co.* (U. S.) 52 Fed. 241, 243, 3 C. C. A. 60, 18 L. R. A. 305.

In Laws 1862, c. 169, § 7, which declares that every railroad company shall be liable for all damages sustained by any person in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employes, of the corporation, to any person sustaining such damages, "employes" applies to conductors, agents, superintendents, and others engaged in operating the road, and the like, but does not apply to contractors or persons building or constructing the roadbed, or laying down the ties and rails. *Foley v. Chicago, R. I. & P. Ry. Co.*, 21 N. W. 124, 126, 64 Iowa, 644.

"Employes," as used in a statute requiring the payment of the employes of a railroad, refers to conductors, agents, superintendents, those engaged in operating the road, and the like, and not to contractors or persons building or constructing the roadbed, or laying down the ties and rails. *Ney v. Dubuque & S. C. R. Co.*, 20 Iowa, 347, 351.

St. 1868, c. 448, making the owners or lessees of mills liable for certain acts of persons "in their employ" in the mill, does not include a person who had contracted to manufacture shingles for the defendant, and who ran and controlled the mill himself, and was not subject to the direction or control of the defendant. *State v. Emerson*, 72 Me. 455, 456.

In *Balch v. New York & O. M. R. Co.*, 46 N. Y. 521, it was held that the words "employé" and "laborer," as used in the general railroad act of 1850, which gives the laborer a claim against the company for the indebtedness of a contractor, are used in their ordinary and usual sense, and imply the personal services and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and furnishes a team or teams for work, with or without his own services. *Fidelity & Deposit Co. v. Parkinson* (Neb.) 94 N. W. 120, 122.

#### Corporation.

In the statute providing that the stockholders of manufacturing and mining corporations shall be individually liable for all debts due and owing laborers, servants, apprentices, and employes for services rendered such corporation, "employes" is qualified, and its import and meaning limited and con-

trolled, by its association with the preceding words, "laborers, servants, and apprentices," in accordance with the familiar maxim, "Noscitur a sociis." It does not include a corporation which performs services for a corporation of the kind designated in the statute. *Dukes v. Love*, 97 Ind. 341, 344.

#### Drayman.

A drayman in the regular employ of a corporation, and whose services are of a kind or class which the corporation must have in order to continue its business, is an employé, within Revision, p. 188, § 63, giving laborers in the employ of a corporation, upon its insolvency, a lien upon the assets for their wages, and providing that the word "laborers" shall be construed to include all persons doing labor or service, of whatever character, for, or as workmen or employes in the regular employ of, such corporation. "Laborer," though less comprehensive than "employé," is by statute made its equivalent, and the correlative of "employer." The word "employé" properly describes any one who renders labor or services to another. *Watson v. Watson Mfg. Co.*, 30 N. J. Eq. (3 Stew.) 588, 589.

#### Engineer.

25 Stat. 855, § 10, rendering any person acting for or employed by a railroad company guilty of a misdemeanor in refusing to handle interstate freight, includes locomotive engineers. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* (U. S.) 54 Fed. 730, 736, 19 L. R. A. 387.

#### Family of employé.

The terms "officers" or "employes," in the exception to the provision of the interstate commerce act forbidding the giving of passes, that nothing in the act shall be construed to prevent railroads from giving free carriage to their own officers and employes, cannot be construed to include the families of officers or employes. *Ex parte Koehler* (U. S.) 31 Fed. 315, 321.

#### Fireman.

"Employé," as used in a constitutional amendment prohibiting the granting of any extra compensation to, or any increase in the compensation of, any public officer, employé, agent, or servant, to take effect during the continuance of the office of any person whose salary might be increased thereby, includes a fireman employed at a yearly salary, who is to hold his office during good behavior. The express mention of "employé" is not to be nullified by the subsequent use of the words "officer" and "salary." *Wright v. City of Hartford*, 50 Conn. 546, 547.

In Laws 1890, c. 388, § 1, requiring municipal corporations to pay weekly each and every employé the wages earned to

within six days of the date of such payment, means a laborer or workman, and does not apply to a member of the fire department. *People v. City of Buffalo*, 11 N. Y. Supp. 314, 317, 57 Hun, 577.

#### **Hospital physician.**

The terms "officers, clerks, subordinate officers, and employes," in Act June 1, 1885, relating to cities of the first class, in reference to the appointment of officers, clerks, subordinate officers, and employes, do not include the medical staff, or the board of visiting physicians of the Philadelphia Hospital, consisting of specialists or experts, in the various departments of medical science, who perform gratuitous services. *Commonwealth v. Fittler*, 23 Atl. 568, 571, 147 Pa. 288, 15 L. R. A. 205.

#### **Insurance adjuster.**

In Code, art. 47, § 15, providing that whenever any person or body corporate shall have its property taken possession of by a receiver in the distribution of the property or estate, all moneys due and owing for wages or salaries to clerks, servants, or employes should be first paid in full, the word "employes" has a limited meaning, and cannot be applied in its broadest sense, or as including every one in the service or employment of a corporation or individual. The statute did not mean by "employes" persons rendering services of a higher degree than clerks. The duties of an adjuster of an insurance company being of a higher character than clerk, such an officer, while in a general sense an employé, cannot, by any fair rule of construction, be considered an employé, in the limited and restricted meaning of that term, as used in the statute. *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 34 Atl. 778, 782, 82 Md. 535, 38 L. R. A. 97.

#### **Janitor.**

The janitor of the hall of a town of less than 12,000 inhabitants is not an employé of the town, who can invoke St. 1896, c. 517, § 6 (providing that, in towns in which the civil service act has not been applied to the labor service, the selectmen of the towns shall take such action as may be necessary to secure the employment of veterans in the labor service of their respective towns in preference to all other persons except women), in his behalf, by mandamus, as a veteran of the late Civil War, as the Legislature intended the words "labor service" to mean such service as defined by the rules of the civil service commissioners, and their rules do not include such an employé. *Johnson v. Kimball*, 48 N. E. 1020, 170 Mass. 58.

#### **Manager or superintendent.**

"Employés," as used in Laws 1885, c. 375, giving preference to the wages of employes, operatives, and laborers of corpora-

tions, when a receiver is appointed, means something more than operatives and laborers, but does not include every person in the employment of a corporation. Citing *People v. Remington*, 45 Hun, 329, affirmed in 109 N. Y. 631, 16 N. E. 680, which held that a superintendent of a corporation was not an employé, and *Palmer v. Van Santvoord*, 153 N. Y. 612, 47 N. E. 915, 38 L. R. A. 402, holding that the manager of a corporation was not an employé, so that a person who has absolute control and supervision of the affairs of a corporation is a general manager, and is not entitled to the preference under the act. In re *American Lace & Fancy Paper Works*, 51 N. Y. Supp. 818, 820, 30 App. Div. 321. So, also, In re *Stryker*, 53 N. E. 525, 158 N. Y. 526, 70 Am. St. Rep. 489.

A superintendent of a mining company will not be included in the term "employé," as used in 22 St. at Large S. C. p. 502, giving to employes of factories and mines a lien for their wages or salaries. *Malcomson v. Wappoo Mills* (U. S.) 86 Fed. 192, 198.

#### **Officer of corporation.**

"Employés," as used in Corporation Act, § 63, providing that, where a corporation is insolvent, the laborers and employes shall have a preferred lien for their wages, cannot be construed to include officers. The first legislation upon this subject only provided a preference for laborers. By universal consent, this had reference only to those who performed manual labor, of whatever nature, but it became manifest to common understanding that there was another class who did equal service in the interests of corporations, and of their creditors, whose vocation was of a different character from that of mere manual labor. There seemed to be no just reason for omitting the latter class from the preference, and the Legislature extended the favor which it had given to laborers to this class, and designated them as "employés." *Weatherby v. Saxony Woolen Co.* (N. J.) 29 Atl. 326. See, also, *Bristol v. Kretz*, 49 N. Y. Supp. 404, 406, 22 Misc. Rep. 55.

The president of a railroad company will not be said to be a laborer or employé, within the meaning of the statute providing that the wages of laborers and employes shall not be subject to garnishment or attachment except for public dues. The term "wages" indicates inconsiderable pay, without excluding salary, which is suggestive of larger compensation for personal services. But its application to laborers and employes certainly conveys the idea of a subordinate occupation, which is not very remunerative, but under immediate supervision. *South & N. A. R. Co. v. Falkner*, 49 Ala. 115, 118.

#### **Public officer.**

"Among lexicographers the definition given by Prof. Whitney in the Century Diction-

ary of the word 'employé' seems to me to be the most lucid and comprehensive. It is as follows: 'One who works for an employer; a person working for a salary or wages, applied to any one working, but usually only to clerks, workmen, laborers, etc., and but rarely to the higher officers of a corporation or government, or to domestic servants.' As used in Laws 1890, c. 388, requiring municipal corporations to pay weekly every employé engaged in its business, it does not include a clerk in the mayor's office, the secretary and treasurer of the park commission, a member of the fire department, a school-teacher, and a patrolman on the police force. *People v. City of Buffalo*, 11 N. Y. Supp. 314, 315, 57 Hun, 577.

An officer is distinguished from the employé in the greater importance, dignity, and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public officer for misfeasance or nonfeasance in office, usually, though not necessarily, in the tenure of his position. *State ex rel. Kane v. Johnson*, 27 S. W. 399, 401, 123 Mo. 43 (citing *People v. Langdon*, 40 Mich. 673); *State ex rel. Cameron v. Shannon*, 33 S. W. 1137, 1144, 133 Mo. 139.

"Employés," as used with respect to classes of public servants, refers to those whose employment is merely contracted for, and differs from officers, whose functions appertain to the administration of government. *Moll v. Sbisá*, 25 South. 141, 51 La. Ann. 290.

A member of the Capitol police, appointed by the commissioner of public buildings, is an employé in the office of the commissioner, within a resolution of Congress authorizing an increase of salary of all the civil officers and other clerks and employés in the office of such commissioner. *Mallory v. United States* (U. S.) 3 Ct. Cl. 257, 259.

A police surgeon is not a clerk or employé, within New York Charter 1873, c. 755, § 2, giving the police board power to fix the salaries and compensation of all clerks appointed by the board, and of all employés whom they may be authorized to appoint; he is an officer, within the meaning of the charter. Certainly such surgeons are not clerks, and, as employés are usually considered as embracing laborers and servants, and those occupying inferior positions, they can scarcely be included in that class of persons. *People v. Board of Police*, 75 N. Y. 38, 41.

"Employé," as used in Civ. Code, tit. 6, entitled "Services," § 1965 et seq., relating to the contract of employment, and regulating the duties, obligations, and liabilities of employer and employé, means the same as

"servant." There is no necessary distinction between the terms. The term "employé" may sound more euphonious than the term "servant," but there is no substantial difference between the two, except as the statute makes a difference. All public officers are servants of the people. A person appointed and employed by resolution of a city as driver of the street wagon, and to care for its horses, at a certain sum per month is an employé of the city, and not an officer thereof. The relation of master and servant was created by the employment—nothing more nor less—just as the relation is created and regarded between a railroad or other private corporation where persons are employed to perform special service, not an independent calling. *White v. City of Alameda*, 56 Pac. 795, 796, 124 Cal. 95.

The term "employé," within the meaning of Laws 1890, c. 388, providing that every municipal corporation in the state shall pay each and every employé weekly the wages earned by such employé to within six days of the date of payment, does not include a public officer. In *People v. Board of Police*, 75 N. Y. 38, the court says "employés are usually considered as embracing laborers and servants, and those occupying inferior positions." *People v. Myers*, 11 N. Y. Supp. 217, 25 Abb. N. C. 368.

#### Salaried servant.

The word "employés," as used in Laws 1883, c. 349, giving a preference for wages due laborers, servants, and employés in case of the assignment of their employer, includes a stockholder in the assigning corporation, who has been engaged in the service of the corporation on a salary. "If the word 'servants' or 'employés' in the clause of the act quoted, meant nothing more nor different than the word 'laborers' therein, then they are extremely tautological and a useless repetition." *Conlee Lumber Co. v. Ripon Lumber & Mfg. Co.*, 29 N. W. 285, 287, 66 Wis. 481.

Within Laws 1885, c. 376, providing that the claims of employés, operatives, and laborers of an insolvent corporation for wages shall be paid first out of funds in the hands of a receiver, bookkeepers, foremen, superintendents, and draftsmen employed on monthly salaries are not included in the term "employé"; the word "employé" being limited by the more specific words "operatives and laborers." In re *Stryker*, 53 N. E. 525, 158 N. Y. 526, 70 Am. St. Rep. 489.

#### Trainman or constructionman.

In *Ney v. Dubuque & S. C. R. Co.*, 20 Iowa, 347, it was held that, in connection with railroads, the term "employé" applies to conductors, agents, superintendents, and others engaged in operating the road, and the like, and not to contractors or persons build-

ing or constructing the roadbed, or laying down the ties and rails. *Ballard v. Mississippi Cotton Oil Co.*, 34 South. 533, 551, 81 Miss. 507, 62 L. R. A. 407, 95 Am. St. Rep. 476.

The term "employé," in Act Ohio March 23, 1888, for the protection of railroad employes, which requires every railroad in the state to block frogs, etc., includes the relation between an employé of one railroad, taking the numbers of cars transferred to the tracks of another railroad while they are on the latter tracks, and the latter railroad company. The word "employé," used in the statute, does not mean simply those men on the pay roll of the second company, who were in one sense its only employes, but it means all employes and servants authoritatively engaged in and about the tracks, rails, and frogs of the Wabash Company. *Atkyn v. Wabash R. Co.* (U. S.) 41 Fed. 193, 197.

#### **Servant synonymous.**

See "Servant."

#### **Traveling salesman.**

An employé is a person who is employed—one who works for wages or a salary—and as used in Laws 1885, c. 376, providing that, when a receiver of a corporation shall be appointed, the wages of the employes, operatives, and laborers thereof shall be preferred to every other debt of the corporation, means something more than an operative or laborer, and will include a traveling salesman employed at an annual salary. In *re Cortland Mfg. Co.*, 45 N. Y. Supp. 630, 631, 21 Misc. Rep. 226.

The word "employes," in Laws 1885, c. 376, is a word of larger import than the words "operatives and laborers," and is not confined to those who perform manual labor only; and hence an employé of a corporation, whose duties are to go from place to place, and set up, put in operation, and repair machines made by such corporation, as well as to sell or solicit sales of machines, and who receives a compensation of \$100 per month, is entitled to a preference given by the statute. *Palmer v. Van Santvoord*, 47 N. E. 915, 153 N. Y. 612, 88 L. R. A. 402.

The term "employes," as used in Laws Wash. 1897, p. 55, entitled "An act providing for a lien for employes," and providing that every person performing labor in the operation of any railway, canal, or transportation company, or any water, mining, or manufacturing company, sawmill, lumber, or timber company, shall have a prior lien on the property used in the operation of its business, to the extent of moneys due him for labor performed within a certain time preceding the filing of his claim therefor, is of broad significance, including any person who gives his time for hire. The title of

the statute was not chosen in a careless manner, but with a deliberate purpose, in giving the enactment a true interpretation in accordance with the intention of the Legislature to insure to the employes of corporations payment of their wages by subjecting the entire assets and franchises of every industrial corporation to a prior lien in favor of employes. The statute does not restrict its beneficence to persons performing labor in the operation of railways, canals, mines, sawmills, and factories, but the lien is given to every person performing labor in the operation of such companies. Therefore, all participants in carrying on the operation of the different kinds of companies mentioned are entitled to liens, and a traveling salesman for a lumber company is within its provisions. In *re Lawler* (U. S.) 110 Fed. 135, 136.

"Employes," as used in Laws 1885, c. 376, providing that wages of employes, operatives, and laborers shall be preferred to every other debt against any insolvent insurance or moneyed corporation, will be construed in its restricted and limited sense, as not including any and all persons employed by corporations, irrespective of their service and the relation which they hold to the company, but will include persons selling pianos on commission. In *re Luxton & Black Co.*, 54 N. Y. Supp. 778, 779, 35 App. Div. 243.

"Employes," as used in Laws 1897, c. 266, providing that, on assignments for benefit of creditors, the wages or salaries of employes shall be preferred, will include a traveling salesman, whose duty it was to sell goods in a particular locality, and whose compensation consisted exclusively of commissions. In *re Smith*, 59 N. Y. Supp. 799.

A salesman on commission is an employé, within the statute giving preference to employes on assignment by the employer, though the compensation of the employé was measured in part by a share of the profits. In *re Ginsburg*, 59 N. Y. Supp. 656, 661, 27 Misc. Rep. 745.

#### **Employé in the office.**

14 Stat. 569, authorizing the payment of employes in the office of the coast survey, naval observatory, etc., means "a person who is engaged in the performance of the proper duties of an office, whether his particular duties are carried on within or without the walls of a building in which the chief officer usually transacts his business." *Stone v. United States* (U. S.) 8 Ct. Cl. 260, 262.

#### **Employé of carrier.**

The term "employes," as used in an act concerning carriers engaged in interstate commerce, and their employes, shall include all persons actually engaged in any capacity in train operation or train service of any de-

scription, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: provided, however, that the act shall not be held to apply to employes of street railroads, and shall apply only to employes engaged in railroad train service. U. S. Comp. St. 1901, p. 3206.

#### **Employé of postal service.**

Rev. St. U. S. § 5467 [U. S. Comp. St. 1901, p. 3691], declares that any person employed in any department of the postal service who shall embezzle any letter intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or delivered by any carrier, mail agent, route agent, letter carrier, or other employé of the postal service, shall be guilty of the offense of robbing the mail. Held, that the term "employé of the postal service" was not limited to an officer employed by the postal department of the United States government, but included, as well, employes who were hired and paid by postal contractors, or other persons having charge of mail matter, sworn as mail carriers, etc. *United States v. Hanna*, 17 Pac. 79, 80, 4 N. M. (Gild.) 216.

One sworn as a deputy postmaster, who handled mail whenever he was about the office and felt like it, was an employé, within the meaning of the law. *United States v. Brent* (U. S.) 24 Fed. Cas. 1225, 1226.

#### **EMPLOYED.**

See "Actually Employed"; "Regularly Employed."

The word "employed" may mean either busy or occupied at work, or it may mean intrusted with the management of an affair. *Brugier v. Moussier's Adm'r*, 5 La. 93, 95.

In a bond given by a contractor, conditioned as required by Laws 1850, c. 278, requiring the contractor to execute a bond to secure the payment of wages to laborers employed on public works, by "laborers employed" was meant those hired by him, working at his request, and under an agreement on his part to compensate them for their services, and excluded the idea of their being employed by some other person as a subcontractor or independent contractor. *McCluskey v. Cromwell*, 11 N. Y. (1 Kern.) 593, 599.

#### **As actual employment.**

The word "employed," in Act May 24, 1888, c. 308, 25 Stat. 157 [U. S. Comp. St. 1901, p. 2637], declaring that eight hours shall constitute a day's work for letter carriers, and that, if a carrier is employed a greater number of hours per day than eight, he shall be paid extra, "means actual employment in the carrier's work or service, and does not extend to intervals, however brief, when the

carrier has control of his time." *King v. United States* (U. S.) 32 Ct. Cl. 234.

"Employed," as used in St. 1873, c. 284, § 1, exempting a vessel regularly employed in the coasting trade from compulsory pilotage, did not necessarily mean continuously so employed, but would include the case of a vessel actually and legally so employed at the time the services of a pilot are tendered, though the word "employed" is more commonly used as signifying continuous occupation. *Wilson v. Gray*, 127 Mass. 98, 99.

#### **As customarily employed.**

In an instruction that certain goods were not subject to a certain duty if the use to which such goods are chiefly applicable, and for which they were employed, was in making or ornamenting hats, "employed" means for which they were habitually employed or customarily employed or usually employed, and not for which they had been employed. *Hartranft v. Langfeld*, 8 Sup. Ct. 732, 736, 125 U. S. 128, 31 L. Ed. 672.

#### **As designated or selected.**

Laws 1857, c. 446, provides that all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of money or the taxing of the citizens of the city of New York, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation. Held, that the word "employed" is used as meaning selected or designated. *In re Astor*, 50 N. Y. 363, 368.

#### **As importing an employer.**

In Gen. St. c. 2397, giving a mortgage lien to persons making advances to any person or persons who are "employed" or about to engage in the cultivation of the soil, "employed" is synonymous with the word "engaged," and includes those who are already engaged, as well as those about to engage, in the cultivation of the soil. It does not import that the person so employed must be in the employ of another. The statute does not authorize a mere employé to give a lien. *Carpenter v. Strickland*, 20 S. C. 1, 5.

Gen. Order No. 30, adopted April 12, 1875, providing that fees cannot be allowed to an attorney at law acting for an assignee in bankruptcy, except where he is "necessarily employed by the assignee," cannot be construed to authorize fees for legal services by the assignee as such, he being an attorney at law, for he cannot, as assignee, employ himself as an attorney at law. *In re Muldaur* (U. S.) 17 Fed. Cas. 958, 959.

The State Treasurer is employed in the treasury of the state, within Comp. Laws, § 5771, which provides for the punishment of

any officer, clerk, or other person employed in the treasury of the state, who shall commit any fraud or embezzlement therein. The term "employed," as used in the statute, cannot be restricted to a narrow sense, as implying an employer, and only to be understood in the sense of procured to render service, as a master employs a servant. Such is the sense in which it has been quite generally used in reference to embezzlement, but this has happened mainly because the crime always presupposes the offender to have come rightfully into the possession of the money or property by reason of some position of trust and confidence. The crime has been more frequently and generally provided for as to clerks, agents, and servants than as to public officers, and, as the former are so much more numerous, the offense has been more frequently committed by them. The primary signification of the word "employ," as given by Webster, is to occupy the time, attention, and labor of; to keep busy or at work—which sense would include the treasurer, and such is its meaning in the statute, rather than the fourth sense given by Webster, "to engage one's services." *People v. McKinney*, 10 Mich. 54, 83.

#### As engaged in.

"To be employed in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *United States v. Catherine* (U. S.) 25 Fed. Cas. 332, 338; *Same v. Morris*, 39 U. S. (14 Pet.) 464, 475, 10 L. Ed. 543.

This is not only the ordinary meaning of the word, but it has frequently been used in that sense in the acts of Congress. Thus Act March 3, 1825, entitled, "An act to reduce into one, the several acts establishing the post office department," declares that the Postmaster General and all other persons employed shall take the oath previous to entering the duties assigned to them. And again, Act July 2, 1813 (3 Stat. 4), declares that certain vessels employed in the fisheries shall not be entitled to certain bounties unless the master enter into a certain agreement with every fisherman employed therein before he proceeds on his voyage. *United States v. Morris*, 39 U. S. (14 Pet.) 464, 475, 10 L. Ed. 543.

"Employed," as used in the act of Congress prohibiting any citizen of the United States to have any property in a vessel employed in transporting slaves, means not only the act of doing it, but also to be engaged to do it; and accordingly the chartering and fitting out of a vessel at Havana with design to have her perform a voyage then arranged for bringing slaves to the country brought the transaction within the prohibition of the act. *United States v. Catherine* (U. S.) 25 Fed. Cas. 332, 337. Thus, in Laws 1893, p. 99, declaring that no female shall be employed in any factory or workshop more than eight

hours in any one day, etc., "employed" imports not only the act of employing, but the state of being employed, thus rendering the prohibition of the statute two-fold: First, that no manufacturer, etc., shall employ any female, etc., and, second, that no female shall consent to be employed. "To be employed in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *Ritchie v. People*, 40 N. E. 454, 455, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315. Thus a man is not "employed" as a mechanic, within the meaning of Laws 1894, c. 622, providing that mechanics employed by a municipal corporation shall not receive less than prevailing local wages in their trades. One hired in the street-cleaning department as a painter, and doing work as a driver, could not demand a painter's wages. *McCunney v. City of New York*, 58 N. Y. Supp. 138, 139, 40 App. Div. 482.

In *Swan & C. St.* p. 707, providing that no person shall be employed as a teacher unless he has first obtained the certificate required by law, "employed" means the actual engagement in the discharge of the duties as teacher; and hence the statute does not invalidate a contract to teach a school by one not having a certificate at the time such contract is made, but who obtains the same before the time the school is to begin. *School Dist. No. 2, Oxford Tp., v. Dilman*, 22 Ohio St. 194.

"Employed in the slave trade," as used in the first section of the slave trade act of 1800, c. 51, 2 Stat. 70, § 1, providing that it shall be unlawful for any citizen to have any property in any vessel employed in the slave trade, means not merely the actual transportation, but the being employed in that business; and a vessel caught in such trade, though before she has taken slaves on board, is liable to forfeiture under the act. *The Alexander* (U. S.) 1 Fed. Cas. 362.

#### As invested.

"Employed," as used in Const. art. 207, exempting from taxation the capital and machinery employed in certain manufactures, means "invested." Implements and property not used by the manufacturer, but used about the premises or in the factory, are not exempt; the term not being sufficient to include the property of any one other than the manufacturer, and then only when used in his special calling. *State ex rel. Ward v. Assessors*, 15 South. 384, 385, 46 La. Ann. 859.

Laws 1880, c. 542, §§ 3, 11, as amended by Laws 1885, c. 501, provides that every domestic corporation shall pay an annual tax upon the value of its capital stock employed within this state. Held, that "employed" should be construed to mean employed by the corporation claiming the exemption; that is,

used; kept at work; busy. It does not mean invested. In order that an exemption may be had upon the ground of capital employed outside the state, the capital must be used, kept at work, or busy outside the state. Money invested by a corporation in stock of local corporations in various parts of the country is not employed outside the state, within the meaning of this statute. *People v. Wemple*, 18 N. Y. Supp. 511, 513, 63 Hun, 444.

#### **As indicating permanency.**

"Employed," as used in Pub. St. c. 11, § 20, cl. 2, providing that all machinery employed in any branch of manufacture shall be assessed where such machinery is situated or employed, means something more than merely being temporarily in use at a place. A portable sawmill, frequently moved from place to place, and temporarily placed in a town other than that in which the owner resides or has his place of business, is not situated or employed in such town, within the meaning of the statute. *Ingram v. Cowles*, 23 N. E. 48, 49, 150 Mass. 155.

#### **As used.**

"Employed," as used in Act June 29, 1888, c. 496, § 4, 25 Stat. 210 [U. S. Comp. St. 1901, p. 3536], providing that any boat or vessel used or employed in violating any provisions of the act should be liable, etc., means to make use of; to put to a purpose. Practically, the words "used or employed" are synonymous. Every boat or vessel put to the purpose of violating the provisions of the statute is liable to the penalties, and to be put to such or any purpose necessarily requires antecedent determination on the part of her master or owners, or of some one with sufficient authority, that she shall perform such purpose. A vessel can only be used or employed by or with the consent of the person who has the legal right to use and employ. *United States v. The Anjer Head* (U. S.) 46 Fed. 664.

The constitutional exemption from taxation of capital, machinery, and property "employed in manufacture," does not apply to property which has once been employed for manufacturing purposes, after it has ceased to be actually so employed. *Electric Traction Co. v. City of New Orleans*, 14 South. 231, 45 La. Ann. 1475.

Act June 29, 1888, c. 496, 25 Stat. 209 [U. S. Comp. St. 1901, p. 3533], prohibiting the dumping of mud from scows in the North river within prescribed limits, and declaring that any boat or vessel used or employed in violating any provision of the act shall be liable to penalties imposed, means a boat or vessel used in violating the act to the knowledge and intent of her officers, and does not include a tug which was proceeding in good faith to the prescribed dumping ground, when

the scows in tow were dumped by the scowmen within the prescribed limits against the express orders of the captain and officers of the tug. *The Emperor* (U. S.) 49 Fed. 751, 753.

In 59 Geo. III, c. 95, exempting from taxation tools, carts employed in carrying mold, soil, marl, or compost employed in husbandry for manuring or improving land, "employed" means to be employed; the word pointing to the purpose or destination of the material. *Regina v. Freke*, 5 El. & Bl. 944, 949.

"Employed," as used in Metropolitan Building Act 1885 (18 & 19 Vict. c. 122), exempting the persons erecting a building to be employed for her majesty's use or service from giving the customary notice of an intention to build, would include a building in process of erection, which was to be applied to the custody of the arms of her troops. *Regina v. Jay*, 8 El. & Bl. 469, 477.

#### **Employed by authority of law.**

A ship placed in the service of a state for the purpose of nautical instruction under Act June 20, 1874, c. 339, 18 Stat. 121 [U. S. Comp. St. 1901, p. 1054], is a ship acting under the orders of a department, and is "employed by authority of law," within Rev. St. § 1571 [U. S. Comp. St. 1901, p. 1079]. *Barnette v. United States* (U. S.) 30 Ct. Cl. 197, 202.

#### **Employed by the state.**

A fireman at the State Soldiers' Home is not "employed by the state or any officer thereof," within Laws 1889, c. 380, providing that a laborer so employed shall receive not less than \$2 per day. *Drake v. State*, 39 N. E. 342, 144 N. Y. 414.

#### **Employed by the United States.**

Act of Assembly of February 12, 1802, providing that every person who shall hold any office or appointment of profit or trust under the government of the United States, whether a commissioned officer or otherwise, a subordinate officer or agent who is or shall be employed under the legislative, executive, or judiciary department of the United States, is incapable of holding or exercising at the same time the office of alderman of any city, corporate town, or borough, cannot be construed to include the selection of an editor of a newspaper to print the laws of the United States by the Secretary of State of the United States. *Commonwealth v. Binns* (Pa.) 17 Serg. & R. 219, 220.

#### **Employed in or about cars or depot.**

A newsboy engaged in selling papers, and permitted to pass in and out of the cars of a passenger railway company on such business, is within the meaning of Act 1863, April 4, providing that any person engaged



or employed on or about the roads, depot, premises, or cars of a railroad company, not being a passenger or employé, shall only have such right of action and recovery against the company for personal injuries as would exist if such person were an employé. *Philadelphia Traction Co. v. Orbann*, 12 Atl. 816, 818, 119 Pa. 87.

#### **Employed in manufacture.**

The words "employed in the manufacture of wood," in a constitutional provision exempting capital, machinery, and other property employed in the manufacture of wood, do not include vessels employed to procure timber for sawmills. *Martin v. City of New Orleans*, 38 La. Ann. 397, 400, 58 Am. Rep. 194.

Const. art. 207, exempting from taxation capital, machinery, and other property employed in the manufacture of tapestry fabrics, includes all property so employed, though it may incidentally be used for other purposes; as, for instance, where a part of a building or factory used for such purposes is occupied by the owner as a dwelling house, such occupation does not alter the character of the factory so as to withdraw it from the exemption. *City of New Orleans v. Arthurs*, 36 La. Ann. 98, 99.

The phrase "employed in the manufacture of," as used in the constitutional provision that "the capital, machinery, and other property employed in the manufacture of \* \* \* machinery shall be exempt for twenty years from taxation," does not include property leased for manufacturing purposes. *State ex rel. Ward v. Assessors*, 15 South. 384, 46 La. Ann. 859.

#### **Employed in the service.**

Where the federal Constitution enables Congress to provide for the government of such part of the militia as may be "employed in the service" of the United States, and which makes the President commander in chief of the militia when called into the actual service of the United States, there is a distinction between the words "employed in the service" and the words "called into the service"; the words "employed in the service" meaning the actual mustering in service, while the words "called into service" import some act to be done before the actual employment of the militia. *Houston v. Moore*, 18 U. S. (5 Wheat.) 1, 60, 5 L. Ed. 19.

#### **Employed on police force.**

The charter of Brooklyn (Laws 1888, c. 583), providing that no person employed on the police force shall be removed without cause, and then only after a public trial, evidently contemplates membership in the force, and will not be construed to relate to mere employés in the police department.

*People v. York*, 60 N. Y. Supp. 208, 210, 43 App. Div. 444.

#### **Employed on water.**

A stipulation in a contract of hiring a slave that he was not to be employed on water means some employment requiring him to go upon the water, or necessarily connected therewith; and such a contract is not broken by sending the slave to water horses at a shallow part of a deep stream, with instructions not to ride into deep water, although he did ride into deep water and was drowned. *Madre v. Saunders*, 48 N. C. 1, 2.

#### **Employed within the state.**

See, also, "Capital Employed."

Steamships owned by a domestic corporation, and employed in interstate commerce, and plying between ports of New York and Cleveland, Duluth, and other ports of the Great Lakes, are not employed within the state, within the meaning of Tax Law, § 184, providing that a domestic corporation shall pay a tax computed on the basis of its capital stock employed within the state. *People v. Knight*, 77 N. Y. Supp. 398, 399, 75 App. Div. 164.

Under Tax Law (Laws 1896, p. 856, c. 908) § 182, taxing capital stock of foreign corporations paying more than 6 per cent. dividends, "employed within the state," capital invested in securities of corporations of a kindred nature, from which the corporation investing derives a practical advantage, is taxable; but capital invested in securities entirely apart from any business of the corporation is not employed within the state, and is therefore not taxable. *People v. Morgan*, 83 N. Y. Supp. 998, 1000, 86 App. Div. 577.

#### **EMPLOYER.**

An employer is one who employs; one who uses or engages the services of another person. In re *Cortland Mfg. Co.*, 21 Misc. Rep. 226, 229, 45 N. Y. Supp. 630, 632 (citing *Stand. Dict.*).

Where a subcontractor employed a framework knitter, who worked as a weaver of gloves for the subcontractor, in frames provided by him, at an agreed gross price per dozen pairs, and the subcontractor furnished the work by agreement to a master manufacturer, who found machinery and materials, the subcontractor was an employer, within 1 & 2 Wm. IV, c. 37, relating to the wages of artificers, and requiring the employers to pay them in the current coin of the realm. *Chawner v. Cummings*, 8 Q. B. 311, 321.

The words "employer" and "employment" are not of the technical language of

the law, or of any science or pursuit, and must be construed according to the context and the approved usage of the language. The word "employment" means the act of employing or using; occupation, business; agency or services for another or for the public. An employer is one who employs; one who engages or keeps in service. Therefore, from the definitions of these words, it is evident that the statute relating to embezzlement without the consent of the employer contemplates the relation of agency—a contract for services, whereby the accused is bound to do or perform something in connection with the property embezzled, and that by virtue of such relation he acquired possession thereof. *State v. Foster*, 37 Iowa, 404, 407.

Whenever the term "employer" or "employers" is used in the act relating to the court of mediation or arbitration, it shall be held to include "firm," "joint stock association," "company," or "corporation," as fully as though each of the last-named terms was expressed in each place. *Comp. Laws Mich.* 1897, § 568.

#### EMPLOYERS' LIABILITY.

The term "employers' liability," when applied to insurance, is a descriptive term, generally used to designate a certain well-known branch of the insurance business, and the use of the term cannot be exclusively appropriated by an insurance company. *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 18 N. Y. Supp. 397, 398, 61 Hun, 552; *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.*, 10 N. Y. Supp. 845, 846, 24 Abb. N. C. 368.

#### EMPLOYMENT.

See "Common Employment"; "Extraordinary Employment"; "Independent Employment"; "Joint Employment"; "Life Employment"; "Permanent Employment"; "Professional Employment"; "Public Employment"; "Same Grade of Employment"; "Worldly Business or Employment"; "Place of Employment."

Change of employment, see "Change."

Secular employment, see "Secular Business."

Employment is the act of employing or using—the state of being employed—and is so used in *Sess. Laws* 1896, p. 219, c. 72, §§ 1, 2, providing that the period of employment of certain working men shall be eight hours per day, so that the employer and servant are *particeps criminis*, and the servant cannot recover for overtime. *Short v. Bullion-Beck & Champion Min. Co.*, 57 Pac. 720, 721, 20 Utah, 20, 45 L. R. A. 603.

In 2 Rev. St. p. 673, § 59, providing that "if any clerk or servant of any private person or corporation shall embezzle or convert to his own use without the assent of his master or employer any money, goods, rights in action, or other valuable security, or effects whatever belonging to any other person which shall come into his possession by virtue of such employment, he shall upon conviction be punished," etc., the phrase "by virtue of such employment" means by reason of the relation which exists between a clerk or servant and his employer. *People v. Hennessey* (N. Y.) 15 Wend. 147, 150.

The contract of employment is a contract by which one who is called the "employer" engages another, who is called the "employé," to do something for the benefit of the employer or of a third person. *Civ. Code Cal.* 1903, § 1965; *Civ. Code Mont.* 1895, § 2650; *Rev. Codes N. D.* 1899, § 4094; *Civ. Code S. D.* 1903, § 1417.

#### As appointment.

In *Civil Service Law* (*Laws* 1899, c. 370) § 21, providing that no veteran should be removed from a position by appointment or employment, except for incompetency or misconduct, after hearing on notice, "employment" is synonymous with "appointment," being used interchangeably with such term. *Stutzbach v. Coler*, 61 N. E. 697, 698, 168 N. Y. 416.

#### As authority.

"Employment," as used in Act Cong. March 3, 1825, c. 65, providing that any person who shall be employed as president, cashier, clerk, or servant in the Bank of the United States, who shall fraudulently embezzle, secrete, or make way with any money or other valuable security which shall come into his possession by virtue of such employment, shall be deemed guilty of felony, means his authority from the bank. *United States v. Forrest* (U. S.) 25 Fed. Cas. 1144, 1146.

#### As carrying on business.

"Employment," as used in Act April 22, 1794, forbidding any employment or business on Sunday, means the act of carrying on a business on Sunday; and hence the carrying on of such a business only constitutes one offense, though numerous sales are made. *Friedeborn v. Commonwealth*, 6 Atl. 160, 113 Pa. 242, 57 Am. Rep. 464.

Where a person whose business was that of a butcher, without being engaged in retailing liquor as a business, or intending so to engage, on one occasion sold five cents' worth of ardent spirits, he was not following the employment of a retail liquor dealer, within the statute requiring such a person to take out a license. *Moore v. State*, 16 Ala. 411, 413.

**Contract implied.**

"Employment" implies a contract on the part of the employer to hire, and on the part of the employé to perform services; and, until such a contract is mutually entered into, it can have no binding obligation on either party. *Malloy v. Board of Education of City of San Jose*, 36 Pac. 948, 949, 102 Cal. 642.

"Employment," as used in Laws 1866, c. 466, § 4, declaring that the employment of teachers in certain schools shall be subject to the approval of the superintendent, means the act of hiring, and not the state of being employed; and hence, when the approval is once given, the contract of employment is complete, and the teacher cannot be discharged by the superintendent. *People v. Hyde*, 89 N. Y. 11, 17.

**Hiring distinguished.**

"Employment," as used in Code, § 4500, which prohibits the employment of a servant of another hired under written contract attested by one or more witnesses, is not synonymous with "hiring," but means to use a servant for a special or general purpose inconsistent with his duty to his employer, with a mutual benefit. *Hightower v. State*, 72 Ga. 482, 484.

**As occupation.**

Gen. St. c. 26, § 52, provides that the board of health shall from time to time assign certain places for the exercise of any trade or employment which is a nuisance, etc. Held, that "employment," as here used, would include the keeping of a large number of swine within the limits of a town. *Commonwealth v. Young*, 133 Mass. 526, 529.

The word "employment" does not necessarily import an engagement or rendering services for another. A person may as well be employed about his own business as in the transaction of the same for a principal. One of the definitions given by Webster of the word "employment" is "occupation; business; that which engages the head or hands." Worcester says, "Employment means business, occupation, object of industry, engagement, avocation, calling, or profession." Therefore, in a statute prescribing punishment for females found employed in saloons, carrying beer, it applies alike, whether they acted as proprietors or servants. *State v. Canton*, 43 Mo. 48, 51.

**Office distinguished.**

See "Civil Office"; "Office."

"Employment" is a more extensive term than "office"; every office being an employment, but an employment not necessarily being an office. *Moll v. Sbisa*, 25 South. 141, 51 La. Ann. 290.

"Though an office is an employment, it does not necessarily follow that every employment is an office. A man may certainly be employed by the government under a contract, express or implied, to do an act or perform a service, without becoming an officer. But if a duty be a continuous one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties pertaining to his station without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duty from an officer." *Bunn v. People*, 45 Ill. 397, 403 (quoting from *United States v. Maurice* [U. S.] 26 Fed. Cas. 1211, 1214).

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involve a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country—either legislative, executive, or judicial—attaches for the time being, to be exercised for the public benefit. An office is a public station or employment conferred by the appointment of the government. Although every office is an employment, every employment is not an office. A man may be employed to do an act or perform a service without becoming an officer, but, if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters on the duties pertaining to his station without any contract defining them, if those duties continue, though the person be changed, it is difficult to distinguish such a charge or employment from an office, or the person who performs those duties from an officer. In the Opinion of the Judges to the Governor, 3 Me. (3 Greenl.) 481, the Supreme Court of Maine said: "There is a marked difference between an office and an employment under the government. An office implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office; and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office. Employment has none of these distinguishing features, and one appointed state printer cannot be said to be acting as an officer, and exercising any of the sovereign functions of the government, in doing the mechanical work of manufacturing blank books, printing a notice, order, or proclamation, or supplying blanks, stationery, and letter heads for the territorial government, or a docket for the Supreme Court. *Guthrie Daily Leader v. Cameron*, 41 Pac. 635-637, 3 Okl. 677.

**As place in army.**

As used in 49 Geo. III, c. 126, § 2, forbidding the buying of offices, including nominations to an office, commission, or "place or employment," would include a cadetship in the Madras infantry. The words "place" and "employment" are so general as to comprehend those and every other advantageous position that the party can gain by nomination to a specific thing. *Regina v. Charterle*, 13 Q. B. 447, 461.

**Railroad company.**

"Employment," as used in a statute authorizing the taxing of merchants, hotel keepers, etc., and "any other person or employment which it may deem proper," if taken according to its natural import, cannot be held to comprehend a railroad corporation, which is neither a person nor an employment, within the ordinary acceptation of the words. "Employment" is a common word, generally used in relation to most common pursuits, and therefore ought to be received as understood in common parlance. *City of Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237, 248, 56 Am. Rep. 592.

**As temporary agency.**

An employment is an agency for a temporary purpose, which ceases when that purpose is accomplished. *People v. Loeffler*, 51 N. E. 785, 790, 175 Ill. 585; *Lasher v. People*, 55 N. E. 663, 666, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103; *Wilcox v. People*, 90 Ill. 186, 192.

**EMPOWER.**

Where, in a statute, any one is empowered to perform a certain act, the act is not only authorized, but commanded. *Strong v. Wright*, 1 Conn. 459, 466.

New York City Charter, § 1473 et seq., providing that the police department is authorized and empowered to grant theatrical licenses, is to be construed as vesting a discretionary power in the department to grant or withhold licenses, which may be controlled by mandamus. The language is almost identical with that of section 1999 of the consolidation act, under which authority to grant licenses was vested in the mayor, whereas, by the provisions of the charter which we have quoted, such power is now lodged with the police department. This very contention now made as to the intent and meaning of the words "authorized and empowered," which are to be found in both statutes, was involved in the case of *People v. Grant*, 58 Hun, 455, 12 N. Y. Supp. 879; and Justice Barrett, who wrote the opinion therein, thus disposes of it (page 457, 58 Hun, and page 880, 12 N. Y. Supp.): "The relator's contention is that these words, 'authorized and empowered,' should be con-

strued as imperative, and he cites authorities for the proposition that the permissive words in question should be treated as mandatory. The rule undoubtedly is that where public bodies or officers are empowered to do that which the public interests require to be done, and adequate means are placed at their disposal, the proper execution of the power may be insisted on, though the statute conferring it be only permissive in its terms. *City of New York v. Furze* (N. Y.) 3 Hill, 612. The word 'may' is thus construed at times to mean 'must.' But why, it may be asked, should this construction be given to the act under consideration? What public interest demands that the mayor should be required under all circumstances to accept the fee and grant the license? It seems to me that it is quite the other way. The public good clearly requires that the permissive words in question should be read in their natural and ordinary sense." *People v. Murphy*, 72 N. Y. Supp. 473, 475, 65 App. Div. 123.

Under a resolve of the legislature empowering the judge of probate to grant letters of administration on a particular estate, it would be doing violence to the language and intent of the Legislature to suppose that it meant to dictate to a judicial tribunal the course of its proceedings in such particular case. We do not think the Legislature would have passed a resolve requiring and directing the judge of probate to do what by this resolve they intended only to empower him to do, and the judicial discretion vested in the judge by the laws of the commonwealth on all subjects within his jurisdiction was left unaffected by the resolve, and he had the right, as before, to determine the penalty of the bond, judge of the sufficiency of the sureties, and decline substituting other security for the bond, if he should be of opinion that by the general laws he was not at liberty to take a security in a particular case, as empowered by the resolution, different from that which he should feel obliged to require in all others. *Appeal of Picquet*, 22 Mass. (5 Pick.) 65, 67.

**EMPRESARIOS.**

The term "empresarios" was a name given to individuals who in the early history of Mexico were given very large bodies of land in consideration that they should bring emigrants into the country and settle them on the lands, with a view of increasing the population, and securing the protection thus afforded against the wild Indians on the Mexican borders. *United States v. Maxwell Land-Grant Co.*, 7 Sup. Ct. 1015, 1017, 121 U. S. 825, 30 L. Ed. 949.

**EMPTOR.**

See "Caveat Emptor."

**EMPTY.**

"Emptying," as used in Rev. St. § 3324 [U. S. Comp. St. 1901, p. 2168], requiring dealers in distilled spirits to efface and obliterate the revenue stamp on a cask at the time of emptying such cask, and providing a punishment for failure to do so, should not be construed in its ordinary, strict signification, requiring that the cask be completely deprived of its contents before the dealer is guilty of failing to efface and obliterate the stamp. The ordinary signification of the words "to empty" is to make void; to exhaust; to deprive of the contents; hence when a retail dealer of distilled spirits draws off the contents of a cask as far as can be done from the faucet, and then removes it from the place where it had been used in his business, he should efface and obliterate the stamp, though it still contains a small quantity of distilled spirits, of small value. *United States v. Buchanan* (U. S.) 9 Fed. 689, 690.

"Empty" as used in the charter of a canal company, wherein it is provided that every vessel not having commodities on board sufficient to pay the toll of \$4 shall pay so much as, with the commodities on board, will yield that sum, and every empty boat shall pay \$4, the word "empty" means without cargo. *Perrine v. Chesapeake & Delaware Canal Co.*, 50 U. S. (9 How.) 172, 189, 13 L. Ed. 92.

The charter of a turnpike road, authorizing a different toll for a loaded wagon than that authorized for an empty wagon, does not mean that the wagon must be absolutely empty. To say that every wagon must be either loaded or empty, and that this wagon was not empty, and therefore it must be loaded, may be tolerable school logic; but, when applied to the present case, it is logic which common sense will not sanction. A loaded wagon, as meant by the charter, is not contradistinguished from a wagon absolutely empty. A wagon absolutely empty would be taken as an estray; at least, it would be suffered to pass the gate, for there would be no person answerable for the toll. *Merrick v. Phelps*, 5 Conn. 465, 468.

**EN DECLARATION DE SIMULATION.**

A Louisiana action, the object of which is to cause to be declared simulated acts, the appearance of which is contrary to the truth. *Erwin v. Bank of Kentucky*, 5 La. Ann. 1, 4.

A Louisiana action, the object of which is to have a contract judicially declared a simulation and a nullity, to remove a cloud from the title, and to bring back for any legal purpose the thing sold to the estate of the owner. It is essentially one in revendica-

tion, and never of condition. *Edwards v. Ballard*, 20 La. Ann. 169, 170.

**EN ROUTE.**

The words "en route," in a contract to furnish teams for transportation of military supplies, accompanying the Yellowstone expedition, en route from Ft. Lincoln for 50 days or more, mean while the troops were moving in pursuit of Indians or only temporarily encamped. When the army was posted along the Yellowstone, and went into camp, it was no longer en route. Such a contract does not require a hauling of supplies from post to post, unattended by troops. *McLean v. United States* (U. S.) 17 Ct. Cl. 83, 90.

**ENACT.**

Bouvier defines the word "enact": "To establish by law; to perform or effect; to decree." By either of these definitions, the word is of equal force to the word "resolve," the fifth definition of which, given by Webster, is: "To express an opinion or determination by resolution or vote, as, 'it was resolved by the Legislature.'" The formula, "Be it enacted," therefore, includes the formula, "Be it resolved," and therefore the former phrase, while ordinarily applied to the passage of bills, may be used in passing a mere resolution or proposal, as a resolution to submit a constitutional amendment. *In re Senate File No. 31*, 41 N. W. 981, 984, 25 Neb. 864.

**ENACTING CLAUSE.**

The term "enacting clause" is used to designate the section of the bill or statute which authorized the whole bill or document as law. *Pearce v. Vittum*, 61 N. E. 1116, 1117, 193 Ill. 192.

The enacting clause of legislative acts and resolutions is that preliminary expression, such as "Be it enacted," or, "The General Assembly do enact," etc., which serves to identify the act of legislation as of the General Assembly; to afford evidence of its legislative statutory nature; to secure uniformity of identification, and thus prevent inadvertence and possible mistake or fraud. *State v. Patterson*, 4 S. E. 350, 352, 98 N. C. 660.

The enacting clause of a statute is not necessarily alone or only that which purports to be the enacting clause, such as "The people of the state of — enact," but comprehends every part of the statute which should be stated in order to define the subject of the enactment with clearness and certainty. *Territory v. Burns*, 9 Pac. 432, 433, 6 Mont. 72.

Const. 1870, art. 4, § 11, declares that the style of the laws of this state shall be, "Be it enacted by the people of the state of Illinois, represented in general assembly." This is known as the "enacting clause." It is no part of any section of the statute, and a repeal of any section or sections of the statute would not affect the enacting clause. *Pearce v. Vittum*, 61 N. E. 1116, 1117, 193 Ill. 192.

Within the rule that exceptions in a statute should only be negated in an indictment or information when they are descriptive of the offense defining it, but not when the exceptions afford matter of excuse only, and do not define or qualify the offense created by the enacting clause, the term "enacting clause" should be construed to mean all parts of the statute which create and define the offense, whether in one, or more sections or acts. Yet, under an ordinance requiring a license fee from peddlers of certain articles, providing that the owners and renters of land may vend the products thereof in all towns and cities without obtaining a license therefor, a complaint for peddling without a license need not negative the fact that defendant was vending products of his own land. *State v. Bevin*, 41 Atl. 655, 70 Vt. 574.

#### ENACTMENT.

The term "enactment," although inapt to express the beginning of a period of time, may properly be construed to mean taking effect. In *re Hendricks*, 57 Pac. 965, 967, 60 Kan. 796.

#### ENAGENAR.

A term in the Spanish law which is defined in *Seoane's Neuman & Baret's Dictionary* by Valazquez as meaning "to alienate, to transfer, or to give away property." *Mulford v. Le Franc*, 26 Cal. 88, 105.

#### ENAGENACION.

A term used in the Spanish Law, and as defined by Eschriche, is "the act by which the property in a thing by lucrative title is transferred as a donation or by onerous title, as by sale or barter. This word, taken in a more extended sense, comprises also the enfiteusis (lease), the pledge, the mortgage, and even the creation of a servidumbre (servitude) on an estate. It follows, therefore, that a person who cannot alienate (enagenar) a thing can neither pledge nor hypothecate the same with servitudes (servidumbres)." In its most comprehensive sense, the meaning of the two words, "enagenacion" and "alienation," are as nearly identical as the signification of any two words in different languages are ordinarily found to be. Each word embraces in its most comprehensive

sense the transfer of every estate known to the law, from a fee simple to an estate at will or sufferance. *Mulford v. Le Franc*, 26 Cal. 88, 103.

#### ENCLOSURE.

See "Inclosure."

#### ENCOURAGE.

Under Civ. Code La. art. 2324, providing that one who causes another to do an unlawful act, or assists or encourages in the commission, is responsible in solido with that person for the damages caused by such act, officials or authorities who passively permit a wrongful act are included, though a strict meaning of the words "causes, assists, or encourages" might not under other circumstances include such failure to prevent. *Comitez v. Parkerson* (U. S.) 50 Fed. 170, 171.

In *True v. Commonwealth*, 14 S. W. 684, 90 Ky. 651, the words "encourage, aid, or abet, counsel, advise, or assist," were said to be words in appropriate use to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it to be done, and thereby becomes a principal or accessory. *Omer v. Commonwealth* (Tex.) 25 S. W. 994, 996.

Under Acts 1799, c. 8, § 2, declaring that any game or match of hazard or address for money or other valuable thing is gaming, the act of cockfighting for money or other valuable thing constitutes gaming. By the same act, all who encourage or promote any game, etc., are involved in the same guilt with the actors or betters. How could any one more effectually promote and encourage a match of this kind than by not only giving it countenance by his presence, but actually paying his money to support and sustain it? The preparations are made by the principal offenders; notice is given of the time and place; the public are called upon to attend and pay money for the privilege of participating in the enjoyment of the sport; and one who accepts the invitation, and contributes his money to the extent of the fee demanded, is actively and efficiently aiding, abetting, and encouraging the unlawful thing. *Johnson v. State*, 36 Tenn. (4 Sneed) 614, 621.

#### ENCROACHMENT.

Encroachment is the gradual entering on and taking possession by one of what is not his own—the unlawful gaining upon the rights or possessions of another. *Chase v. City of Oshkosh*, 51 N. W. 560, 562, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898.

#### On highway.

"An object is not an incumbrance in a highway unless it obstructs the use of the

way, while an encroachment is an unlawful gaining upon the rights or possessions of another, as where a man sets a fence beyond his line." *Bouv. Law Dict.* This is the meaning of the term in *Gen. St.* p. 151, c. 70, entitled, "The Incumbrances and Encroachments upon Highways." The Legislature, in passing such statutes, understood encroachments and incumbrances to be different evils, requiring different remedies. Thus the title furnishes evidence that the object of the statute was to preserve the limitations of the public right in the prevention of obstruction to travel. *State v. Kean*, 45 Atl. 256, 257, 69 N. H. 122, 48 L. R. A. 102.

An encroachment, in statutory sense, is a fixture which intrudes into or invades a highway, but does not necessarily prevent public travel; and, where a fence is in a highway, it is an encroachment. A man may willfully place a load of hay or a pile of wood in the middle of the street, and leave it there. This would not be an encroachment, but an obstruction, though room was left on either side for travelers to pass. *State v. Pomeroy*, 73 Wis. 664, 41 N. W. 726.

The fencing in or inclosing of a portion of a street or highway by a fence or wall, or the occupancy of it, would be an encroachment. *Chase v. City of Oshkosh*, 51 N. W. 560, 562, 81 Wis. 313, 15 L. R. A. 553, 29 Am. St. Rep. 898.

A worm rail fence, 5 feet in width, constructed with the middle of the worm on the line of a public road, thereby placing 2½ feet of the fence in the road, is an encroachment, within the meaning of *Rev. St. § 4715*, directing the supervisor of roads to remove all encroachments by fences or otherwise on public roads, etc., since, to be an encroachment, within the meaning of the act, does not necessarily require that the fence should also be an obstruction, in view of the words which follow the word "encroachments." *Barton v. Campbell*, 42 N. E. 698, 699, 54 Ohio St. 147.

The Michigan laws have always made a distinction between "cumbering and obstructing" a public way, and "encroaching" on it. The former term has been applied to impediments to travel, while the latter has embraced actual inclosure of a portion of the street by fences or walks, or occupation by building. An encroachment on the street may in one sense be said to cumber it, but, as the Legislature has never employed the two words as synonymous terms, a power to impose a penalty for cumbering or obstructing a street will not authorize a proceeding in the same manner as for encroachments. *City of Grand Rapids v. Hughes*, 15 Mich. 54, 57.

It is difficult to lay down any just rules by which to determine in any given case whether an object placed in a highway is an

obstruction, or only an encroachment. It may be safely said that an object or structure, to be an obstruction, need not necessarily be so as to stop travel on the highway. A man may willfully place a load of hay or a pile of wood in the middle of a street, and leave it there. This would not be an encroachment, within the statute, because it is not a fence, building, or other fixture, yet it would undoubtedly be an obstruction, although room was left on either side of it for travelers on the highway to pass; hence a barn occupying nearly one-half of a highway in a populous village, and impeding and interfering with travel, is an obstruction. *State v. Leaver*, 22 N. W. 576, 579, 62 Wis. 387.

"Encroachment," as used with regard to a highway or public way, means an actual inclosure of a portion of the street by fences and walks, or its occupation by buildings. The meaning of this word is entirely distinct from that of "obstruction," which is applied to an impediment to travel and passage placed in the open street, and tending to make its use more difficult and dangerous. *Gorham v. Withey*, 17 N. W. 272, 52 Mich. 50.

#### On land.

Any part of the roof or cornice of a building, or of a water spout, so constructed as to project beyond the division wall, and overhanging or overshadowing any part of the adjoining owner's premises, is an encroachment upon his property. *Pierce v. Lemon* (Del.) 2 Houst. 519, 523.

The erection of a bay window over the soil of another is a tort, for which an action lies, though the damage may be merely nominal. *Codman v. Evans*, 83 Mass. (1 Allen) 443, 447; *Id.*, 87 Mass. (5 Allen) 308, 81 Am. Dec. 748.

#### On park.

A building upon a public park is an encroachment. *City of Chicago v. Ward*, 48 N. E. 927, 933, 169 Ill. 392, 38 L. R. A. 849, 61 Am. St. Rep. 185.

#### On water course.

*Schenectady City Charter*, tit. 7, § 51, provides that the city council shall not remove encroachments from the natural water courses in the city until they have been established by a jury. Held, that the banks of a water course, with growing trees thereon, was an "encroachment," within the meaning of the charter, and that proceedings for their removal must be taken under title 7, § 51, of the charter. *City of Schenectady v. Furman*, 15 N. Y. Supp. 724, 726, 61 Hun, 171.

## ENCUMBRANCE.

See "Incumbrance (On Title)."

**END.**

See "To That End"; "West End."

"Ended" means final; definitive; complete; conclusive; and to say that a contract is ended is to say that it is abrogated in a final, conclusive way. *Bonsack Mach. Co. v. Woodrum*, 13 S. E. 994, 995, 88 Va. 512.

"End," as used in a tax judgment which is against an undivided third of the east end of each block, means the east half of the block. *Chiniquy v. People*, 78 Ill. 570, 575.

The word "end" is defined to be the extreme point of a line or anything that has more length than breadth. The end of a parallelogram is the line extending from one side line to the other at their extremities; and the width of the end is the length of such line. If the line connecting the extreme points of parallel side lines make an angle with one greater than that made with the other, as, for instance, one being 10 and the other 170 degrees, it might not be proper to regard this line the width of the end of the figure presented, or even as the end itself. In figures having side lines irregular and not parallel with each other, a line connecting them where they terminate may be the end, and its length the width of the end, or otherwise, according to the peculiar shape of each figure. Hence the words "end" and "width of the end," are not terms of greater precision, and the meaning of parties who may use them without any words in explanation may not always be apprehended with certainty. *Kennebec Ferry Co. v. Bradstreet*, 28 Me. 374, 377.

**Of voyage.**

The phrase "end of the voyage," when construed literally, means the arrival of the vessel, but as used in the following order, "Please pay William Bradford or his order \$24.90 at the end of my voyage in the Schooner Columbus on a fish voyage, if I make enough to pay, after taking out \$10.00 I now owe you," it refers to the time when the fish caught on such voyage are sold and converted into money. *Bradford v. Drew*, 46 Mass. (5 Metc.) 188, 190.

**Of will.**

Where the will of testator is commenced on the first and is formally concluded upon the third page of a folio of foolscap paper, and signed there, and a fourth page contains another testamentary provision, and what is written on the fourth page is by clear inference incorporated into the body of the will, though the signature is not at the end of the writing in point of space, yet the signature will appear at the end of the will in point of fact, within the statute providing that the

will shall be "signed at the end thereof." *Appeal of Baker*, 107 Pa. 381, 388, 52 Am. Rep. 478.

An instrument is signed at the end thereof when nothing intervenes between the instrument and the subscription. Accordingly, a codicil was signed by a subscribing witness at the end thereof, though there was a blank space of four inches between the signature of the testator and the commencement of the attestation clause. *In re Dayger* (N. Y.) 47 Hun, 127, 129.

2 Rev. St. p. 63, § 40, requiring the subscription to be at the end of the will, does not mean that the signature must not be after the attestation clause, as such clause constitutes no part of the will; but, if the testator chooses to insert the attestation clause before his signature, and thus make it a part of the will, it does not prevent his subscription from being at the end of the will. *Younger v. Duffie*, 94 N. Y. 535, 540, 46 Am. Rep. 156. The phrase "end of the will" is to be interpreted according to its plain and obvious sense, and means that the subscription and signature should be the concluding portion of the will. A will containing material provisions relative to testator's property after his signature and the signature of the witnesses is invalid. *In re O'Neill's Will*, 91 N. Y. 516, 520; *Id.*, 27 Hun, 180, 181.

A will written on the first and third pages of a sheet of paper, and signed at the end of the third page, in a device written on which page were interlined the words, "See next page," on which page—the fourth—was written an unsigned clause making a certain bequest, which interlineation was made by the testator's direction, is "signed at the end thereof," within the meaning of Act April 8, 1833, § 6, providing that every will, unless the person making same shall be prevented by the extremity of his last sickness, shall be signed at the end thereof, etc. *Appeal of Baker*, 107 Pa. 381, 388, 52 Am. Rep. 478.

Ky. St. c. 21, § 26, providing that, when the law requires any writing to be signed by a party thereto, he shall not be deemed to be a party thereto unless the signature be subscribed at the end or close of such writing, does not require that no words whatever shall follow the signature; but, where a date and the name of the place of making a will follow testator's signature, the statute was complied with, since neither the date nor place of making are a part of the will. *Flood v. Pragoff*, 79 Ky. 607, 614.

**Of year.**

Where a portion of the purchase price of a crop of prunes was to be paid when the crop was taken off "at the end of the year," such phrase meant the end of the fruit season, and not the end of the calendar year.



Brown v. Anderson, 19 Pac. 487, 488, 77 Cal. 236.

### END LINE.

End lines of a mining claim are not necessarily those appearing as end lines in the original plat of the claims, but, when a mining claim crosses the course of a lode or vein, instead of being along the vein or lode, the end lines are those which measure the width of the claim which crosses the lode. *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.*, 18 Sup. Ct. 895, 907, 171 U. S. 55, 43 L. Ed. 72; *Argentine Min. Co. v. Terrible Min. Co.*, 7 Sup. Ct. 1356, 1359, 122 U. S. 478, 30 L. Ed. 1140; *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 6 Sup. Ct. 1177, 1184, 118 U. S. 196, 30 L. Ed. 98; *Walrath v. Champion Min. Co.*, 18 Sup. Ct. 909, 914, 171 U. S. 293, 43 L. Ed. 170.

The statute of 1872 gives to locators of mining claims "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes and ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." These are their extralateral rights, which should neither be extended nor restricted by the courts. The only limit placed by the statute is that "their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines as marked on the ground are considered by the courts as the end lines of the location. *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* (U. S.) 63 Fed. 540, 549.

### END ON.

See "Meeting End on."

### ENDANGER.

See "Inhuman Treatment Endangering Life."

1 Wag. St. § 33, p. 430, provides that if any person shall be maimed, etc., or his life be endangered, by the act or culpable negligence of another in cases and under circumstances which would constitute murder or manslaughter if death had ensued, the person causing the act, etc., shall be punished, etc. Held, that by the words "his life be endangered" was not meant that the person should actually be injured. The words make it as much an offense to shoot at a man and miss him as to shoot at him and hit him. *State v. Agee*, 68 Mo. 264.

### ENDEAVOR.

"Endeavor" generally means to use efforts, to attempt, to try, to strive, etc., but, as used in a deed of property from parents to a son, who agreed to support and maintain them for the remainder of their natural lives, which provided that, "so long as second party is living and endeavoring to perform his part of the stipulations herein named, the said second party is not to be molested or dispossessed, but shall have and hold" the property free from any and all incumbrance, was meant to emphasize the duty already put on the son—to call him to fulfill, and demand full compliance—and not to destroy, lessen, and fritter away the main purpose of the deed on the grantors' part. *Goldsmith v. Goldsmith*, 33 S. E. 266, 267, 46 W. Va. 426.

### ENDEAVOR TO MAKE A REVOLT.

As to what will constitute an endeavor to make a revolt upon shipboard, within the meaning of the acts of Congress, it is said that mere insolent conduct, disobedience of orders, or even violence committed on the person of the master, unattended by other circumstances, will not amount to this offense, but that these acts must be coupled with an intent to subvert the authority of the master, and to displace him from his command, which intention is to be discovered from the expressions or the actions of the parties concerned, and from all the circumstances attending the transaction. A mere conspiracy of the crew to make a revolt will not amount to an endeavor to make it, unless it be followed up by some other acts tending to that end. Nor is concert among the crew to make a revolt an essential ingredient in constituting the offense. One or more daring individuals, depending for success on their courage and personal strength, or their popularity with the crew, etc., may, by destroying or confining the officers without concert of the crew, make a revolt,

and, of course, may endeavor to make one; the former including the latter. *United States v. Kelly* (U. S.) 26 Fed. Cas. 700, 701. See, also, *United States v. Haines* (U. S.) 26 Fed. Cas. 62, 64; *United States v. Huff* (U. S.) 13 Fed. 630, 635; *United States v. Savage* (U. S.) 27 Fed. Cas. 966.

Where a crew combine together to refuse to do duty, and actually refused until the master complies with some improper request, on their part, there is an endeavor to make a revolt, within the meaning of Act Cong. April 30, 1790, c. 9, § 12, 1 Stat. 115. *United States v. Gardner* (U. S.) 25 Fed. Cas. 1258.

A total refusal to perform any duty on board ship until the master has yielded to some illegal demand of the crew, when it has produced a compliance, or a suspension of his power to command, is a revolt, and any act or attempt or combination to produce such a result is an endeavor to make a revolt. *United States v. Haines* (U. S.) 26 Fed. Cas. 62, 64.

A combination by the crew to prevent the vessel from going to sea pursuant to the order of the master was an endeavor to make a revolt. *United States v. Nye* (U. S.) 27 Fed. Cas. 210, 211.

To constitute an endeavor to make a revolt, the attack on the master should be accompanied by some evidence, indicating on the part of the assailants an intention to take possession of the vessel. *United States v. Smith* (U. S.) 27 Fed. Cas. 1246, 1247.

## ENDORSE—ENDORSEMENT.

See "Indorse—Indorsement."

## ENDOW.

The articles of incorporation of a certain corporation provided as follows: "The object of this incorporation is to acquire and hold property in trust for the M. E. Church in the State of Oregon, and to endow, build up, and maintain an institution for educational purposes, and to confer all such honors, distinctions and degrees as are used in colleges," etc. It was held that "endow" means to induce the college with all the functions and capacities which such word imports; that is, to take and receive property or funds in all the various forms in which it may be donated for educational purposes. *Liggett v. Ladd*, 21 Pac. 133, 138, 17 Or. 89.

A trust deed of certain property, with directions to found and endow a certain institution at a cost of a certain sum, construed to be a direction to the trustees, and to mean that they shall expend the money for such purposes. *Floyd v. Rankin*, 24 Pac. 936, 939, 86 Cal. 159.

## As provision by dower.

"Endowed," in a statute providing that, when a widow dissents from the will of her husband, she may be endowed as if her husband died intestate, should not be construed as a technical term, and confined to the act of assigning dower. Webster and Richards define "endow" to mean to give; to bestow; to furnish with a portion of goods or estate; to settle on. The old marriage ceremony of England concluded with the words, "With all my worldly goods I thee endow." It is the word applied to the provision made or the fund set apart for the support of literary and charitable institutions. So the word is not limited to the technical sense of giving dower. It has a larger scope than that, and applies alike to the real and personal estate of the husband. *Gupton v. Gupton*, 40 Tenn. (3 Head) 488, 489.

In Comp. Laws, § 8935, providing that, if provision be made for a woman by her husband's will, she shall elect to take it, or be endowed by the lands of her husband, the word "endow" means a provision made by law by way of dower, and not that made by the statute of descent, giving the wife one-half of the husband's lands if he dies intestate. *Stearns v. Perrin*, 90 N. W. 297, 130 Mich. 456.

## ENDOWMENT.

The word "endowment," as used by a testatrix in making endowments to certain charitable organizations and churches, has no reference to building or providing a site for a building, but it supposes something already in existence at the time when the gift is made, or when the endowment is to take place. *Edwards v. Hall*, 35 Eng. Law & Eq. 433, 436.

"Endowment," as used in a statute exempting from taxation any endowment to a certain institution, means property or pecuniary means bestowed as a permanent fund. It is understood in common acceptance as a fund yielding income for the support of some institution. *Appeal of Wagner Institute*, 11 Atl. 402, 405, 116 Pa. 555.

In Laws 1866, p. 1079, § 5, exempting from taxation, first, certain real estate, namely, all colleges, academies, or seminaries of learning; second, certain goods and chattels, namely, the furniture thereof and the personal property used therein; and, third, the endowment or fund of any religious society, college, etc., the words "endowment or fund" are ejusdem generis, and comprehend a class of property different from the other two, not real estate or chattels; the "fund," as a general term, including the endowment, which is that particular fund or part of a fund of the institution bestowed for its more perma-

nent uses. *First Reformed Dutch Church of New Brunswick v. Lyon*, 32 N. J. Law (3 Vroom) 360, 361; *Nevin v. Krollman*, 28 N. J. Law (9 Vroom) 574.

**Endowment according to common right.**

Endowment according to common right, at common law, is the assignment by the sheriff to the widow as dower of a one-third part of each manor, or a one-third part of the arable meadow and the pasture land. *French v. Pratt*, 27 Me. 381, 392 (citing Co. Litt. 30b, 32b, 39b).

**Endowment against common right.**

Endowment against common right is the assignment of the widow's dower by the heir, he having the right to assign one manor in lieu of a third of three manors, and this assignment will be good if accepted by the widow. *French v. Pratt*, 27 Me. (14 Shep.) 381, 392 (citing Co. Litt. 30b, 32b, 39b).

**ENDOWMENT INSURANCE.**

An endowment policy of life insurance is one payable at a certain time at all events, or sooner if the party should die sooner, and the premiums on which are all to be paid within a certain limited time. *Carr v. Hamilton*, 9 Sup. Ct. 295, 129 U. S. 252, 32 L. Ed. 669.

A form of insurance known as "endowment insurance" is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated. *State v. Federal Investment Co.*, 48 Minn. 110, 111, 50 N. W. 1028; *Union Cent. Life Ins. Co. v. Woods*, 37 N. E. 180, 181, 11 Ind. App. 335.

An endowment policy is an insurance in to which enters the element of life. In one respect it is a contract payable in the event of continuance of life; in another, in the event of death before the period specified. *And. Law Dict.* 401; *Union Cent. Life Ins. Co. v. Woods*, 37 N. E. 180, 181, 11 Ind. App. 335.

"In *Cooke, Ins.* § 107, it is said: 'Sometimes the contract to pay on the death of the insured is conjoined with a contract to pay on the expiration of a fixed period, should he live so long. Such a contract is called a "contract of endowment insurance," though, so far as concerns the contract to pay on the expiration of a fixed period, it is not, strictly speaking, a contract of life insurance at all.' *Joyce*, in his work on Life Insurance, said that 'endowment insurance' was an insurance payable at the expiration of a fixed period." *State v. Orear*, 45 S. W. 1081, 1084, 144 Mo. 157.

Laws 1869, Act 104, *How. Ann. St. c.* 118, § 1, authorized not less than five persons to incorporate to secure to the family

or heirs of a member on his death a certain sum of money by assessment on the members, or to secure in the same manner a certain sum weekly or monthly to a member disabled by sickness or otherwise. Held, that a fraternal beneficiary association organized under such act was not authorized to conduct endowment insurance business. *Walker v. Giddings*, 103 Mich. 344, 347, 61 N. W. 512.

**ENEMY.**

See "Alien Enemy"; "Public Enemy."

An enemy is he with whom a nation is at war, and the term "enemy," as used in a marine insurance policy insuring against perils by enemy, means public enemies, or those with whom the body of a nation is at war. *Monongahela Ins. Co. v. Chester*, 43 Pa. 491, 493.

On a declaration of war between the United States and Great Britain, every American citizen and every British subject resident in their respective countries become by the declaration enemies to each other. *Griswold v. Waddington* (N. Y.) 16 Johns. 438, 447.

By the law of nations, an enemy is defined to be "one with whom a nation is at open war." When the sovereign ruler of a state declares war against another sovereign, it is understood the whole nation declares war against that other nation. All the subjects of one are enemies to all the subjects of the other, and during the existence of the war they continue enemies, in whatever country they may happen to be, "and all persons residing within the territory occupied by the belligerents, although they are in fact foreigners, are liable to be treated as enemies." *Grinnan v. Edwards*, 21 W. Va. 347, 357 (quoting *Vatt. Law. Nat. bk. 3, c. 5, §§ 69-71*).

**Rebels.**

"Enemies," as used in *Const. U. S. art. 3, § 3*, defining "treason," means subjects of a foreign power which is in a state of open hostility with the United States, and the term does not embrace rebels in insurrection against their own government. *United States v. Greathouse* (U. S.) 26 Fed. Cas. 18, 22.

As the term "enemies" is used in speaking of the enemies of a nation engaged in a civil war, it includes all persons residing within the territory in forcible possession of the insurgents, "whose property may be used to increase the revenues of the hostile power, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors." *In re Prize Cases*, 67 U. S. (2 Black) 635, 674, 17 L. Ed. 459.

**ENEMY'S PROPERTY.**

"Enemy's property" is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law. The general rule is that in war the citizens or subjects of the belligerents are enemies to each other, without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership. And by the law of prize, property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences. *The Benito Estenger*, 20 Sup. Ct. 489, 490, 176 U. S. 568, 44 L. Ed. 592.

By the general law of prize, property engaged in an illegal intercourse with the enemy is deemed enemy property. It is of no consequence whether it belong to an ally or to a citizen; the illegal traffic stamps it with the hostile character, and attaches to it all the penal consequences of enemy ownership. *The Sally*, 12 U. S. (8 Cranch) 382, 3 L. Ed. 597.

**Property of rebels.**

"Enemy's property," as the term is used in the rule that enemy's property on the high seas is subject to capture, includes the property of persons residing within that portion of the nation in a state of civil war, in which the persons in insurrection reside, and in which the forces of the nation cannot go without the exercise of force. "Whether property be liable to capture, as enemy's property, does not in any manner depend on the personal allegiance of the owner." In *re Prize Cases*, 67 U. S. (2 Black) 635, 674, 17 L. Ed. 459.

Within the law relating to captures, an enemy's property is that property owned by a public enemy, and would include property owned by the Confederates in the late Civil War. *Taylor v. Jenkins*, 24 Ark. 337, 339, 88 Am. Dec. 773.

**ENERET.**

The word "eneret" is a Danish word, and means monopoly. *Atlas Glass Co. v. Simmonds Mfg. Co.* (U. S.) 102 Fed. 338, 342; *Id.* (U. S.) 102 Fed. 643, 647, 42 C. C. A. 554.

**ENFEOFF.**

The words "enfeoff or grant" are sufficient words in a deed to create feoffment. *Perry v. Price*, 1 Mo. 553, 555.

Lord Eldon, in *Browning v. Wright*, 2 Bos. & P. 21, said the words "enfeoffed,

granted, bargained, sold, and confirmed" certainly import a covenant in law. It seems now to be settled that in conveyances by deeds of bargain and sale they have no such effect, but, on the creation of an estate less than freehold, a covenant of title is implied from the words of leasing. *Phillips v. City of Hudson*, 81 N. J. Law (2 Vroom) 143, 151.

**ENFITENSIS.**

"Enfitensis" is the Spanish term meaning lease. *Mulford v. Le Franc*, 26 Cal. 88, 103.

**ENFORCE.**

"Enforce" means to put in execution, to cause to take effect; and an order to a defendant not served with summons to show cause why he should not be bound by the judgment is causing it to take effect. *Ticknor v. Kennedy* (N. Y.) 3 Abb. Prac. (N. S.) 337.

A statute providing that no process shall be enforced against a person in the military service of the United States is comprehensive enough to include all forms of execution, as well as original and meane process. The word "enforce" implies execution of process, and would scarcely apply to any other. There is nothing in the nature of a mortgage to exempt it from the law. *Breitenbach v. Bush*, 44 Pa. (8 Wright) 313, 320, 84 Am. Dec. 442.

"Enforced," as used in Code, § 136, subd. 1, providing that a judgment may be entered against persons jointly liable on a contract, though process is only served against one of such defendants, and that the judgment may be enforced against the joint property of all, and the separate property of the defendants served, embraces all the legal means of collecting a judgment. It includes proceedings supplemental to execution. *Emery v. Emery* (N. Y.) 9 How. Prac. 130, 132.

Sess. Laws 1865, p. 124, § 28, makes it the duty of the state's attorneys of the several judicial circuits to "enforce the collection of fines, forfeitures, and penalties" imposed or incurred in the courts of record in their several counties, etc. Held, that the power thus conferred to enforce the collection of all fines, forfeitures, and penalties includes the right to receive and give receipts therefor that shall operate as a full discharge to the party paying the same, and also includes the right to receive the amount of any judgment that may have been rendered for any such fine, forfeiture, and penalty, and to execute an acquittance therefor. *People v. Christer-son*, 59 Ill. 157, 158.

2 Rev. St. (1st Ed.) 220, defining the powers of the surrogate courts, and authorizing

them to enforce the payment of debts, does not confer authority to adjudicate on the existence of a demand made against the state by one claiming to be a creditor, though the words used would seem to imply such a meaning. *Wilson v. Baptist Education Soc.* (N. Y.) 10 Barb. 308, 316.

### ENFORCEABLE TRUST.

"By an enforceable trust is meant one in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them, and, in case such demand is refused, may sue the trustee in a court of equity and compel compliance with the demand." *Tilden v. Green*, 28 N. E. 880, 889, 130 N. Y. 29, 14 L. R. A. 33, 27 Am. St. Rep. 487.

### ENGAGE.

See "Actually Engaged"; "Wholly Engaged."

A newsboy engaged in selling papers, and permitted to pass in and out of the cars of a passenger railway company on such business, is "engaged" within the meaning of Act April 4, 1868, providing that any person engaged or employed on or about the roads, depot, premises, or cars of a railroad company, not being a passenger or employé, shall only have such right of action and recovery against the company for personal injuries as would exist if such person were an employé. *Philadelphia Traction Co. v. Orbann*, 12 Atl. 816, 818, 119 Pa. 337.

The word "engaged" shall be construed to include either "sworn" or "affirmed." Pub. St. R. I. 1882, p. 77, c. 24, § 10.

#### As actually doing an act.

A statute imposing a license tax on any person engaging in or carrying on the business of keeping a theater meant an actual use or management of a theater; and hence one who had a hall which he intended to use as a theater, but in which no performance had ever been given, was not within the statute. *Gillman v. State*, 55 Ala. 248, 250.

A vessel is not engaged in killing seal, within section 1956, Rev. St., unless she is used or employed in the actual killing of the seal, and actual preparation or intention on the part of her owners so to employ her is not sufficient to constitute the offense if for any reason no seal are killed. *The Ocean Spray* (U. S.) 18 Fed. Cas. 558, 559.

Webster defines "engage" as "to embark; to devote attention and effort." A vessel equipped for hunting sea otter, and cruising in Alaskan waters for that purpose, is engaged in killing seal within Rev. St. § 1956, although the animals have to be captured by boats sent out often to considerable distances

from the vessel. *The Alexander* (U. S.) 60 Fed. 914, 917.

#### As bind by contract or promise.

As used in the term, "I engaged the plaintiff" to do certain work, the word "engaged" means agreed with or bound by contract. *Martin v. Martin* (Wis.) 3 Pin. 272, 3 Chand. 303.

A contract by a person that "I engage to my son the farm on which he lives" is equivalent to saying, "I promise him the farm," or "I promise that he shall have the farm"—not a lease of the farm, not a part of it, not a qualified interest in it, but the farm itself. *Rue v. Rue*, 21 N. J. Law (1 Zab.) 369, 375.

#### As carry on or transact.

"Engaged," as used in an ordinance requiring the procurement of a license by one engaged in the kind of business specified in St. 1893, p. 358, authorizing the licensing of certain kinds of business transacted and carried on, is synonymous with "transacted and carried on." It is difficult to conceive of one being engaged in a business who does not transact and carry it on, and it is equally difficult to picture one transacting and carrying on a business who is not engaged in it. *Inyo County v. Erro*, 119 Cal. 119, 51 Pac. 32, 33.

"Engage in," as used in an indictment charging that defendant engaged in business without a license, though not identical with the words of the statute prohibiting any person from carrying on or conducting any such business without a license, are equivalent to those used in the statute. "To engage in" means to embark; to take part; to employ one's self; to enlist. The definitions of the words used in the indictment substantially mean the same thing as the words "carry on and conduct," used in the statute. *Roberts v. State*, 26 Fla. 360, 362, 7 South. 861.

#### As interested.

An indictment charged that defendant had willfully and fraudulently and intentionally engaged in the manufacture and sale of liquors, etc. Held, that "engaged," as so used, did not necessarily mean the same as "interested," within the meaning of the statute which makes it unlawful to be interested in the manufacture and sale of spirituous liquor. The word "engaged" might apply to a common laborer in a brewery, or to an engineer running a distillery, yet the party would be in no way interested in the manufacture of liquor. *People v. Gregg*, 13 N. Y. Supp. 114, 116, 59 Hun, 107.

#### As occasional or single act.

In an application for life insurance, reciting that the applicant was not engaged in

the sale of alcoholic beverages, "engaged" means occupied, and does not relate to an occasional act outside of a regular employment. A servant in an hotel, who was occasionally called upon to serve liquor to guests, was not engaged in the sale of alcoholic beverages, within the meaning of the application. *Gullitnan v. Metropolitan Life Ins. Co.*, 38 Atl. 315, 316, 69 Vt. 469.

Rev. Code, § 3614, forbidding any one to engage in shooting on the Sabbath, does not mean that the shooting should be repeated, but one act is a violation of the statute. *Smith v. State*, 50 Ala. 159.

"Engage or carry on business," as used in Revenue Law, § 105, declaring it unlawful for any person to engage in or carry on any business for which a license is required, without first obtaining and paying for such license, signifies that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit, and it is not necessary that it should be the sole, exclusive business or occupation; and, while the doing of a single act pertaining to a particular business will not be considered as engaging in or carrying on a business, yet a series of such acts would be so considered. *Harris v. State*, 50 Ala. 127, 130.

A contract whereby the owner of a lumber yard sold his lumber, stock, etc., to another person, and agreed "that I will not engage in the lumber business directly or indirectly at said W.," etc., would include engaging his services to or in assisting a rival dealer in the same business, or soliciting and making sales, or influencing buyers who generally bought at that place; but it would not include mere isolated acts which do not tend to interfere with the other party's business, or occasional services voluntarily rendered for the convenience or accommodation of another in good faith, nor would it include subordinate employment not affecting the management or control of the business, or directly influencing custom. *Nelson v. Johnson*, 36 N. W. 868, 869, 38 Minn. 255.

"Engage in," as used in a city ordinance providing that any person who shall engage in any business for which a license is required, without first taking out such license, shall be fined, etc., implies that the action is continuous, so that, where it is alleged that a person engaged in a business requiring a license, he is subject to but one penalty, and not to a separate penalty for each and every day during which he allowed the tax to remain unpaid. *Nashville, C. & St. L. Ry. v. City of Attalla*, 24 South. 450, 451, 118 Ala. 362.

Act March 11, 1881, imposing an annual tax on persons engaged in the business of selling spirituous liquors, does not mean a simple selling of liquors, so that a person

could be convicted of a violation of the statute by proof of a single sale, but means a selling, engaged in as a regular occupation or business. *La Norris v. State*, 13 Tex. App. 33, 43, 44 Am. Rep. 699.

#### As to pursue for profit or livelihood.

Code 1876, § 4227, making it a misdemeanor to engage in or carry on any business for which a license is required, without first having obtained such license, means to pursue such business for profit or as a means of livelihood; and whether it is one's sole business, or auxiliary to some other vocation, is entirely immaterial. *Grant v. State*, 73 Ala. 13, 14.

#### Engaged in agriculture or farming.

The phrase "engaged in agriculture," as used in Thomp. & S. Code, § 2109a, which exempts certain property to the head of a family engaged in agriculture, means a person engaged in raising cereals and stock, which are produced on an extended scale for market. It does not include a butcher and day laborer who lives on a one-acre lot, and cultivates it as a garden. *Simons v. Lovell*, 54 Tenn. (7 Helsk.) 510, 515.

A person engaged chiefly in farming, within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], is one whose chief occupation or business is farming; and one's chief occupation and business, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for a livelihood, or as the means of acquiring wealth, great or small. In re *Mackey* (U. S.) 110 Fed. 355, 6 Am. Bankr. Rep. 577.

The owner of a farm upon which he resides, but who has leased the same for a year for a rental, is not engaged in farming, and may be adjudged an involuntary bankrupt. In re *Matson* (U. S.) 123 Fed. 743.

The expression "persons engaged chiefly in farming," as used in Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], exempting from liability to adjudication for involuntary bankruptcy "persons engaged chiefly in farming, or the tillage of the soil," is not modified by the phrase "or the tillage of the soil"; and hence a person whose principal occupation is raising cattle and hogs for the market, his farm being devoted chiefly to use as pasture land, and for raising grass and hay and corn wherewith to feed and fatten the stock, is a farmer, though not a tiller of the soil. In re *Thompson* (U. S.) 102 Fed. 287, 4 Am. Bankr. Rep. 340.

### Engaged in business.

See, also, "Carry on Business."

As doing business, see "Doing Business."

A complaint in a slander suit, alleging that plaintiff is engaged in the woodenware business, means that he is a buyer and seller of woodenware, and not that he is only a turner of wooden bowls. *Carpenter v. Dennis*, 5 N. Y. Super. Ct. (3 Sandf.) 305, 306.

"Being engaged in the retail liquor business," within the meaning of Rev. St. § 3242 [U. S. Comp. St. 1901, p. 2094], inflicting penalties on one for being engaged in the retail liquor business without a license, characterizes the procuring of spirituous liquor with the intent to sell it again in small quantities to any person who may apply for it, or a present determination by one having liquor on hand to sell it to any one who may apply for it. *United States v. Rennecke* (U. S.) 28 Fed. 847, 848.

The words "engaged in the business of selling spirituous liquors," in an instruction in a prosecution for retailing liquor without a license, required of persons selling liquor in quantities of one quart and less than five gallons, does not characterize a selling of liquor, unless in the prescribed quantities. *Halfin v. State*, 18 Tex. App. 410, 413.

"Engaging in or pursuing the occupation of selling liquors," which is taxable under the statutes, does not characterize the act of making one sale of intoxicating liquors. *Merritt v. State*, 19 Tex. App. 435, 436.

"Engaged in the business or employment of keeping a tenpin alley," as used in a statute providing that persons engaged in the business or employment of keeping a tenpin alley should take out a license therefor, or be subjected to a fine, is not equivalent to "keeping a tenpin alley," as used in an indictment charging a violation of the statute. One may keep a tenpin alley for the amusement of himself or his family without being engaged in keeping it as a business or avocation. *Eubanks v. State*, 17 Ala. 181, 183.

Under Code, § 3190, declaring that no contract of a minor can be disaffirmed where, by reason of the minor's having engaged in business as an adult, the other party had good reason to believe him capable of contracting, it is held that the term "engaged in business" should be construed as signifying an employment or occupation which occupied the minor's time for the purpose of a livelihood or profit; and hence evidence that a minor was employed as a farm laborer at a stipulated price per year, and while so engaged he purchased certain lots, was insufficient to show that he was engaged in business, so as to preclude him from rescinding such purchase. *Beickler v. Guenther*, 98 N. W. 895, 896, 121 Iowa, 419.

### Engaged in labor.

See "Labor."

### Engaged in navigation.

The term "engaged in commerce or navigation," within the meaning of the rule that, in order to authorize salvage, there must be a service rendered to a vessel, etc., engaged in commerce or navigation, does not apply to a dismantled steamboat which has been fitted up as a saloon and hotel; and therefore salvage cannot be recovered for services in assisting the boat from the shore, where she had grounded while she was being towed from one place to another. *The Hendrick Hudson* (U. S.) 11 Fed. Cas. 1085, 1086.

### ENGAGEMENT.

A statute making a special partner who fails to pay the amount of capital agreed to be paid by him in cash liable for all engagements thereof, as general partners, is to be construed as meaning the engagements of the partnership as long as it has a legal existence. *Haviland v. Chace* (N. Y.) 89 Barb. 283, 287.

### Contract of marriage.

Ord. 1787, art. 2, declaring that no law ought ever to be made or have force in the territory southwest of the Ohio river that shall in any manner whatsoever interfere with or affect private contracts or engagements bona fide and without fraud previously formed, cannot be construed to apply to the contract of marriage. The article is intended to forbid the passage of laws which would impair rights of property vested under private contracts or engagements, and has no more compass than the word "contracts," in the Constitution, forbidding the passage of laws impairing the obligation of contracts. *Maynard v. Valentine*, 8 Pac. 195, 202, 2 Wash. T. 8.

### Policy of insurance.

"Engagement," as used in the charter of an insurance company, providing that any policy or engagement signed by the president and attested by the secretary shall be valid, and bind the corporation, without the presence of the board of directors, provided, however, that no policy or engagement entered into by the corporation should be transferable, negotiable, or assignable unless the consent of the corporation shall have been previously obtained and indorsed in writing, should be construed as synonymous with "policy"; and it would be a very strained construction of the term to suppose that it meant a bank note, so as to permit the company to engage in banking, for such is not the usual and ordinary acceptance of the term "engagement." *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 358, 384, 8 Am. Dec. 243.

**ENGINE.**

See "Fire Engine"; "Traction Engine"; "Steam Farm Engine."

The word "engine" is defined as an ingenious or skillful contrivance used to effect a purpose, and is often synonymous with the word "machine." Within such definition, an electric passenger elevator is an engine. *Lefler v. Forsberg*, 1 App. D. C. 86, 41.

The term "engine," as used in pleadings in an action against a railroad company for negligently setting fire to property adjoining its track, was construed in a colloquial, and not in a technical, sense—intended to describe the locomotive engine or machine which drew the cars—and referred to the entire machine. *Brown v. Benson*, 29 S. E. 215, 217, 101 Ga. 753.

**ENGINE HOUSE.**

A place where locomotive engines are kept is commonly known, understood, and designated as an "engine house" or "roundhouse," and there is no common use which would designate such a place as an "engine room." *Kincaid v. People*, 139 Ill. 218, 217, 28 N. E. 1060, 1061.

**ENGINE ROOM.**

As building, see "Building (In Criminal Law)."

The room or compartment in a mill, factory, or other building where stationary engines are placed is in common usage called an "engine room"—meaning thereby a room in or attached to a building in which the engine is situated or operated—and does not apply to an engine house or roundhouse, where locomotive engines are kept. *Kincaid v. People*, 139 Ill. 218, 217, 28 N. E. 1060, 1061.

**ENGINEER.**

See "Cadet Engineers"; "City Engineer"; "Mechanical Engineer"; "Conductor."

The term "engineer," in Act Cong. July 7, 1838, § 12, providing that every captain, engineer, pilot, etc., employed on any steamboat propelled by steam, whose mistake, negligence, or inattention to duties causes the destruction of the life of any person on board such vessel, shall be deemed guilty of manslaughter, etc., means the individual who acts as engineer. If he assumes to perform the important duties of an engineer without the proper qualifications, his ignorance is no excuse, but rather an aggravation of his offense. *United States v. Taylor* (U. S.) 28 Fed. Cas. 25, 30.

The term "engineer," as used in a contract for work done on a railroad, providing

that the engineer should be the sole judge of the quality and quantity of the work, means the engineer having charge of the section, who is called the "resident engineer," and not the "chief engineer," for the chief engineer never does and never can make these estimates, or even verify those made by others. *Herrick v. Belknap's Estate*, 27 Vt. (1 Williams) 673, 679.

As agent, employé, or laborer.

See "Agent"; "Employé"; "Laborer."

As locomotive engineer.

"Engineer," when used in connection with railroads, is employed to designate the party in charge of the locomotive. Webster defines an "engineer" as one who manages an engine. *Whitehouse v. Grand Trunk R. Co.* (U. S.) 29 Fed. Cas. 1033, 1035.

The word "engineer" is defined in the Century Dictionary as an engine driver; one who manages an engine; a person who has charge of an engine and its connected machinery. As used in New Jersey Corporation Act, § 88, authorizing service to be made upon foreign corporations by serving any officer or engineer, etc., thereof, must be given its usual and commonplace meaning, and hence includes a railroad locomotive driver. *Devere v. Delaware, L. & W. R. Co.* (U. S.) 60 Fed. 886, 887.

In construing a statute providing that "every railroad corporation shall be liable for damages sustained by any employé thereof without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yardmaster, conductor, or engineer, or of any other employé who has charge or control of any stationary signal, target point, block or switch," the court said: "There were at the time of the enactment, and had been for a long period of years theretofore, and have been subsequently, in railroad service everywhere, in this country, as a matter of common knowledge, officers known as 'superintendents,' in the operating department of the road, general superintendents of the whole line, and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. Now, it must be presumed that the Legislature used the word as it was commonly used; that they had in mind the officers of railroads to whom the term was generally applied. The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer. It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or of a bridge crew, because he merely conducts or manages the work, or that it can be applied to any other



conductor than the one who manages the railroad train, and yet the act does not say 'train conductor.' It could not be sincerely claimed that the word 'engineer' can be applied to the engineer who locates tracks and does engineering work of that kind, or who runs some little stationary pumping engine, or to any one of many other persons connected with railroad service that might properly be called 'engineers,' and yet the act does not say 'locomotive engineer.' And the same illustration might be given in respect to each of the persons specifically named in the act. It may thus be clearly seen that to apply the word 'superintendent' to the mere foreman of a repair shop would be entirely inconsistent with the obvious purpose of the act." *Hartford v. Northern Pac. R. Co.*, 64 N. W. 1033, 1034, 91 Wis. 374.

### ENGINEER IN CHARGE.

A contract by a railroad company with the plaintiff, as contractor, to do certain bridge masonry, provided that the plaintiff, "for and in consideration of the covenants, stipulations, and agreements hereinafter mentioned, promises and agrees to execute, construct, and finish, in every respect, in the most workmanlike manner and to the satisfaction and acceptance of the engineer or engineers in charge of the defendant railroad company, all the masonry work required to be done," etc. Another clause of the contract gave the defendant railroad the right at any time, in case the force employed on the work mentioned in the contract should be considered by the engineer in charge of the railroad as inadequate to complete any portion of such work within the time specified, to employ such additional force as he might consider requisite. Held, that the words "engineers in charge," in the first clause, should be construed in connection with the second clause, and that such words meant the engineer or engineers in charge of the defendant railroad. It would seem that the engineer in charge of the railroad company was the one who was to direct the method of the doing of this work, and it is to his satisfaction and acceptance that the work is to be done. *Reilly v. Lee*, 16 N. Y. Supp. 313, 317, 61 Hun, 627.

### ENGINEERING PURPOSE.

Sp. Laws 1864, c. 1, authorizing the building of a railroad up a certain valley on its present located line, except so far as might be necessary to change the same for engineering purposes in coming up said valley, means a purpose of constructing the road on that route in coming up the valley, on which it can be built, operated, or kept in repair in the best, cheapest, and safest manner. *McRoberts v. Southern Minn. R. Co.*, 18 Minn. 108, 120 (Gil. 91, 105).

## ENGLISH.

### Abbreviations, initials, figures, etc.

"English words," as used in Act Feb. 10, 1818, requiring a physician to deliver his account or bill of particulars in plain English words, or as nearly so as the articles will admit, cannot be construed to include contractions, initials, and symbols. They are not words, or, at any rate, are not English words. *Hedges' Ex'rs v. Boyle*, 7 N. J. Law (2 Halst.) 63, 71.

Figures and initials to represent the year, as "A. D. 1830," are a part of the English language, within the meaning of statutes requiring judicial proceedings to be in the English language. *State v. Hodgden*, 3 Vt. 481, 485.

The signs of degrees (°) and minutes (′), used in stating the courses in describing a highway, are no part of the English language, within a statute requiring pleadings to be drawn in the English language. *State v. Town of Jericho*, 40 Vt. 121, 122, 94 Am. Dec. 387.

It will be going too far to assert that the Arabic numerical figures in universal use are not for some purposes a part of the English language. For similar purposes they are also a part of most other languages throughout the civilized world, and how far a mark, point, or other sign prefixed or added to the figures to show the application and sense of the number expressed should also be recognized as English language must depend much on usage and custom. The usual marks expressive of dollars and cents, when applied by general and long practice, as in stating accounts and the like, may to that extent be treated as part of our language by adoption and use. But the term "English language," in the statute requiring declarations and other pleadings to be drawn in the English language, does not include the marks commonly used to denote dollars and cents; and therefore a declaration in assumpsit upon a promissory note in which the amount of the note is only expressed in figures, to which the dollar mark is prefixed, is insufficient. *Clark v. Stoughton*, 18 Vt. 50, 51, 44 Am. Dec. 361.

### Latin terms.

It was argued in support of a demurrer to a plea in abatement that the plea was not wholly in the English language; that "vs." stands for "versus," and that "versus" is not an English word; that the plea should have been entitled, "Smith against Butler." But "vs." and "versus" have been too long used in legal practice, and their meaning is too well understood, to be open to the objection stated. They have, in fact, become ingrafted upon the English language, at least so far as they are used in this

country in legal proceedings. Their meaning is well understood, and their use quite as appropriate as the word "against" could be. *Smith v. Butler*, 25 N. H. (5 Fost.) 521, 522.

Under Rev. St. c. 182, § 1, providing that "all writs, declarations, processes, indictments, answers, pleadings, and entries in the courts and before justices shall be in the English language and no other" a plea which has "actio non" in the place where it is usually said, "The plaintiff his action ought not to maintain," will not be rejected because those words are not English, but they will be regarded as merely insensible and rejected. *Berry v. Osborn*, 28 N. H. (8 Fost.) 279, 287.

### ENGLISH EDUCATION.

An English education is one acquired through the medium of the English language, and mathematics and geography and geology and other sciences are no more a part of an English education than they are of a German education. *Powell v. Board of Education*, 97 Ill. 375, 381, 37 Am. Rep. 123.

### ENGRAVING.

"Engraving," as used in Copyright Act Feb. 3, 1831, 4 Stat. 436, § 1, providing that any person who shall invent, design, etch, engrave, work, or cause to be engraved, etched, or worked, any print or engraving, shall have the sole right of printing, reprinting, publishing, and defending such print, cut, or engraving, means an engraved plate—an impression from an engraved plate. *Wood v. Abbott* (U. S.) 30 Fed. Cas. 424, 425.

The copyright act of June 18, 1874 (18 Stat. c. 301, p. 79 [U. S. Comp. St. 1901, p. 3412]), declares that the words "print, cut, and engraving" shall be applied only to pictorial illustrations, or works connected with the fine arts. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 733, 140 U. S. 428, 35 L. Ed. 470.

"Engraving," being defined as the art of producing on hard material incised or raised patterns, characters, lines, and the like, or an impression from an engraved plate, block of wood, or other material, is not identical with printing, which is the art of impressing letters, characters, or figures on paper or cloth, so that a contract for engraving is not governed by a statute regulating public printing. In re *American Bank Note Co.*, 58 N. Y. Supp. 375, 376.

The words "print" and "engraving," as used in 4 Stat. 436, providing that a person inventing any "print or engraving," etc., shall have the right of reprinting, etc., such cut or engraving for the term of 28 years, are synonymous. *Wood v. Abbott* (U. S.) 30 Fed. Cas. 424, 425.

### ENHANCED IN VALUE.

As used in statutes providing that, in estimating the value of real estate for the purpose of the widow's dower therein, its value at the time it was aliened shall be taken, when such real estate shall have enhanced in value after alienation, "enhanced in value" applies to improvements made by the alienees, and not to an increase in value arising from the gradual increase of prosperity in the country. *Butler v. Fitzgerald*, 61 N. W. 640, 644, 43 Neb. 192, 27 L. R. A. 252, 47 Am. St. Rep. 741 (citing *Thornburn v. Doscher* [U. S.] 32 Fed. 810, 812; *Allen v. McCoy*, 8 Ohio [8 Ham.] 418; *McClannahan v. Porter*, 10 Mo. 746; *Summers v. Babb*, 13 Ill. [3 Peck] 483; *Thompson v. Morrow* [Pa.] 5 Serg. & R. 289, 9 Am. Dec. 358; *Powell v. Monson & Brimfield Mfg. Co.*, 19 Fed. Cas. 1218).

### ENJOIN.

"Enjoin" is a mandatory word, in legal parlance, always; in common parlance, usually. *Clifford v. Stewart*, 49 Atl. 52, 55, 96 Me. 38.

"Enjoin," according to Webster and Johnson, means to order or direct with urgency; to instruct with authority; to command. *Lawrence v. Cooke* (N. Y.) 32 Hun, 126, 129.

Where a testator's will recited, "I enjoin upon her to make provision for such grandchild out of my residuary estate as may be expedient to the welfare of said grandchild," the word "enjoin" amounted to a command, and not merely to a hope, wish, desire, or recommendation. *Lawrence v. Cooke* (N. Y.) 32 Hun, 126, 134.

### ENJOY.

Const. art. 1, § 1, which reads as follows: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty," does not mean that a person shall enjoy life or liberty in an unregulated manner and according to his uncontrolled will, but in such a manner as the general welfare of the community may require him to observe. *Ex parte Smith*, 38 Cal. 702, 705.

Act April 11, 1848, declaring that property which accrues to a married woman shall be owned, used, and enjoyed by her as her separate property, means such use and enjoyment as are consistent with the nature and kind of property. A store of liquors and cigars cannot be used and enjoyed in the same manner as household furniture or a dwelling house. They are merchandise, and it is the nature of merchandise to be sold

and exchanged. When, therefore, the statute authorizes married women to own, use, and enjoy merchandise as their separate property, it legalizes trade by them. It makes them merchants. *Wierman v. Anderson*, 42 Pa. (6 Wright) 311, 317.

In a will giving personal property to testator's daughter, and providing that, in case she should die without issue, the property willed and bequeathed to her should be given to another daughter, to be enjoyed by her and her heirs forever, the words "to be enjoyed by her" do not show that the gift was intended as a personal bequest. *Chism's Adm'r v. Williams*, 29 Mo. 288, 292.

"Enjoy," as used in a will providing that testator's wife should hold, use, occupy, and enjoy his entire estate, both real and personal, as he had done before, and to care for his children in the same way, during her natural life, means that she is to have the benefit of it, and devote it, as her husband had done in his lifetime, in caring for herself and children. *Rountree v. Dixon*, 11 S. E. 158, 159, 105 N. C. 850.

"Enjoyed," as used in a will devising land which is being enjoyed by a certain person, must be construed to be a term of general description, and is sometimes held as any benefit which has been possessed by the occupier of the premises devised. *Fetters v. Humphreys*, 19 N. J. Eq. (4 C. E. Green) 471, 479.

A gift or bequest to a married woman after marriage, directing "that she shall enjoy and receive the issues and profits," excludes the marital rights of the husband, and the property will be for her exclusive use. *Clark v. Maguire*, 16 Mo. 302, 314 (citing *Story*, Eq. § 1382).

#### ENJOYMENT.

See "Adverse Enjoyment"; "Natural Use and Enjoyment"; "Personal Enjoyment."

"Enjoyment," as used in a complaint to foreclose a mechanic's lien, that the realty was necessary for the convenient use and enjoyment of the building, is equivalent to occupation, within the meaning of the statute. *Ward v. Crane*, 50 Pac. 839, 841, 118 Cal. 676.

Const. art. 9, providing that a homestead, to the extent of 160 acres of land, shall be exempt from forced sale under any process of law, and that this exemption shall accrue to the heirs of the party having "enjoyed or taken the benefit of such exemption," means any one who has owned and occupied the land with his family, whether he has or has not been threatened with execu-

tions or other process, since the enjoyment of a homestead consists in the use and occupation of it with his family. *Baker v. State*, 17 Fla. 406, 408.

#### ENJOYMENT AS OF RIGHT.

The words "enjoyed by any person claiming right," applied to easements in St. 2 & 3 Wm. IV, c. 71, § 2, and the words "enjoyment thereof as of right," in section 5, means an enjoyment had not secretly, or by stealth, or by tacit sufferings, or by permission asked from time to time, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use, without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription, an adverse user, or by deed, or shall have been merely lawful, so far as to excuse a trespass. *Tickle v. Brown*, 4 Adol. & E. 369.

Enjoyment of an easement as of right for 20 years next before the commencement of a suit, within 2 & 3 Wm. IV, c. 71, means a continuous enjoyment, for the 20 years before the commencement of the suit, of the easement as an easement. "Enjoyment as of right" would appear to be properly put in contradistinction to "enjoyment under leave granted." *Onley v. Gardiner*, 4 Mees. & W. 496, 499; *Battishill v. Reed*, 18 C. B. 696.

#### ENLARGE.

By the term "enlarge any of the slips in the city," as used in a statute permitting the officers of a city, when they think it for the public good, to enlarge any of the slips in the city, is doubtless intended as well their extension into the river as their widening. The former mode, rather than the latter, was contemplated. The gradual filling up of the slips from accumulation of filth within them and the growth of the city around them would naturally lead to their enlargement by extension into the river, in preference to widening them. *Marshall v. Vultee* (N. Y.) 1 E. D. Smith, 294, 306.

As used in Act March 17, 1869, declaring that any railroad, canal, or slack-water navigation company might widen, enlarge, or otherwise improve its line of railroad, "widen or enlarge" cannot be construed to include the widening of the gauge of a railroad, though in their general sense the words are sufficient to include it, for they are used in connection with the lines of the railroad, canals, and slack-water navigation company, which, as to railroads, means its right of way. *Western New York & P. Ry. Co. v. Buffalo, R. & P. Ry. Co.*, 44 Atl. 242, 244, 193 Pa. 127.

## ENLIST—ENLISTMENT.

Persons enlisted for the navy, see "Navy."

"Enlistment" is a technical word derived from Great Britain, with a technical meaning, and in the English it is defined to be a voluntary acknowledgment to serve as a private soldier for a certain number of years. Chambers defines it as the mode by which the English army is supplied with troops, as distinguished from the conscription prevailing in many other countries. The term "enlistment," as it is used in the United States army, refers to a voluntary entering of the army by men ordinarily known as "common soldiers." *Babbitt v. United States* (U. S.) 16 Ct. Cl. 202, 213.

"The act of making a contract to serve the government in a subordinate capacity, either in the army or navy." Bouv. "To enlist is to enroll for military service." *Erichson v. Beach*, 40 Conn. 283, 286.

The word "enlist," in England, whence we brought it, as well as in the American states, means not merely to enroll the name, but to sign a written contract of military service, made on the part of the government by the recording officer. *Franklin Beneficial Ass'n v. Commonwealth*, 10 Pa. (10 Barr) 357, 360.

"Enlist," in the laws, as in common usage, may signify either the complete fact of entering into the military service, or the first step taken by the recruit towards that end. *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480, 485.

Act Cong. 1855, c. 136, § 11, 10 Stat. 628, making it an offense to entice a seaman who is enlisted, does not mean one who has passed the examination at the naval rendezvous, merely, and has not been examined and passed on the receiving ship. *United States v. Thompson* (U. S.) 28 Fed. Cas. 101.

The act of "volunteering or enlisting," contemplated by section 20, c. 63, Gen. St., includes the whole transaction by which a person not before in the military service would get into it, and would embrace the muster of the recruit, as well as the signing of the contract and enlistment by him. *Wood v. Town of Springfield*, 43 Vt. 617, 624.

An "enlistment" is not a contract, only, but effects a change of status, and is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardian. *Morrissey v. Perry*, 187 U. S. 157, 160, 11 Sup. Ct. 57, 34 L. Ed. 644, 645.

"Enlisted," as used in St. 1864, c. 103, § 2, authorizing the raising of money to pay, and refunding money already paid, "for each

volunteer already enlisted," means a person who was mustered and received into the military service of the United States. *Barker v. Inhabitants of Chesterfield*, 102 Mass. 127, 130.

The words "enlisted men," as used in the act relating to the militia, includes noncommissioned officers, musicians, or privates, unless otherwise expressed or implied. Pub. St. N. H. 1901, p. 331, c. 59, § 131.

### Cadets.

The term "enlisted men," in Act Cong. June 18, 1878, c. 263, 20 Stat. 150 [U. S. Comp. St. 1901, p. 884], providing that all officers of the army who have served as officers in the volunteer force during the war of the Rebellion, or have enlisted themselves in the armies of the United States, "shall be and are hereby credited with the full time they shall have served as such officers and such enlisted men, in computing their services for longevity pay," refers only to certain classes of enlisted men, including Indian scouts and hospital stewards, and does not include cadets at West Point. *Babbitt v. United States* (U. S.) 16 Ct. Cl. 202, 213.

### Commissioned officers.

"Enlistments," as used in a statute authorizing towns to raise money to encourage enlistments in the army, is limited in its reference to rank and file, and does not embrace one who enters the service under a commission as an officer. *Hilliard v. Town of Stewartstown*, 48 N. H. 280, 281.

### Drafted men.

By the term "enlisted" is meant any one whose name is duly entered upon the military roles, and it applies to those who are drafted as well as to those who volunteer. *Inhabitants of Otis v. Inhabitants of Sheffield*, 107 Mass. 282, 284.

## ENORMOUS.

"Enormous" as a word of richer, deeper color than the word "great," and it is used in an instruction that the party is not compelled to flee from his adversary who assaults him, but, before he can justify the homicide, the assault must be so fierce as to not allow the party assailed to yield without manifest danger to his life or enormous bodily harm, has a tendency to lead the jury to believe that something more than great bodily harm must be apparent, and is therefore erroneous. *McDonald v. State*, 14 S. W. 487, 89 Tenn. (5 Pickle) 161; *Ritchey v. People*, 47 Pac. 272, 274, 23 Colo. 314.

## ENROLLED—ENROLLMENT.

The words "enrollment, registry, or record," in a statute making it criminal to de-

face any registry or record, are not confined to records of courts of justice. Every registry or enrollment directed by law, and preserved for the use of the public, is embraced by this act of Assembly. It extends, without doubt, to the public books in the land office. *Ream v. Commonwealth* (Pa.) 3 Serg. & R. 207, 209.

#### Of vessel.

Act Dec. 31, 1792, and Act July 18, 1793, authorizing foreign vessels wrecked and repaired in the United States to be registered or enrolled, applies to vessels engaged in coasting and home trade. Vessels engaged in the foreign trade are registered, and those engaged in the coasting trade and home trade are enrolled, and the words "registered" and "enrolled" are used to distinguish the certificates granted to those two classes of vessels. *United States v. Leetzel*, 70 U. S. (3 Wall.) 566, 18 L. Ed. 67.

#### ENROLLED BILL.

When a bill which has been introduced into the Legislature has been finally passed by both houses, signed by the officers of each, signed by the Governor, and filed away by the Secretary of State as the highest evidence of what the law is, it is called an "enrolled bill." It is then the embodiment of the act—the law—that finally passed the Legislature. *Sedgwick County Com'rs v. Bailey*, 13 Kan. 600, 608.

#### ENSUING.

Under a charter authorizing inhabitants of a town to vote for township officers at their annual town meeting, and to vote for sheriff for the "ensuing year," such words do not mean only the year following the passage of the act, but the year following each annual town meeting. *Chase v. State*, 20 N. J. Law (Spencer) 218, 219.

"Ensuing year," as used in Laws 1867, c. 75 (Tayl. Rev. St. c. 13, § 62), providing that the county board of supervisors may at the annual meeting in November determine the amount of the annual salary that should be received by the county treasurer, who was to be elected in the county during the ensuing year, should be construed to apply to the officer elected the same calendar year, and not to the one to be chosen the next year after the salary is fixed. *Hull v. Winnebago County*, 11 N. W. 486, 487, 54 Wis. 291.

#### ENTER—ENTRY.

See "Book Entries"; "False Entry"; "Fraudulent Entry"; "Special Entry"; "Vague Entry."

Gen. St. p. 2689, par. 221, authorizing cities to make contracts with railroad com-

panies whose roads enter their corporate limits, should be construed to apply to railroads which are located in a city, even though they do not extend beyond the city limits. *Morris & Cummings Dredging Co. v. City of Jersey City*, 46 Atl. 609, 610, 64 N. J. Law, 587.

A life policy providing that there should be no liability for deaths from injuries received while "entering, attempting to enter, leaving, or attempting to leave" a public conveyance means the act of getting on or getting off the train, or attempting to do so, and in passing from one part of the conveyance to another. *Sawtelle v. Railway Pass. Assur. Co.* (U. S.) 21 Fed. Cas. 555, 556.

In reference to a vessel reaching port, the words "arrive" and "enter" are not synonymous, as there may be an arrival without an actual entry or an attempt to enter a port. An arrival within a port cannot be without an entry into the port. *United States v. Open Boat* (U. S.) 27 Fed. Cas. 346, 351.

#### ENTER—ENTRY (In Commercial Law).

"An entry is a setting down in writing." *Bissell v. Beckwith*, 32 Conn. 509, 517.

The word "entries," when used in reference to books of account, reports, and statements, means the act of making or entering a record—that is to say, the act of making a record of the fact of the transaction—but as used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], providing that every president, director, etc., of every national banking association, who shall make a false entry in any book, report, or statement of the association, with the intent to injure or defraud the association, etc., is used to denote the result of the act, rather than the act itself. It signifies that which is written, be it words or figures; and, if that which is written misrepresents the facts or the transaction which it was intended to authenticate, then it is a false entry, within the meaning of the statute. Thus an entry is made notwithstanding that a previous entry is altered, so that one is guilty who erases one or more figures from a number already written in a book of account, and writes others in lieu thereof. *United States v. Crecilius* (U. S.) 34 Fed. 30, 31.

#### Letter.

Act 1850 provides that, in suits by or against the representatives of deceased persons, the entries and written memoranda of the deceased relative to the matter in issue may be received as evidence. In a suit involving the meaning of this provision, it was contended that the terms "entries" and "memoranda" have attached to them by usage an established technical, legal, or mercantile import, and that letters, as such,

never come within the meaning of the expressions. The court said that it was obvious that so narrow a construction would in many cases, at least, defeat the ends of the statute, and that the definitions in the best dictionaries do not require it; that to "enter" is to set down in writing, and an entry is a setting down in writing, while a memorandum is a note to help the memory, a memorial, a record—thus including a letter. *Bissell v. Beckwith*, 32 Conn. 509, 517.

#### ENTER-ENTRY (In Criminal Law).

Where a statute employs the words "breaks into and enters," borrowed from the common-law definition of "burglary," they must be received with the signification and understood in the sense given them at common law. "There must, in general," says Blackstone, "be an actual breaking, not a mere legal clausum fregit (by leaping over invisible, ideal boundaries, which may constitute a civil trespass), but a substantial and forcible eruption." The degree of force or violence which may be used is not of importance. It may be very slight. The lifting the latch of a door, the picking of a lock or opening with a key, the removal of a pane of glass, and, indeed, the displacement or unloosing of any fastening which the owner has provided as a security to the house, is a breaking—an actual breaking—within the meaning of the term as employed in the definition of burglary at common law, and as is employed in the statute. In *Hughes' Case*, 1 Leach, 406, the prisoner had bored a hole with a centerbit through the panel of the house door, near to one of the bolts by which it is fastened, and some pieces of the broken panel were found within sight of the threshold of the door; but it did not appear that any instrument, except the point of the centerbit, or that any part of the prisoner's body, had been inside of the house, or that the aperture made was large enough to admit a man's hand. The court was of the opinion that there was a sufficient breaking, but not such an entry as would constitute the offense. The boring of the hole through the floor of the crib was a sufficient breaking, but with it there must have been an entry. Proof of a breaking, though it may be with an intent to steal, or with intent to commit a felony, is proof of one only of the facts making up the offense, and is as insufficient as proof of an entry through an open door without breaking. If the hand or any part of the body is intruded within the house, the entry is complete. The entry may also be completed by the intrusion of a tool or instrument within the house, though no part of the body be introduced. Thus, "if A. breaks the house of B. in the nighttime, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook or other engine, to reach out goods, or puts a pistol in at the window, with an intent to kill, though his hand be not within the win-

dow, this is burglary." 1 Hale, P. C. 555. When no part of the body is introduced—when the only entry is of a tool or instrument introduced by the force and agency of the party accused—the inquiry is whether the tool or instrument was employed solely for the purpose of breaking, and thereby effecting an entry, or whether it was employed not only to break and enter, but also to aid in the consummation of the criminal intent, and its capacity to aid in such consummation. Until there is a breaking and entering, the offense is not consummated. The offense rests largely in intention, and, though there may be sufficient evidence of an attempt to commit it, which of itself is a crime, the attempt may be abandoned—of it there may be repentance, before the consummation of the offense intended. The breaking may be at one time, and the entry at another. The breaking may be complete, and yet an entry never effected. From whatever cause an entry is not effected, burglary has not been committed. When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. *Walker v. State*, 63 Ala. 49, 51, 35 Am. Rep. 1.

In cases of burglary, where one and the same instrument is used for purpose of breaking and for the purpose of committing an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building, and was used in committing the ulterior offense, without showing that the accused entered in person. Thus the use of an auger in boring a hole into a bin through the wall of a granary, by which the grain is taken from the granary, constitutes an entry. *State v. Crawford*, 80 N. W. 193, 194, 8 N. D. 539, 46 L. R. A. 312, 73 Am. St. Rep. 772.

It is not burglary to enter into a house through a door or window which a man finds open, or through a hole which was made there before, and steal goods, or, where one draws goods of a house through such door, window, or hole, he is not guilty of burglary. If a man leaves his door or window open, it is his own folly and negligence, and, if a man enters therein, it is not burglary. *Pines v. State*, 50 Ala. 153, 154.

"Entering," as used in the definition of "burglary," defining that crime to be the breaking and entering of a dwelling house in the nighttime, with intent to commit a felony therein, means an entering of the dwelling with the hand, foot, or some instrument which is intended to commit a felony. *State v. McCall*, 4 Ala. 643, 644, 39 Am. Dec. 314.

"Entering," as used in the statute defining "burglary," means the making of any

opening in a building or place where goods are kept, in the nighttime, and by which the defendant, or any part of his body, is enabled to enter the building; and, therefore, if, in the operation of making practicable an opening through the wall of a building in the nighttime, he thrusts his arm or hand through for the purpose of removing bricks, plastering, or rubbish of any kind, in order to enlarge the opening and make it more safe or convenient for use, it would be a breaking and entering in the nighttime, within the statute. *Commonwealth v. Glover*, 111 Mass. 395, 402.

The provision of the Code that an entry in burglary is not confined to the entrance of the whole body extends the meaning of the word so as to embrace acts where there is an entry of any part of the body, provided it is with the intention to commit a felony. *Franco v. State*, 42 Tex. 276, 280; *Burke v. State*, 5 Tex. App. 74, 79.

The word "enter," as used in defining burglary, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, and used or intended to be used to threaten or intimidate the inmates, or to detach or remove property. *Gen. St. Minn.* 1894, § 6682. The word "enter," as used in the chapter of the Penal Code defining and punishing burglary, includes the entrance of the offender into such building or apartment, or the insertion therein of any part of his body, or any instrument or weapon held in his hand, and used or intended to be used to threaten or intimidate the inmates, or to detach or remove property. *Pen. Code N. Y.* 1903, § 601.

The "entry" into a house, within the meaning of the term as used in the article defining "burglary," includes every kind of entry but one made by the free consent of the occupant, or of one authorized to give such consent. It is not necessary that there should be any actual breaking, to constitute the offense of burglary, except when the entry is made in the daytime. The entry is not confined to the entry of the whole body. It may consist of the entry of any part for the purpose of committing a felony, or it may be constituted by the discharge of firearms or other deadly missile into the house with intent to injure any person therein, or it may be constituted by the introduction of any instrument for the purpose of taking from the house any personal property, although no part of the body of the offender should be introduced. *Pen. Code Tex.* 1895, arts. 840, 841.

#### ENTER-ENTRY (In Practice).

Mr. Anderson gives, as one of the definitions of "entry," recording, in due form and

order, a thing done in the court. *State v. Lamm*, 9 S. D. 418-420, 69 N. W. 592.

"Entry," as a matter of record, is the act of setting down or causing to be set down in writing; recording or causing to be recorded in due form. *Citing Abb. Law Dict.* 420. To enter a paper on a public journal or record is to inscribe, to enroll, or to record it. *Thomason v. Ruggles*, 11 Pac. 20, 25, 69 Cal. 465.

#### In legislative journal.

"Entered," as used in Const. art. 10, § 1, providing that a proposed amendment to the Constitution, agreed to by a majority of the members elected to each of the two houses, shall be entered on their journals, means that it should be spread at length on the journals, and not that the title or other descriptive words only should be written. *Koehler v. Hill*, 15 N. W. 609, 626, 60 Iowa, 543.

Const. art. 18, § 1, declaring that proposed amendments to the Constitution shall be entered in the journals of each house after the requisite vote in favor of them, means any identifying reference, and does not require them to be copied in full. *Oakland Pav. Co. v. Tompkins*, 12 Pac. 801, 802, 72 Cal. 5, 1 Am. St. Rep. 17. *CONTRA*, see *Thomason v. Ruggles*, 11 Pac. 20, 25, 69 Cal. 465.

The words "entered in," as used in Const. art. 18, § 1, declaring that, if any amendment be proposed in the Senate and Assembly, and two-thirds of the members of each house shall vote in favor thereof, such amendment shall be entered in their journals, are to have their natural and ordinary meaning. The word "entered" must be construed in connection with the preposition "in" and "their journals." Whatever meaning we may attribute to the word "enter" or "entry," taken by itself, in arriving at its meaning here we cannot disassociate it from the words used with it. It requires that the vote be entered in writing in the journals of the two houses. *Oakland Pav. Co. v. Hilton*, 11 Pac. 3, 9, 69 Cal. 479.

#### Of appearance.

The act of Congress declaring that where the defendant, at the time of entering his appearance in the said court, files a petition for removal to the next United States Circuit Court to be held in the district where the suit is pending, that state court shall accept the surety and proceed no further, means such action as amounts to an entry of appearance as interpreted by the state court. *Cooley v. Lawrence*, 12 N. Y. Super. Ct. (5 Duer) 605, 610.

#### Of arraignment.

Entry of arraignment is the record of the defendant's appearance in court for the

purpose of being tried, and is necessary only when he must appear in person. *Lynch v. Commonwealth*, 88 Pa. 189, 193, 32 Am. Rep. 445.

#### Of foreclosure.

In a fire insurance policy insuring the mortgagor of a chattel, to be void if the title to the property be transferred or changed, the provision that the entry of a foreclosure of mortgage shall be deemed an alienation of the property means any act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the insured of all right and title in the chattel unless he shall pay the debt—such as the giving and recording under the statutes of notice of intention to foreclose the mortgage for breach of its condition. The words "entry of a foreclosure" are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. *McIntire v. Norwich Fire Ins. Co.*, 102 Mass. 230, 231, 3 Am. Rep. 458.

#### Of judgment.

Entry of judgment is the act of placing the judgment rendered on record. *Blatchford v. Newberry*, 100 Ill. 484, 491.

"The entry of a judgment is a ministerial act, which consists in spreading upon the record a statement of the final conclusion reached by the court in the matter, thus furnishing external and incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action." *Winstead v. Evans* (Tex.) 83 S. W. 580; *Burns v. Skelton*, 68 S. W. 527, 29 Tex. Civ. App. 453; *Columbus Waterworks v. City of Columbus*, 26 Pac. 1046, 1049, 46 Kan. 666; *Martin v. Pifer*, 96 Ind. 245, 248.

Under Code, § 810, no lien is created by judgment before it is entered, and such judgment is entered when the clerk has complied with the statute requiring him to keep among the records of the court a book for the entry of judgments, and providing that judgments shall be entered in the judgment book. *Reid v. McGowan*, 28 S. C. 74, 79, 5 S. E. 215.

The entry of a judgment is merely evidence that the judgment has been rendered, and is purely a ministerial act. *State v. Brown*, 72 Pac. 86, 87, 81 Wash. 397, 62 L. R. A. 974.

District court rule 71 provides that, on the entry of the judgment in all cases on a bond or stipulation filed with the clerk for the appraised or agreed value of any property liable in this court, the clerk shall receive, in addition to the amount of the bond, interest at a certain rate per annum for the time which shall intervene between the entry of the judgment, or date of the stipula-

tion, and the date when the money shall be paid into court. Held, that the words "entry of judgment" should be construed to mean entry of the judgment or decree on the stipulation; and not the entry of the main decree in the cause. *The Belle* (U. S.) 3 Fed. Cas. 128, 129.

"Entering up such judgment," as used in Comp. St. div. 5, § 1237, providing that creditors shall be allowed interest on any judgment rendered before any court or magistrate authorized to enter up the same within the territory from the day of entering up such judgment until satisfaction of the same, means the time which is finally fixed by the courts, and allows interest on a judgment entered *nunc pro tunc* from the day on which the judgment is to be considered as entered, and not the day on which it is actually entered. *Barber v. Briscoe*, 23 Pac. 726, 727, 9 Mont. 341.

The term "entering" is used, rather than the term "rendering," to apply to judgments by confession, under statutes authorizing judgments by confession in vacation, through the agency of the clerk, in which there is no judicial determination of a controversy. *Schuster v. Rader*, 22 Pac. 505, 506, 18 Colo. 829.

"Enter judgment," written by a judge on the papers in confession proceedings that have been submitted to the court for inspection and judgment, indicate clearly that the court has considered the matter, and intends by these words to render a judgment for the amount confessed in the *cognovit*, and such memorandum fully authorizes the spreading on the record by the clerk of the whole and formal judgment ordered. *Jasper v. Schlesinger*, 22 Ill. App. 637, 641.

A judgment is a judgment when it is rendered. The entering makes a record of the judgment which the court has rendered. *Parrott v. Kane*, 85 Pac. 243, 244, 14 Mont. 23.

#### Same—Rendering.

"Entered," as used in a statute requiring a judgment to be entered in the judgment book, includes the giving of the judgment by the court, and a direction to enter it, as well as the entry of it in the judgment book. *Livingston v. Hammer*, 20 N. Y. Super. Ct. (7 Bosw.) 670, 676.

Within the meaning of the Code, providing for an appeal to be taken to the General Term from a judgment entered the judgment is not to be considered as entered until it is perfected. It is not the rule in the minutes made at the Special Term from which the party appeals, but the judgment entered in the judgment book and perfected. *Bentley v. Jones* (N. Y.) 3 Code Rep. 37, 38.



It is true that the two words, "rendered" and "entered," in their strict sense, bear a clear difference in meaning and intent. Giving to these words such signification, a judgment may be said to be rendered by a declaration from the bench, but to enter it requires the act of the clerk in writing it upon the journal. It is true, also, that for some purposes a judgment may be regarded as rendered so soon as it is pronounced. In order to create a judgment lien upon the lands of a judgment debtor as of the first day of the term at which a judgment against such debtor is rendered, under favor of Rev. St. § 5375, providing that such lands and tenements within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which judgment is rendered, the judgment must not only be pronounced during the term, but an entry of such judgment must be made on the journal during the term. *Coe v. Erb*, 52 N. E. 640, 641, 59 Ohio St. 259, 69 Am. St. Rep. 764.

The use of the word "entered" in Code, § 114, speaking of judgments being entered, was construed, in view of other sections of the Code, showing that the Legislature drew a marked distinction between the rendition of a judgment and its entry, as not to refer to the rendition of the judgment. *McClain v. Davis*, 16 S. E. 629, 630, 37 W. Va. 330, 18 L. R. A. 634.

To enter is to make a record, and not merely to announce. Webster says it is the act of committing to writing, or of recording in a book. To take an order or a judgment is not to enter it. Either may be taken, and never entered. Such is the meaning of the word used in Comp. Laws, § 5049, providing that exceptions to the giving or refusing of instructions may be taken at any time before the entry of final judgment. *Uhe v. Chicago, M. & St. P. Ry. Co.*, 57 N. W. 484, 485, 4 S. D. 505.

There is a clear distinction between the making or rendering of a judgment and the entry. The judgment is made or rendered when the court announces it or signs the judgment, as is the common practice, and returns the signed judgment to the counsel, while the entry of a judgment is merely evidence that a judgment has been rendered, and is purely a ministerial act. *Barthrop v. Tucker*, 70 Pac. 120, 121, 29 Wash. 666.

The rendition of a judgment and the entry of such judgment are different and distinct from each other. The former is the act of the court, while the latter is the act of the clerk of the court. *Vigo County v. City of Terre Haute*, 46 N. E. 350, 351, 147 Ind. 134 (citing *Smith v. State*, 71 Ind. 250; *Chamberlain v. City of Evansville*, 77 Ind. 542, 548, et seq.; *Chissom v. Barbour*, 100

Ind. 1; *Mayer v. Haggerty*, 138 Ind. 628, 38 N. E. 42).

Entry of judgment differs from the rendition of judgment, which is a judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. *Winstead v. Evans* (Tex.) 33 S. W. 580; *Martin v. Pifer*, 96 Ind. 245, 248; *Parrott v. Kane*, 35 Pac. 243, 244, 14 Mont. 23.

#### Of record.

Rev. St. 1887, § 2274, providing that in cases of adoption the probate judge shall enter of record in the records of his office the fact of such application and consent, with his approval of such agreement and adoption, is satisfied by the entry of such fact on loose sheets of paper retained in the office of the judge as part of the records of such office. *Nugent v. Powell*, 33 Pac. 23, 25, 4 Wyo. 173, 20 L. R. A. 199, 62 Am. St. Rep. 17.

"Entered of record," as used in Rev. Code, § 3295, requiring a recognizance to be entered of record, means writing it upon the record of the court. *Waldron v. Duckerson*, 2 N. W. 1088, 1091, 52 Iowa, 171.

"Enter," as used in Code, § 5491, providing that the clerk of the lower court in which the remittitur is entered shall docket the case immediately after the other cases then pending in his court which stand for trial at the term above fixed, means "filed" or "duly deposited" and does not mean that the remittitur must be spread upon the minutes before the clerk proceeds to docket the case. *Knox v. State*, 39 S. E. 330, 331, 113 Ga. 929.

Section 397 of the Code makes it the duty of the sheriff to keep a docket of executions placed in his hands, the date of their delivery, and his acts and rulings thereon. Code, § 2863, makes a judgment dormant if no entry be made thereon for seven years. Held, that anything that, transferred upon the docket, will show the execution to be a living thing, will constitute an entry, and that therefore an entry on an execution, "Received this fi. fa. of D. for collection," dated and signed by the sheriff, is a sufficient entry to prevent the dormancy of a judgment. *Hatcher v. Gammell*, 49 Ga. 576, 578.

The entry of an order by the clerk in pursuance of Rev. St. § 742, subd. 4, making it the duty of the clerk to keep a minute book, in which he is required to enter a brief statement of all proceedings had in open court, showing all motions and orders made, constitutes the entry from which the time of taking an appeal is computed, and not the subsequent time when the order is entered at length on the records by the clerk. *Uren v. Walsh*, 14 N. W. 902, 904, 57 Wis. 98.

**Same-Attaching.**

An assignment of errors pasted to the transcript is entered on the record, within the meaning of the Code. *Moore v. Hammons*, 21 N. E. 1111, 119 Ind. 510.

"Entering on docket," as used in 2 Rev. St. 1876, p. 632, § 84, providing that a judgment debtor may have stay of execution by entering replevin bail on the docket of the justice, means to write the undertaking upon the docket as other judgments are written upon it or recorded. To write the undertaking on a separate piece of paper, and attaching it to the docket by pinning thereto, is not entering it upon the docket, within the meaning of the statute. *Lockwood v. Dills*, 74 Ind. 56, 60.

**Same-Filing.**

"Entering of record" and "filing" are not synonymous terms. They always convey distinct ideas. "Entering of record" uniformly means writing, while "filing," which originally signified placing papers in order on a thread or wire for safe-keeping, in this country, and at the present day, means agreeably to our practice, depositing them in due order in the proper office. *Naylor v. Moody* (Ind.) 2 Blackf. 247, 248.

The words "entered" and "entry" are frequently used as synonymous with "recorded" in the law books. All through the statutes, Codes, and rules the word "filing" describes the indorsement on a paper of the date when left in a public office, not for record, but for safe-keeping. The word "entry" or "entered" describes the duty of a public officer when something more is required than filing. When we speak of entering a satisfaction of judgment, we mean that the satisfaction piece or execution is filed, and the appropriate words written in the docket, indicating that it has been paid. Thus a complaint alleging that an order had been entered is a sufficient allegation that it had been recorded. *Lent v. New York & M. Ry. Co.*, 29 N. E. 988, 989, 130 N. Y. 504.

Under Comp. Laws, § 5215, providing that an appeal must be taken by serving a notice in writing on the clerk of the court in which the judgment is entered, and section 5236, providing that, for the purposes of an appeal from an order, either party may require the order to be entered by the clerk of record, and it shall be entered accordingly, it was contended that "enter of record" means that it shall be filed and placed among the papers on file in the case. It was held that there was, however, a marked distinction between entering a paper of record and filing the same. "Entry" is defined as recording in due form and order a thing done in court, while "filed" is defined as receiving a paper into custody, and giving it a place among other papers. The terms "entered" and

"filed" frequently occur in the statute, but they are never used as synonymous terms. And hence an appeal does not lie until the order or judgment has been entered as a permanent record in the court below, and not merely filed. *State v. Lamm*, 69 N. W. 592, 9 S. D. 418.

**Of suit.**

Compulsory Arbitration Law 1810, authorizing either party to a civil suit to take a rule of reference at any time after "entry of such suit," means the time when the suit is placed on the prothonotary's docket. *Hertzog v. Ellis* (Pa.) 3 Binn. 209, 212; *Fehr v. Reich*, 36 Pa. (12 Casey) 472, 474.

**ENTER-ENTRY (In Real Property Law).**

See "Open and Peaceable Entry"; "Unlawful Entry"; "Forcible Entry and Detainer."

Entry, at common law, is nothing more than an assertion of title by going on the land, or, if that was hazardous, by making a continual claim. Anciently an actual entry was required to be made, and a lease executed on the land, to sustain an action of ejectment, but now nothing of that kind is necessary. Entry and the lease, as well as an ouster, are fictions. Nothing is required but that the lessor should have the right to enter. A proceeding precisely analogous obtained in the civil law. *Innerarity v. Mims' Heirs*, 1 Ala. 660, 674.

"Entry" signifies that remedy which the common law gives to the paramount owner of real property to redress without legal process the injury which he sustained when wrongfully deprived of the possession thereof by one having no right thereto. *Riley v. People*, 29 Ill. App. 139, 142; *Ft. Dearborn Lodge, I. O. O. F., v. Klein*, 8 N. E. 272, 279, 115 Ill. 177, 56 Am. Rep. 133.

"Entry" is defined to be the act of going on land, or doing something equivalent, with the intention of asserting a right in the land. *Johnson v. Cobb*, 29 S. C. 372, 380, 7 S. E. 601, 605.

"Entry," in regard to estates and rights, as defined by Bouvier, is taking possession of lands by the legal owner, and an entry by a husband on the lands of his wife on her death is rendered lawful because he is the legal owner of the land for the time being. *Guion v. Anderson*, 27 Tenn. (8 Humph.) 298, 306.

Under a statute providing that, if a widow does not make "an entry on lands to be assigned to her for her dower" within one year after her husband's death, she shall be held to have renounced a bequest in lieu of dower, some positive, unequivocal act an-

nouncing her determination to make an election is necessary. The mere continuance in occupation of land of which her husband died possessed is not such entry. *In re Nagel*, 12 N. Y. Supp. 707, 708.

An entry into land is one of that large class of acts in which the intention with which they are performed is the material element that gives them their legal force and character. The pursuit of game, the usual cutting of trees, or gathering of herbage, wild fruits, and the like, furnish no presumption that the entry is made for the purpose of taking possession—in the first place, because they are not exclusive in their character, and may well consist with like enjoyment of the land by others; and, in the second place, because there is nothing in such proceedings that indicates the limits of the country embraced in the occupation. But it is otherwise where one enters under a deed which defines his claim, or where one, by a fence, attempts to exclude others, or where, by the particular use which he makes of the land, he indicates with precision the extent to which he proposes to enjoy it to the exclusion of others. *Moore v. Hodgdon*, 18 N. H. 144, 149.

#### In eminent domain proceedings.

The expressions, "to enter upon and use land," "to secure grants of right of way," "to secure other privileges," in a statute requiring a canal board, before ceasing work, to proceed along the line and procure releases for necessary lands and materials, which releases shall operate so as to vest in said state a full and complete right to enter upon, use, and take the same at any and all times, and authorizing the board, in consideration of any privileges granted by individuals to the state of a right of way, to contract with said individuals, on behalf of the state, to erect on said canal any bridge or bridges for the benefit of such individual and the public, all indicate an easement, and not a fee simple absolute, and therefore the board has power to contract for an easement. *Indianapolis Water Co. v. Kingan & Co.*, 58 N. E. 715, 718, 155 Ind. 476.

"Enter upon, take possession, occupy or use," as used in Laws 1857, Ex. Sess. p. 3, § 13, authorizing a railroad company created by such law to apply for the appointment of commissioners to appraise lands which it may "enter upon, take possession, occupy, or use" for any of the purposes for which the company is authorized to enter upon, take possession, occupy, or use lands, are used to designate acts which will amount to an appropriation to the use of the company of the property in question. To constitute an entry and taking which will amount to such appropriation the land must be entered on for the purpose of construction of a rail-

road thereon by an entry which will involve and require the taking and keeping by the company of the possession and occupation thereof; or if, in any case, not of the permanent, actual possession, yet of the use thereof to the exclusion of the owner. A strip of land required for a roadbed might well be deemed to be taken when it was staked out or cross-sectioned. Entry thereon for such a purpose would involve, in carrying out the work, an exclusive possession. *Hursh v. First Division of St. Paul & P. R. Co.*, 17 Minn. 439, 443 (Gil. 417, 421).

"Enter upon, take, and use," as used in an act incorporating a canal company, and authorizing it to "enter upon, take possession of, and use" lands and real estate necessary for the conducting of its business, means to enter upon, take, and use such real estate for a time not exceeding the corporate existence of the company. "The property being taken for public use, when that use ceases it must revert to the owner of the same, from whom it was taken, and relieved of the burden or easement which the sovereign power has imposed." *McCombs v. Stewart*, 40 Ohio St. 647, 654.

#### In trespass.

The entering which constitutes a trespass on real estate is simply a lifting of a rail; simply a lifting of anything or removing anything that is erected to inclose the premises; an entry through anything put there to keep persons out, as breaking the glass, like breaking into a house. *McCusker v. Mitchell*, 86 Atl. 1123, 1124, 20 R. I. 13.

Within Acts 1881, § 5, for the preservation of game and fish, providing that any person who shall enter on the land of another for the purpose of hunting or fishing should be deemed guilty of trespass, the unlawful entry is the first crossing of the owner's line. This is one entire and single act. It cannot be divided or multiplied, and constitutes a complete offense. *Kellogg v. Robinson*, 32 Conn. 335, 342.

St. 1 & 2 Wm. IV, c. 32, § 30, providing for the punishment of any person who shall commit any trespass by entering or being on land in the daytime in search or pursuit of game, means a person entering or being on the land, and not the sending of a dog into a cover. *Regina v. Pratt*, 30 Eng. Law & Eq. 304, 306.

#### ENTER—ENTRY (On Public Lands).

See "Cash Entry"; "Homestead Entry"; "Mineral Land Entry"; "Pre-emption Entry"; "Timber Culture Entry."

The term "entry," as applied to appropriations of lands, was probably borrowed from the state of Virginia, in which we find it used

in that sense at a very remote period. Many cases will be found in the Reports of the decisions of this court in which the titles to Western lands were drawn in question which will show how familiarly and generally the term is used by courts and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the office of an officer known in the legislation of several states by the epithet of an "entry taker," and corresponds very much in his functions with the register of land offices under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States; and, by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States at private sale. *Chotard v. Pope*, 25 U. S. (12 Wheat.) 586, 588, 6 L. Ed. 737 (quoted and approved in *Northern Pac. R. Co. v. Sanders* [U. S.] 47 Fed. 604, 607); *Sturr v. Beck*, 133 U. S. 541, 547, 10 Sup. Ct. 350, 353, 33 L. Ed. 761; *United States v. Four Bottles of Sour Mash Whisky* (U. S.) 90 Fed. 720, 723; *Denny v. Dodson* (U. S.) 82 Fed. 899, 910; *McGuire v. Brown*, 39 Pac. 1060, 1062, 106 Cal. 660, 30 L. R. A. 384; *Northern Pac. Ry. Co. v. Nelson*, 61 Pac. 703, 708, 22 Wash. 521; *McMichael v. Murphy*, 70 Pac. 189, 191, 12 Okl. 155; *Thomas v. Railroad Co.*, 2 Copp. Pub. Land Laws 1882, p. 869; *Goddard v. Storch*, 48 Pac. 15, 16, 57 Kan. 714. Doubtless in this sense the term has been used in the several acts of Congress referring to the appropriation of public lands of the United States at private sale, including the town-site laws. So the term "to enter," with reference to such public lands, means to acquire an inceptive right to a portion of the unappropriated soil of the United States by filing a claim with the register of the land office. *Lockwitz v. Larson*, 52 Pac. 279, 281, 16 Utah, 275.

In considering the right to the use of water from public lands for mining, agricultural, manufacturing, and other purposes, as given by Rev. St. U. S. §§ 2339, 2340 [U. S. Comp. St. 1901, p. 1437], and Civ. Code, § 1412, and to enter on the homestead claim of another to divert such water from its natural channel, the court quoted from the opinion in *Witherspoon v. Duncan*, 71 U. S. (4 Wall.) 210, 218, 18 L. Ed. 339, to the effect that "in no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property." *McGuire v. Brown*, 39 Pac. 1060, 1062, 106 Cal. 660, 30 L. R. A. 384.

"Enter," when applied to the acquisition of lands from the government, means to purchase at the government land office. *Goodnow v. Wells*, 25 N. W. 864, 866, 67 Iowa, 654.

To constitute a valid entry of public lands, there must be a reasonable degree of certainty and precision in the description which it gives of the subject intended to be appropriated. In the case of a grant, if the description be such that, when verified by the proofs of what is found on the ground, the land can be identified, it is sufficient, and the grant can be maintained, but more is required in the case of an entry. It is not sufficient that the land can be identified by means of the proofs of the landmarks called for which the private knowledge of the claimant can supply, but the entry must be made with that degree of certainty and speciality that a subsequent locator may be enabled, by the exercise of due care and reasonable diligence, to appropriate the adjacent residuum. *McNeel v. Herold* (Va.) 11 Grat. 309, 313.

#### **As occupy or settle on.**

25 Stat. 1005, relating to the opening of certain land in Oklahoma for settlement, provides that, until such lands are open for settlement by the proclamation of the President, no person shall be permitted to enter upon and occupy the same. Held, that the words "enter on and occupy" have no synonyms that convey their meaning more clearly than they do themselves. No person can occupy land, in the sense here used, without having entered upon it, and no person can enter on land, in the sense here used, without occupying some part of it for the time being, and the terms are used in their ordinary meaning. *Smith v. Townsend*, 29 Pac. 80, 85, 1 Okl. 117; *Id.*, 13 Sup. Ct. 634, 635, 148 U. S. 490, 37 L. Ed. 533.

"Entry" should be construed to mean a settlement on land with a view to purchase or homesteading. *St. Paul, M. & M. R. Co. v. Greenalgh* (U. S.) 26 Fed. 563, 567.

#### **Railroad grant.**

The word "enter" is of generic signification, and includes all methods of acquisition of the equitable title to public lands prior to the passing of the legal title by government patent, except under laws in which words of special signification, such as "pre-empted," are used. The officers of the Land Department allow it a much more extended meaning. Thus, in *State of Iowa v. Cedar Rapids & M. River R. Co.*, 2 Copp. Pub. Land Laws 1882, p. 961, it is said: "You hold that the word 'entry' means a purchase with money or location under or by virtue of some kind of warrant or scrip. It undoubtedly has the meaning you give it; but I think, as

used in said act, it should have a more general meaning, and be construed so as to include any and every lawful appropriation of lands. Lands certified to railroads in accordance with the terms of the grant are thus appropriated." *Goddard v. Storch*, 48 Pac. 15, 57 Kan. 714.

#### **Vague or special entry.**

See "Special Entry"; "Vague Entry."

"Entry," as used in reference to public lands in Tennessee, may be either vague or special. *Phillip's Lessee v. Robertson* (Tenn.) 2 Overt. 399, 415.

#### **ENTER-ENTRY (Under Revenue Laws).**

The term "entry" in the acts of Congress is used in two senses. In many of the acts it refers to the bill of entry—the paper or declaration which the merchant or importer in the first instance hands to the entry clerk. In other statutes it is used, not to denote a document, but a transaction—a series of acts which are necessary to the end to be accomplished, viz., the entering of the goods. *United States v. Legg* (U. S.) 105 Fed. 930, 933, 45 C. O. A. 184. The word is used in the latter sense in 12 Stat. 738, providing a punishment for making or attempting to make an entry by a false invoice, etc. *United States v. Cargo of Sugar* (U. S.) 25 Fed. Cas. 288.

"Entry," as used in section 1 of the act of Congress of 1863 prescribing forfeiture of goods attempted to be imported by any false entry, includes all the different kinds of entries known in the practice and regulations of the customhouse—the entry for warehouse, the entry for consumption, withdrawal entry, entry for transportation, etc. If any owner of goods knowingly makes or attempts to make either of these entries by means of a false practice, the transaction is within the statute. The word "entry" means the entire transaction by which the importer obtains the entrance of his goods into the body of the merchandise of the country. Until the entire transaction between him and the government is closed, by a withdrawal of and payment of the duties upon all the goods covered by the original paper called the "entry for warehouse," the entry contemplated by the statute is not completed; and any false practice anywhere, from beginning to end, may work a forfeiture. *United States v. Baker* (U. S.) 24 Fed. Cas. 953.

The treasury regulations speak of entries for warehouses, entries for withdrawal, and other entries. The entry for warehouses is the original entry, but the term "entry for withdrawal" is a misnomer. There may be an application for permission to withdraw goods already entered, which is called in the treasury regulations the "entry for with-

drawal," and it may be for withdrawal for consumption, transportation in bond, or exportation; but no such application can be the entry meant in the statute providing that the settlement of duties after the expiration of one year from the time of entry, in the absence of fraud, shall be conclusive upon the parties. *United States v. Seidenberg* (U. S.) 17 Fed. 227, 230.

Act June 30, 1864, § 14, providing that on the entry of any goods a protest of the importer shall be filed within 10 days as to "each entry," means that in all cases, whether of entry in bond or for consumption, the owner shall give notice on each entry to the collector; not meaning on the paper called the entry, but in respect of each entry. *Ullman v. Murphy* (U. S.) 24 Fed. Cas. 506.

#### **ENTER INTO.**

The expression "entered into," as used in an allegation of a complaint alleging that defendant entered into a bond, has a well-defined meaning, and is frequently found in statutes, opinions of courts, and legal publications generally. Ordinarily it is equivalent to the phrase "to become bound," "recognition," "contract," etc., and hence such allegation is sufficient as an averment that the bond was executed. *Fire Ass'n of Philadelphia v. Ruby*, 82 N. W. 629, 630, 60 Neb. 216; *Douthitt v. Mohr*, 18 N. E. 449, 450, 116 Ind. 482.

The phrase "entered into," as used in an action for specific performance, wherein plaintiff alleges that decedent entered into an agreement with her, and that she fully performed it, is a sufficient allegation that she agreed with the decedent to do the things on which his agreement which is sought to be specifically performed was conditioned. *Hall v. Gilman*, 79 N. Y. Supp. 303, 305, 77 App. Div. 458.

"The word 'enter,' in Code Civ. Proc. § 2356, authorizing the sale of land by special guardian, and requiring him to enter into an agreement for the sale, does not imply a written agreement; the holding to such effect in *Hardie v. Andrews* (N. Y.) 13 Civ. Proc. R. 413, being obiter. In common speech, the word has no such restricted meaning, and I cannot find that it has in law." *Blanchard v. Blanchard*, 67 N. Y. Supp. 478, 479, 83 Misc. Rep. 284.

#### **ENTER ON.**

"Enter on," as used in Rev. Ord. St. Louis, art. 17,188, § 981, providing that it shall be unlawful for any person, without the consent of the owner or his agent, to enter on any inclosed or improved real estate, lot, or parcel of ground in a city, cannot, in its ordinary signification, apply to a

building. We enter into a building, but we enter on land inclosed or improved or otherwise. *City of St. Louis v. Babcock*, 56 S. W. 731, 732, 156 Mo. 154.

### ENTERED VALUE.

Under an act providing that duty on imported goods shall not be assessed on any amount less than the entered value, the words "entered value" mean the value as it is stated in or upon the invoice. *Arthur v. Goodard*, 96 U. S. 145, 146, 24 L. Ed. 814.

### ENTERING SHORT.

"The custom of bankers in London, on receiving bills for collection, was to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected. *Giles v. Perkins*, 9 East, 12; *Ex parte Thompson*, 1 Mont. & M. 102, 110. And this was called a 'short entry,' or 'entering short.' Such bills continued the property of the customer, unless the contrary was to be inferred from special facts. Country bankers throughout England generally credited to their customers at once all bills considered to be good." *Blaine v. Bourne*, 11 R. I. 119, 121, 23 Am. Rep. 429.

### ENTERPRISE.

See "Military Expedition or Enterprise."

"Enterprise" means an undertaking or hazard; an arduous attempt. Thus a military expedition against Mexico is an "enterprise." *United States v. Ybanez* (U. S.) 53 Fed. 536, 538.

The term "enterprise," as used in the general incorporation statutes of Oregon, authorizing the formation of corporations for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, is not restricted in meaning to a scheme for making money, but includes any object that is consistent with the interest of society and may engage the attention of men and invite their co-operation; and a corporation may lawfully be organized under such statute for the purpose of guarantying bonds of an educational institution to strengthen its credit. *Maxwell v. Akin* (U. S.) 89 Fed. 178, 180.

Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], as amended by Act Cong. Sept. 19, 1890, c. 908, 26 Stat. 465, which provides that no letter, postal card, or circular concerning any lottery, so-called "gift concert," or other similar "enterprise offering prizes dependent on lot or chance," etc., shall be carried in the mail, includes a scheme by which the Austrian government, in order to raise a loan, issued bonds which were payable, not

on any day certain, but the date of payment of which was to be determined by drawings, such drawings also determining which of the series of bonds were to be redeemed, and the amount to be paid for each bond; the amount to be paid in some cases greatly exceeding the face value of the bonds, as high as 250,000 gulden being paid for a 100-florin bond. *Horner v. United States*, 13 Sup. Ct. 409, 413, 147 U. S. 449, 37 L. Ed. 237.

### ENTERTAIN.

"Entertaining," as used in Acts 1873, c. 549, amendatory of Acts 1857, c. 628, and Acts 1870, c. 175, providing that nothing contained in the fifth section, which relates to the sale of liquor between 1 and 5 o'clock in the morning, should be construed to prevent hotels from receiving and entertaining travelers at any time, subject to the restrictions contained in the act, directly expresses the intention to make a distinction between the hotel, as such, and the bar or drinking saloon, because we find that "entertaining" is defined to be "affording entertainment," and that "entertainment" means a "hospitable repast." A "banquet" is said to be a grand entertainment of eating and drinking; a sumptuous feast. The word "entertain" could not have meant the mere service of food. In *re Breslin* (N. Y.) 45 Hun, 210, 213.

An innkeeper is said to "entertain" travelers and strangers, not to "harbor" them; but he may be accused of "harboring" vagabonds, deserters, fugitives, or thieves—persons whom he ought not to entertain. *Van Metre v. Mitchell* (U. S.) 28 Fed. Cas. 1036, 1040.

### ENTERTAINMENT.

See "House of Entertainment."

"Entertainment," as used in Act March 11, 1834, § 17, providing that every innkeeper shall keep good entertainment for man and horse, is synonymous with the term "board." *Scattergood v. Waterman* (Pa.) 2 Miles, 323.

"Entertainment" is synonymous with "board," and includes the ordinary necessities of life; but when used in connection with entertaining a large number of strangers, constituting an organized body, by the residents and business men of the city, it is usually limited only by the amount of money available for the purpose, and the ingenuity of the entertainers in devising sources of enjoyment. *Lasar v. Johnson*, 58 Pac. 161, 163, 125 Cal. 549.

### Charity synonyms.

Webster defines "entertainment" as the act of receiving as host, or amusing, admit-

ting, or cherishing; hospitable reception; hospitable provision for the wants of a guest, especially provision for a table; a feast; a formal or elegant meal, etc.; that which amuses or diverts. The Century Dictionary defines the word, in part, as the act of furnishing accommodation, refreshment, good cheer, or diversion; mental enjoyment; instruction or amusement afforded by anything seen or heard, as a spectacle, a play, etc.; the act of providing gratification or diversion, as the entertainment of friends with a supper, etc. These definitions are sufficient to show that "entertainment" is by no means synonymous with "charity" in its legal sense, and hence a bequest of money to a Masonic lodge to be used for proper forms of "entertainment" for the members is not for a charitable purpose. *Mason v. Perry*, 48 Atl. 671, 678, 22 R. I. 475.

#### ENTERTAINMENT OF THE STAGE.

In an enactment that no "entertainment of the stage" can be exhibited without the Lord Chamberlain's license, such phrase would include ballet dancing. *Gallini v. Laborie*, 5 Term R. 242, 244.

"Entertainment of the stage," as used in Laws 1872, c. 886, enacted to regulate places of amusement in New York City, includes a performance consisting of songs, glees, recitations, selections from operas, and oratorios, and solos, trios, and quartets of various musical instruments. *Society for the Reformation of Juvenile Delinquents v. Neusbach* (N. Y.) 16 Wkly. Dig. 349.

"Entertainment of the stage," as used in a statute prohibiting the performance of an entertainment of the stage, etc., should be construed to include tumbling. *Rex v. Hardy*, 6 Term R. 286, 287.

#### ENTICE.

"Entice" is defined by Worcester to be to allure to ill, to attract, to draw by blandishments or hopes, to decoy, to attempt to seduce, to coax. To "entice" implies that the person yields assent as the result of the enticing. *United States v. Ancarola* (U. S.) 1 Fed. 676, 683.

The word "entice," as used in the pleadings in an action, imports an initial, active, and wrongful effort. The "enticement" which the operations of a children's aid society offers with its means of liberal aid, the opportunities it offers to travel, to visit new scenes, and find new homes, springs from the very nature of and is incident to the enterprise, has its sanction in the act incorporating the society, is legitimate, and may fairly be contrasted with "wrongful enticement." *Nash v. Douglass* (N. Y.) 12 Abb. Prac. 187, 190.

The word "entice," as used in the statute inflicting a punishment on any person who shall take or "entice away any female" under the age of 16 years from her father, mother, etc., without their consent, for the purpose of prostitution, concubinage, or marriage, means to persuade to go away by any art or means. It is not necessary that the female should be asked in direct language to go. Anything done which would tend to persuade the female to go away would constitute the offense, if successful. *People v. Carrier*, 9 N. W. 487, 489, 46 Mich. 442.

#### ENTICING MACHINE.

The phrase "enticing and dangerous machine," within the rule that a dangerous and enticing machine should not be left where the natural and probable results will be that it will cause injury to children, includes a lump of common gunpowder containing pieces of brass. *Travell v. Bannerman*, 75 N. Y. Supp. 866, 867, 71 App. Div. 489.

#### ENTIRE.

The word "entire" means all or whole. *Guthrie v. Wheeler*, 51 Conn. 207, 218; *First Nat. Bank v. Stauffer* (U. S.) 1 Fed. 187, 188.

"Entire," as used in a devise of the "entire and absolute" property, signifies undivided, unmingled, complete in all its parts. *Williams v. Vancleave*, 23 Ky. (7 T. B. Mon.) 388, 393.

In a deed for the "entire use, benefit, profit and advantage of K.," the word "entire" governs the conveyance, and gives its meaning and force to each of the other words, and is the same as if written "entire use, entire benefit, entire profit, entire advantage." "Entire," according to the best lexicographers, means whole, undivided, not participated in with others. If this be the proper meaning of "entire," as it certainly is, the intent of the deed would be that no other person than K. should have any interest in the property whatsoever. *Heathman v. Hall*, 38 N. C. 414, 421.

The resolution of the constitutional convention in Arkansas declaring that "the entire action of the convention of the state of Arkansas, which assembled in the city of Little Rock on the 4th of March, 1861, was and is null and void," means the entire action of the convention of 1861, which is in conflict with the Constitution and laws of the United States, and not the other acts of such convention; otherwise all government must fall, for no government can exist without a Constitution in which there is the necessary power delegated. *Hawkins v. Filkins*, 24 Ark. 286, 324.

**ENTIRE ASSESSMENT.**

Though by an assessment the values of the real and personal estate of a party are added together and the amount of the tax is computed on their sum, it will not be said that this constitutes the assessment an "entire assessment," since the personal estate and the real estate are separately valued. But even if the adding together of the values of the personal estate and the real estate and the computation of the tax on their sum is enough to constitute the assessment an entire assessment, so long as it is possible to separate what is legal from that which is illegal the entire assessment will not be regarded as void. *Mowry v. Slatersville Mills*, 37 Atl. 538, 539, 20 R. I. 94.

**ENTIRE COMMUNITY.**

The words "entire community," contained in an indictment for a public nuisance, do not mean the entire community of the town, but rather has reference to the community of the immediate neighborhood of the nuisance. *West v. State*, 71 S. W. 483, 485, 71 Ark. 144.

**ENTIRE CONTRACT.**

When by the terms of a contract, or by its nature or purposes, it is contemplated and intended that each and all of the parts and provisions shall be dependent upon each other, and not separate and distinct, the contract must be regarded as entire and indivisible. *Potter v. Potter*, 72 Pac. 702, 704, 43 Or. 49 (citing *Oliver v. Oregon Sugar Co.*, 42 Or. 276, 70 Pac. 902; *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734).

A contract may be said to be "entire" when by its terms, nature, and purposes it contemplates and intends that each and all of its parts and material provisions, and the consideration, are common each to the other, and interdependent. *Horseman v. Horseman*, 72 Pac. 698, 702, 43 Or. 83; *Gorse v. Lynch*, 72 N. Y. Supp. 1054, 1056, 36 Misc. Rep. 150. The question depends largely upon the intent of the parties as determined from the language of the contract and the subject-matter of it. A contract to dissolve a firm on a certain date and for the division of the net profits, and requiring the continuing partner before such date to pay the outgoing partner a certain sum for the good will of the business, was held to be an entire contract. *Gorse v. Lynch*, 72 N. Y. Supp. 1054, 1056, 36 Misc. Rep. 150.

As a general rule the consideration to be paid, and not the subject or thing to be performed, determines to which class a contract belongs. If the consideration is single, the contract is entire; but if the consideration is, expressly or by necessary implication, apportionate, the contract is sev-

erable. A contract to serve for a year at a fixed salary per month is severable. *Clay Commercial Tel. Co. v. Root (Pa.)* 4 Atl. 828, 829.

Where certain precincts had agreed, in consideration of the building of a railroad, that they would pay a certain sum when the railroad had been graded, and a certain further sum when the railroad had tied and ironed the roadway through the precincts, according to a provision which provided that the railroad should be constructed by a certain date, such contract was an entire contract, as it evidently contemplated a completed railroad, and was not divisible into two contracts, one relating to the grading and the other to the laying of the ties and iron. *Gray v. Hinton (U. S.)* 7 Fed. 81, 83.

**ENTIRE CROP.**

A mortgage describing the property as "my entire crop grown the present or next year" embraces the crop of each and both years, and is equivalent to the phrase "my entire crop, whether grown the present or next year," and is not defective as to description because covering the crop of one or the other of the two years without showing which of the two crops was intended to be mortgaged. *Holst v. Harmon*, 26 South. 157, 159, 122 Ala. 453.

A mortgage on the "entire crops of corn, cotton and all other crops which may be made by the mortgagor on certain farms to the extent of 100 bales of cotton," the latter clause being in writing and the former printed, operates to limit the mortgage to an absolute mortgage on the cotton only, and it only covers the other crops to secure the delivery of the cotton or the payment of its value. *Comer v. Lehman, Durr & Co.*, 6 South. 264, 265, 87 Ala. 362.

**ENTIRE DAY.**

In a statute providing that during the "entire day of any election" for municipal, county, or district or state officers it shall be unlawful for any establishment where liquors are sold to be open, "entire day" means the day of 24 hours, commencing and ending at midnight, during which day the election is held, and is not limited to the time during which the polls are open. *Haines v. State*, 7 Tex. App. 30, 38; *Lawrence v. State*, 7 Tex. App. 192, 193.

Where a statute requires notice for a fixed number of "entire days" before the day of appearance, both the day of service and the day of appearance are to be excluded in the computation. *Bray v. Fen*, 8 N. J. Law (3 Halst.) 303, 304.

An "entire day," within Code, § 4171, providing that, where a defendant is indict-



ed for a capital offense and is in actual confinement, a copy of the indictment must be delivered to him at least one entire day before the day appointed for trial, is an undivided day. It is not a part of two days. An "entire day" must have a legal, fixed, precise time to begin, and a fixed, precise time to end. A day, in contemplation of law, comprises all of 24 hours, beginning and ending at 12 o'clock at night. Sunday in this case cannot be counted. The "entire day" required by the Code is one entire legal day. Sunday is dies non juridicus. *Robertson v. State*, 43 Ala. 325, 329.

#### ENTIRE INTEREST.

A deed of one's "entire interest" in improvements on public lands is only a quitclaim. *McLeroy v. Duckinoth*, 13 La. Ann. 410, 411.

#### ENTIRE INTEREST (On Money).

National Currency Act, Rev. St. § 5198 [U. S. Comp. St. 1901, p. 3493], provides that the knowingly taking, receiving, reserving, or charging a usurious rate of interest shall be adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it. Held, that the phrase "entire interest" means all the interest which accrues upon it. *First Nat. Bank v. Stauffer* (U. S.) 1 Fed. 187, 189.

#### ENTIRE PROPERTY.

A will wherein the testator gave his "entire property" to three children gave a fee. *White v. White*, 52 Conn. 518, 521.

#### ENTIRE RENTS AND PROFITS.

Within the provision of a will disposing of the entire rents and profits, "entire rents and profits" means all the rents and profits, and is as applicable to the net income as to the gross, and would probably require that in this instance, as in ordinary trusts, the income should bear the expenses. *Guthrie v. Wheeler*, 51 Conn. 207, 213.

#### ENTIRE SATISFACTION.

A contract of employment in which the employers, as security for the fulfillment of the contract, were to retain 25 per cent. of the employé's wages until the contract was fulfilled to their "entire satisfaction," did not mean that the plaintiff should forfeit his unpaid wages if he failed to perform the contract to the satisfaction of the employers, but the effect of this provision was to place a fund in their hands to secure performance, and they could not wrongfully discharge him without any breach of the contract on his

part and retain the wages. *Sloan v. Hayden*, 110 Mass. 141, 142.

#### ENTIRE STOCK.

The term "entire stock," as a term of description of goods intended to be conveyed by a chattel mortgage, while sufficiently broad to include all of the personality of the mortgage used in a store or place where the stock was kept, yet, in the absence of some further words tending to define the position of the stock or to show its location, would be insufficient to protect the mortgage from an objection to its validity on the ground of uncertainty of description. *Jaffrey v. Brown* (U. S.) 29 Fed. 476, 481.

#### ENTIRE TERM.

Code 1876, § 3210, providing that an execution is a lien, in the county within which it is received by the officer, on the lands and personal property of the defendant from the time the writ comes into the hands of the sheriff, and continues only so long as it is regularly issued and delivered to the sheriff without the lapse of an "entire term," means simply "from one session of the court to another; the period of time intermediate between two regular terms as fixed by law." *Carlisle v. May*, 75 Ala. 502, 504.

#### ENTIRE TRACT.

In statutes relative to condemnation of property, an "entire tract of land" means generally so much as belongs to the same proprietor as that taken, and is continuous with it and used together for a common purpose. *Houston & T. C. Ry. Co. v. Postal Tel. Cable Co.*, 45 S. W. 179, 180, 18 Tex. Civ. App. 502; *Sultan Water & Power Co. v. Weyerhaeuser Timber Co.*, 72 Pac. 114, 115, 31 Wash. 558.

#### ENTIRE, UNCONDITIONAL, AND SOLE OWNERSHIP.

Since a fee-simple estate is the highest tenure known to the law, and since landowners in fee simple, in the absence of any proof to the contrary, are presumed to be the owners of the buildings located and standing on the premises, it follows that the interest of the fee-simple owner of land in the buildings thereon is "the entire, unconditional, and sole ownership" of such property, within the meaning of a fire insurance policy requiring such ownership, and the fact of the existence of a lease of such buildings for a term of 10 years does not change the rule. *Lycoming Fire Ins. Co. v. Haven*, 95 U. S. 242, 247, 24 L. Ed. 473.

"Entire and sole ownership," as used in a policy of insurance declaring that the same shall be void if the interest of the assured

was other than the entire and sole ownership, must be construed to mean an ownership of the entire fee, as distinguished from a part ownership or ownership in common, and did not mean that he owned the property free from incumbrance, or that he had not pledged or mortgaged the same, or that his title was unconditional. *Friezen v. Allemania Fire Ins. Co.* (U. S.) 30 Fed. 352, 358.

Under a policy of insurance providing that if the interest of the insured in the property was any other than the "entire, unconditional, and sole ownership thereof, for the use and benefit of the assured," etc., the policy should be void, evidence that, when the policy was issued, plaintiff had agreed that another party should have a share of the net profits of the sale of the oats insured, in consideration of which the latter had agreed to perform certain services, etc., did not tend to show that plaintiff's ownership was not for his own use and benefit. *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4, 11, 31 Am. Rep. 666.

#### Equitable title.

Within an insurance policy providing that, if the interest of the assured be any other than the "entire, unconditional, and sole ownership" of the property for the use of the assured, the policy shall be void, an equitable owner of the property is an entire owner. *Franklin Fire Ins. Co. v. Crockett*, 75 Tenn. (7 Lea) 725, 728.

The omission of the owner of the equitable title to property to state the nature thereof will not render a policy of insurance invalid, under a condition forfeiting the insurance in case the interest is other than the entire, unconditional, and sole ownership, if the fact is not so represented to the company (*Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605); and he will be regarded as the absolute owner, although he may not have paid the purchase money (*Ramsey v. Phoenix Ins. Co.* [U. S.] 2 Fed. 429). Under these principles, where plaintiff insured certain buildings on land which he had contracted to purchase, but on which he had made no payment, and the policy was conditioned to be void if his interest was other than the "entire, unconditional, and sole ownership," or if the insured property was a building on land not owned by him in fee simple, the policy was not vitiated merely because he failed to hold the legal title to the land. *Imperial Fire Ins. Co. v. Dunham*, 12 Atl. 668, 675, 117 Pa. 460, 2 Am. St. Rep. 686.

An equitable title, if sole and unconditional, answers the description of "entire, unconditional, and sole ownership," as used in an application for a policy of insurance. And where the legal title to property was in another, with whom the insured had made a

parol contract for its purchase for a price agreed upon, and a part of which he had paid, and the insured had entered into possession as purchaser, he was within the terms of the policy. *Johannes v. Standard Fire Office*, 35 N. W. 298, 299, 70 Wis. 196, 5 Am. St. Rep. 159.

#### ENTIRELY.

"Entirely," as used in a charge that, in order to justify homicide on the ground of self-defense, accused must have been entirely free from fault in bringing on the difficulty, is not an erroneous addition to the amount of freedom from fault required, the phrase "entirely free from fault" meaning no more than the usual expression "free from fault." *Ellis v. State*, 25 South. 1, 2, 120 Ala. 333.

Where a testator bequeathed a slave to one of his daughters by her maiden name, "entirely for her and her children," and gave others specific legacies of slaves, with incumbrances on them, the words "entirely for her and her children" did not relate to the marital rights of the husband of the legatee, but to the quantity of the estate which the legatee was to take as compared with some of the other legatees in the will, who took unincumbered legacies. If she was unmarried at the time the will took effect, she took a life estate only, with remainder to her children, but if married, with children, she took an absolute estate jointly with them. *Furlow's Adm'r v. Merrell*, 23 Ala. 705, 716.

#### ENTIRELY IGNORANT.

An allegation in an affidavit to compel the plaintiff in an action to furnish a bill of particulars stated that the defendant was "entirely ignorant" of the facts or to what the complaint referred. Held, that the words "entirely ignorant" were sufficiently comprehensive to include a denial of each element tending to constitute knowledge or belief on the subject. *Garfield Nat. Bank v. Peck*, 20 N. Y. Supp. 650, 652, 1 Misc. Rep. 126.

#### ENTIRELY SATISFIED.

In an instruction requiring the jury to be entirely satisfied of the accused's guilt before a conviction could be returned, the words "entirely satisfied" implies a firm and thorough assent of the mind and judgment to the truth of a proposition, and this may exist notwithstanding a possibility that the fact may be otherwise. *People v. Phipps*, 39 Cal. 326, 335.

Where jurors in a criminal case were "satisfied beyond a reasonable doubt and to a moral certainty," they must have been "entirely satisfied." *State v. Ferguson*, 9 Nev. 106, 118.

**ENTIRETY (Estate by).**

As estate of inheritance, see "Estate of Inheritance."

Joint tenancy distinguished, see "Joint Tenancy."

A "tenancy by entireties" arises whenever an estate vests in two persons; they being, when it so vests, husband and wife. *Tindell v. Tindell* (Tenn.) 37 S. W. 1105, 1107; *In re Bramberry's Estate*, 27 Atl. 405, 407, 156 Pa. 628, 22 L. R. A. 594, 36 Am. St. Rep. 64. It may exist in personal as well as real property; in a chose in action as well as in a chose in possession. *In re Bramberry's Estate*, 27 Atl. 405, 407, 156 Pa. 628, 22 L. R. A. 594, 36 Am. St. Rep. 64.

When a husband and wife receive real estate by the same conveyance, they hold it as tenants by entireties. Under the fiction of entirety, a husband and wife do not hold it by moieties, but both and each hold the entirety. *Fogleman v. Shively*, 4 Ind. App. 197, 198, 30 N. E. 909, 51 Am. St. Rep. 218.

A conveyance to a husband and wife jointly, without words limiting the estate taken, makes them "tenants in entireties." *Brown v. Brown*, 133 Ind. 476, 478, 32 N. E. 1128 (citing *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167).

In contemplation of law the husband and wife, for most purposes, are considered as but one person. Chancellor Kent, in his Commentaries, says: "If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties. They are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole." *Ketchum v. Walsworth*, 5 Wis. 95, 102, 68 Am. Dec. 49; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Dodge v. Kinzy*, 101 Ind. 102, 105; *City of Louisville v. Coleburne*, 56 S. W. 681, 682, 108 Ky. 420; *Joos v. Fey*, 9 N. Y. Supp. 275.

Preston defines "tenancy by entireties" as follows: "Tenancy by entireties is when husband and wife take an estate to themselves jointly, by grant or devise, or limitation of use, made to them during coverture, or by grant, etc., to them, which is in fieri at the time of their marriage, and completed by livery of seisin or allotment during the coverture." *Tindell v. Tindell* (Tenn.) 37 S. W. 1105, 1107 (quoting 1 Prest. Est. 131). This species of tenancy is sui generis, and arises from the unity of husband and wife. As between them there is but one owner, and that is neither the one nor the other, but both together, in their peculiar relation-

ship to each other, constituting the proprietorship of the whole, and of every part and parcel thereof. There can be no partition during coverture, for this would imply a separate interest in each; and for the same reason neither can alien, without the consent of the other, any portion or interest therein; and hence the legal necessity results that the survivor must take the whole, for, the estate being incapable of partition during the life of either, nothing could descend by the death of either. This consequence necessarily results from the nature of the estate and the legal relation of the parties. *Ketchum v. Walsworth*, 5 Wis. 95, 102, 68 Am. Dec. 49.

Husband and wife are at common law one person, so that when an estate really vests in them both equally they take as one person; they take but one estate, as a corporation would take. In the case of realty they are seised not per my et per tout, as joint tenants are but simply per tout. Both are seised of the whole, and, each being seised of the entirety, they are called "tenants by the entirety," and the estate is an "estate by entireties." Estates by entireties may be created by will, by instrument, or purchase, and even by inheritance. The estate is inseverable—cannot be partitioned; neither husband nor wife can alone affect the inheritance; the survivor takes the whole. *Thornburg v. Wiggins*, 34 N. E. 999, 1000, 135 Ind. 178, 22 L. R. A. 42, 41 Am. St. Rep. 422.

An estate by entirety is held by the husband and wife as one person and under one title, the grant, gift, or devise creating the estate operating in such a manner as to give each the whole, and each is seised of the whole of the estate in the survivor. It is not the separate property of the wife, for she is without the characterizing feature of holding it to her sole use to the exclusion of the marital rights of her husband. Hence lands held by husband and wife as tenants in common pass to an assignee by an assignment of a court of insolvency, though the statute provides that the separate property of the wife shall not be subject to the disposal of her husband or liable for his debts. *Laird v. Perry*, 52 Atl. 1040, 1041, 74 Vt. 454, 59 L. R. A. 340.

"Entirety" denotes the whole, in contradistinction to "moieties," which denotes the half part. A husband and wife when jointly seised of land are seised by entireties, and not *pur mie*, as joint tenants are. *Bouv.* Tenancy by entireties is essentially a joint tenancy, as modified by the common-law doctrine that husband and wife are one person. The same words of conveyance which could make two other persons joint tenants will make the husband and wife tenants of the entirety. *Joos v. Fey*, 9 N. Y. Supp. 275.

The rule that husband and wife take by entirety was a part of the common law. *Carver v. Smith*, 90 Ind. 222, 224, 46 Am. Rep. 210.

## ENTITLED.

"Entitled" is a strong word, and signifies a claim of right. *Commonwealth v. Moorhead*, 7 Pa. Co. Ct. R. 513, 516.

"Entitled," when used as definitive or descriptive of the right to an interest in property, signifies "to give title, right, and claim." *Thompson v. Thompson*, 18 South. 247, 249, 107 Ala. 163.

In Rev. Code, § 2379, providing that, on the death of a married woman having a separate estate and leaving a husband, the latter shall be entitled to one-half of the personalty of such separate estate and to use the realty during life, the word "entitled" signifies "to give a claim or right to." *Conoly v. Gayle*, 54 Ala. 269, 270.

"Entitled" is defined as to give a title, right, or claim, and is directly opposed to the idea of imposing an obligation or limitation, but gives to the person named a right to demand or receive, so that Laws 1869, c. 413, creating a charitable corporation, and providing that it shall be "entitled" to all the provisions and privileges of law relating to charitable institutions, will not make it subject to the subsequent act prohibiting charitable institutions from taking under wills executed not more than two months before the death of the testator. *People's Trust Co. v. Smith*, 30 N. Y. Supp. 342, 344, 31 Abb. N. C. 422.

"Entitled," as used in a power of attorney to convey all lands to or in which "I am or may be in any way entitled or interested," refers to a title or interest existing at the time of exercising the power. *Carson v. Smith*, 12 Minn. 546 (Gil. 453).

### Choice implied.

The use of the word "entitled" in Const. art. 11, § 1, providing that every householder or head of a family shall be entitled to hold exempt from levy property of a certain value to be selected by him, cannot be construed as preventing him from waiving such homestead exemption if he wishes. He "shall be entitled to hold" plainly means that he may, if he chooses, have the right to hold such property as he may choose to select and set apart as his homestead, not exceeding the specified value. If he never does exercise this right, such property is liable to sell for a satisfaction of his debts. By such language it was never intended to declare that a man's dominion over his own property should be taken away without his consent. *Reed v. Union Bank of Winchester (Va.)* 29 Grat. 719, 723.

### Grant imported.

In the supplementary articles to the Choctaw treaty of September 23, 1830 (7 Stat. 340), wherein no provision is made for patents, the term "shall be entitled to," "there is allowed," "may locate," "shall be granted," "there is given," are used synonymously with respect to reservations. In the case of *Newman v. Doe*, 5 Miss. (4 How.) 561, it was held that the words in a treaty, "shall be entitled to a reservation," were equivalent to a grant. *Meehan v. Jones (U. S.)* 70 Fed. 453, 455.

### As legally entitled.

The constitution of a railroad relief association, providing that, before the association will pay the beneficiary of the member killed the amount of benefits due, the person "entitled to damages because of the accident" shall release the railroad company from all claims for damages, means the person legally entitled to sue for the damages. *Fuller v. Baltimore & O. E. R. Ass'n*, 10 Atl. 237, 238, 67 Md. 433.

Code, § 249, par. 6, declares that persons entitled to an estate may select a disinterested person as administrator. Held, that the phrase "persons entitled to an estate" means the persons in whom the legal right is vested, and, though an estate be entirely insolvent, the persons to whom it descends under the statute of distributions, or those to whom it is devised, are those who are legally entitled to it, and hence they may select the administrator. *Myers v. Cann*, 22 S. E. 611, 613, 95 Ga. 383.

### Title implied.

Rev. St. § 2275 [U. S. Comp. St. 1901, p. 138], provided that where settlements with a view to pre-emption or homestead have been made, before the survey in the field, which are found to have been made on sections 15 and 36, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been granted for the use of schools or colleges in the state in which they lie, other lands of equal acreage are appropriated and granted, to be selected by the state, in lieu of the lands taken, provided that where any state is "entitled" to such sections, or where such sections are reserved to any territory, the selection of such lands in lieu thereof by the state or territory shall be a waiver of its rights to those sections. It was held that "entitled" did not mean having title, so that, a state never having acquired complete title until after survey, the proviso could only refer to surveyed lands. "Entitled" does not ordinarily have such a meaning. When used to express the idea of ownership, it does not signify complete ownership, but merely a claim or right thereto. Thus Webster defines the word, "to give a claim to, to qualify for, with a direct object of the person, and a re-

mote object of the thing; to furnish with grounds for seeking; as, an officer's talents 'entitle' him to command." "Entitled," therefore, refers to the inchoate claim before, rather than the absolute ownership after, survey. *Hibberd v. Slack* (U. S.) 84 Fed. 571, 579.

1 Rev. St. p. 370, pt. 2, cl. 1, tit. 2, as amended by Laws 1893, c. 452, providing that when a person interested in the trust for the receipt of rents shall become entitled to the remainder he may terminate the estate, applies only to the expectant estate to which the remainderman is so far entitled that his title is perfect beyond the possibility of a future lessening or defeat; in other words, the word "entitled" refers not only to the right vested in a present interest, but free from the possibility of an ultimate defeasance. *Thall v. Dreyfus*, 82 N. Y. Supp. 691, 694, 84 App. Div. 569.

A plea of specifications opposing a bankrupt's discharge, alleging that the bankrupt "is entitled" to certain real estate not delivered to his assignee, is equivalent to an allegation that the bankrupt has been guilty, under Bankrupt Act 1864, § 29, of negligence in delivering to the assignee property belonging to him. *In re Rathbone* (U. S.) 20 Fed. Cas. 307.

#### ENTITLED TO HOLD.

"Entitled to hold," in a statute providing that a surviving husband or wife is entitled to hold the homestead for the term of his or her natural life, is employed to pass the entire estate in the subject of the grant for the term, which means the right to possess the property in virtue of a legal ownership, and is not limited to an actual personal occupancy. *Holbrook v. Wightman*, 17 N. W. 280, 281, 31 Minn. 168.

#### ENTITLED TO RECOVER.

"Entitled," as usually employed in an affidavit of attachment stating that the plaintiff is "entitled to recover," means that the party has legal ground to recover; and an affidavit stating that the plaintiff "should recover" is insufficient, the latter being susceptible of being the mere expression of the affiant's opinion. *Sommers v. Allen*, 28 S. E. 787, 788, 44 W. Va. 120.

Gen. St. c. 210, § 10, providing that a party to a suit duly notified by the adverse party "shall be entitled to recover" certain fees for attending the taking of a deposition when the latter neglects or refuses to take it, means that the party shall have the right, privilege, and power to maintain an action, and, in the event of success, to recover the amount named in the statute. *Robertson v. Northern R. R.*, 3 Atl. 621, 623, 63 N. H. 544.

#### ENTITLED TO SERVICE.

Hutch. Dig. St. 1822, § 44, providing that any "master or other person entitled to the service of any slaves," who shall inflict cruel or unusual punishment on them, or shall authorize or permit the same to be inflicted, shall be punished, etc., should be construed to include an overseer of a slave, who is a person, as agent or employé of another, having the right to command the obedience, and of course entitled to the services, of the slave placed under his charge. The statute does not mean simply the owner, master, or other person entitled beneficially to the services of the slave, but includes all descriptions of persons having the charge, management, or control of slaves. *Scott v. State*, 31 Miss. 473, 478.

#### ENTITLED TO SHARE.

The phrase "entitled to share," in a statute authorizing the granting of administration to relatives of a deceased who are entitled to share in his property, "can have but one meaning, and that is a reference to the person presently interested, and not those who might be or would be upon the happening of events. The words do not contemplate futurity; they contemplate present interest." *In re Seymour*, 68 N. Y. Supp. 638, 639, 33 Misc. Rep. 271.

Pub. St. c. 187, § 10, providing that no "person entitled to a share" in an estate of any deceased person shall have a right to demand the same within a certain time after administration, etc., unless he shall give bond, etc., should be construed to apply to persons entitled to a distributive share only, and not to apply to a pecuniary legatee. *Steere v. Wood*, 2 Atl. 551, 15 R. I. 199.

#### ENTITLED TO VOTE.

In Act Sept. 1, 1891, amending the charter of Dawson, and declaring that all male citizens of this state, residing in the state, who are entitled to vote for members of the General Assembly, shall be entitled to vote at an election for municipal officers, etc., "entitled" means qualified. *Davis v. City Council of Dawson*, 17 S. E. 110, 111, 90 Ga. 817.

#### ENTRANCE.

In an allegation that certain persons were entitled, with respect to land, to "certain entrances and exits," "entrances" may mean doors or gates or openings, or perhaps passages. "They might be held to mean a right of way over certain lands." *Roberts v. Trujillo*, 1 Pac. 855, 3 N. M. (Gild.) 50.

Within the meaning of Liquor Tax Law, § 17, subd. 8, requiring the consent of own-

ers of dwellings to the establishment of saloons when the dwellings are within 200 feet of the nearest entrance to the place where traffic of liquor is carried on, the word "entrance" is not to be construed as meaning the front entrance to such places, but embraces rear entrances also. *In re Saunderson*, 69 N. Y. Supp. 928, 34 Misc. Rep. 375.

A rear entrance in a building, by which the barroom can be reached by walking 10 feet through a hall, is an "entrance" within the meaning of Liquor Tax Law, § 17. *In re McMonagle*, 84 N. Y. Supp. 1068, 1069, 41 Misc. Rep. 407.

## ENTREAT.

A will where testator makes an absolute gift of property, "entreating" that it be used in a certain way, is sufficient to raise a trust where the subject and object of the trust are sufficiently certain. *Major v. Herndon*, 78 Ky. 123, 129.

In a will wherein testator makes a devise, and thereafter expresses an entreaty as to the disposition of the property or fund, "entreaty" is a precatory word, sufficient to create a trust in the property devised. *Curd v. Field*, 45 S. W. 92, 103 Ky. 293.

## ENTRUST.

See "Intrust."

## ENTRY.

See, also, "Enter—Entry."

An "entry" is a passage leading into a house or other building, or to a room; and as used in a lease of a building, providing that there was leased an "entry" from the street, will be held to mean an entry in the building leased, and not one by the side of the building. *Guild v. Ohio Lodge No. 132*, 49 Pac. 684, 685, 6 Kan. App. 67.

## ENTRYMAN.

See "Bona Fide Entryman"; "Homestead Entryman."

## ENUMERATE.

"Enumerated," as used in 1 Rev. St. p. 732, § 1, providing that "no beneficial power, general or special, hereafter to be created, other than such as are already enumerated and defined in this article, shall be valid," does not literally limit the beneficial powers to those specifically detailed in the previous sections, but the word "enumerated" is to be construed in the sense of "mentioned," "in-

dicated," "referred to," or "authorized." *Cutting v. Cutting* (N. Y.) 20 Hun, 360, 385; *Id.*, 86 N. Y. 522, 533.

"The word 'enumerate' is very frequently used with the meaning of 'designate,' or 'specifically mention.' Lexicographers give as definitions of the word, 'to mention in detail, or reckon up singly, to tell, to recount, to relate.'" It is used in the meaning of "designate" or "specifically mention" in Pol. Code, § 3650, providing that the assessor shall prepare an assessment book, in which shall be listed the various descriptions of property, their value, kind, amount, and quality, but which provides that a failure to "enumerate" in detail such property shall not invalidate the assessment. *City and County of San Francisco v. Pennie*, 29 Pac. 66, 67, 93 Cal. 465.

An article is "enumerated," so as to be without the provision that on manufactured articles not enumerated the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material of chief value, not only when the article is mentioned by its specific trade-name, but also when it may be fairly included within some generic clause contained in the tariff schedule so as to be distinguished from other articles. *Wolff v. United States* (U. S.) 71 Fed. 291, 292, 18 C. C. A. 41.

"Enumerated," as the term is used in reference to the Constitution, means the powers of government which are enumerated in the Constitution itself. *Bloomer v. Todd*, 19 Pac. 135, 140, 8 Wash. T. 599, 1 L. R. A. 111.

## ENUMERATED MOTIONS.

"Enumerated motions" are motions arising on special verdict, issues of law, cases, exceptions, appeals from judgments sustaining or overruling demurrers, etc. Supreme Court Rule 38. Where an interlocutory judgment adjudicating certain rights, also referred it to a referee to take and state certain accounts, and the referee, after hearing, made his report, but before the filing of any exceptions plaintiff gave notice of motion on the report, accounts, objections filed, evidence before the referee, interlocutory judgment, summons, pleadings, etc., for confirmation of the report, and for final judgment, the motion was an "enumerated" one within the rule. *Rogers v. Pearsall*, 47 N. Y. Supp. 551, 552, 21 App. Div. 389.

## ENVELOPE.

An "envelope" is the outside surface of a letter not inclosed in a jacket or like covering. *United States v. Huggett* (U. S.) 40 Fed. 636, 640.

## EPIDEMIC.

In a permit accompanying a life insurance policy, stipulating that "permission is hereby given to J. to proceed to Cuba and return before April 1, he to take his own risk of death from epidemics," the word "epidemics" was not employed in a peculiar medical sense, but was to be understood in its plain, ordinary, and popular sense. The company did not stipulate solely against diseases which usually assume an epidemic character, but it meant to stipulate for exemption from liability in case of death from any disease, however simple and harmless under ordinary circumstances at home, that might by any possibility prevail in Cuba to an extent which might be called an "epidemic." *Pohalski v. Mutual Life Ins. Co.*, 36 N. Y. Super. Ct. (4 Jones & S.) 234, 252.

## EPILEPSY.

"Epilepsy" or 'epileptic fits' is defined by Dr. Dunglison in his Medical Dictionary to be a disease of the brain which may be either idiopathic or symptomatic, spontaneous, or accidental, and which occurs in paroxysms, with uncertain intervals between. These paroxysms are characterized by loss of consciousness, and by convulsive motion of the muscles. Frequently the fit attacks suddenly; at other times it is preceded by indisposition, vertigo, and stupor. At times, before the loss of consciousness occurs, a sensation of a cold vapor is felt, hence called 'aura epileptica.' Sometimes it goes off in a few seconds; at other times it is protracted for hours. In all these there is a loss of sensation, sudden falling down, distortion of the eyes and face, countenance of a red purple or violet color, grinding of teeth, foaming at the mouth, convulsion of the limbs, difficult respiration, generally stertorous. After the fit the patient retains not the least recollection of what has passed, but remains for some time affected with headache, stupor, and lassitude. The disease is in the brain, and is generally organic; but it may be functional and symptomatic of irritation in other parts, as in the stomach, bowels, etc. It does not, however, frequently destroy life, but is apt to lead to mental imbecility. Dr. Wood, in his Practice of Medicine, vol. 2, p. 748, says that temporary insanity in some cases follows the paroxysms, varying in different instances from the slightest alienation to most violent mania. In this latter form the affection is known as the 'epileptic fury.' These symptoms generally subside in the course of two or three days. The course of epilepsy is generally one of deterioration. The brain appears to be gradually more and more deranged in its functions in the intervals of attack. The memory and intellectual powers in general

become enfeebled. Sometimes positive mania ensues, ending in dementia. Sometimes the mental disorder has the character of debility from the commencement of the process of deterioration. In rare instances an increased intellectual impairment may be seen after each paroxysm; much more frequently it is very gradual, and the effect is rendered striking only by comparing distinct points of time." Epilepsy is to be distinguished from insanity, for while it may bring insanity on in a longer or shorter time, it is not to be treated as insanity itself, any more than the ravings and delirium of a fever, or the unconsciousness or hallucinations produced by chloroform or ether. *Aurents v. Anderson* (Pa.) 3 Pittsb. R. 310, 311.

Epilepsy may be considered, while it lasts, as a state of insanity during which the patient is deprived of reason and judgment, and at the same time of sense and consciousness, and is wholly incapable of doing anything. *Lawton v. Sun Mut. Ins. Co.*, 56 Mass. (2 Cush.) 500, 517.

"Epilepsy," within the meaning of a question in an application for a life policy whether the applicant's parents, etc., have been afflicted with "consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease," is to be construed only as an inquiry whether such relatives have been afflicted by such disease in a hereditary form, the word "other" in the question plainly indicating that the inquiry is so limited. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 21.

## EPILEPTIC FURY.

"Epileptic fury" is a term used to designate a temporary insanity in the form of a violent mania, which sometimes follows the paroxysms of an epileptic fit. The mania generally subsides in the course of two or three days. *Aurents v. Anderson* (Pa.) 3 Pittsb. R. 310, 311.

## EPISCOPACY.

"Episcopacy" is defined by Webster as the government of a church by bishops or prelates; that form of ecclesiastical government in which bishops are established as distinct from and superior to priests; government of church by three distinct orders of ministers—bishops, priests, and deacons. Such, doubtless, is the general sense or meaning of the word "episcopacy," as commonly used and understood in this country and in Europe. This description would include the Protestant Episcopal Church in this state and country, and would necessarily limit and restrict the claim to a legacy given to support the "episcopacy." *Trustees of Diocese of Central New York v. Colgrove* (N. Y.) 4 Hun, 362, 368.

## EPITHET.

The word "epithet," as defined in dictionaries, is apparently limited to adjectives and nouns expressive of some character, quality, or attribute. In the earlier editions of Webster it is extended to nouns as well as to adjectives; in the later editions, however, it seems to be confined to adjectives. The exact meaning of the word is discussed there, and its use in the sense of phrase, name, or expression is pronounced improper. It cannot, however, have been the intention of Congress in providing, in Rev. St. § 3893 [U. S. Comp. St. 1901, p. 2658], for the punishing of any person mailing any letter or postal card upon which scurrilous matter was written or printed, to limit the word to this restricted meaning. It was clearly not intended to confine the use of the word to nouns or adjectives, but any form of expression which imputes to a person any indecent or scurrilous characteristic or quality is within the statute. The original signification of the word "epithet" is sometimes "put upon," "attributed," "charged," or "imputed." *United States v. Pratt* (U. S.) 27 Fed. Cas. 611, 618.

## EQUAL.

Webster defines "equal" to mean "in just proportion; to make equivalent to; to fully recompense." *Fry v. Hawley*, 4 Fla. 258, 279.

"Equal," as used in Const. art. 2, § 18, providing that all elections shall be "free and equal," is synonymous with the word "uniform." The definition of "equal" elections does not include the idea of uniformity in regulation, inasmuch as it is the settled policy of the state that there may be in force in localities subjects of elections which have been accepted by such localities which are not in force in other localities which did not vote to accept them. Elections are "free" when the voters are subjected to no intimidations or improper influence, and when every voter is allowed to cast his ballots as his own judgment and conscience dictate; when the vote of every elector is "equal" in its influence on the result of every other elector; when each ballot is as effective as every other ballot. *People v. Hoffman*, 5 N. E. 596, 600, 116 Ill. 587, 56 Am. Rep. 793.

### As division per capita.

A will providing that the balance of testatrix's estate, real and personal, should go to her nieces during their lives, and at their deaths to go to her heirs "in equal amounts," does not require that the property should be distributed per capita instead of per stirpes, or that the testatrix did not intend a complete testamentary disposition of

all her estate. *Appeal of Cockins*, 2 Atl. 363, 365, 111 Pa. 26.

"Equal shares," as used in a devise to testator's "heirs in equal shares," will be construed to mean that the heirs are to take per capita and not per stirpes. *Daggett v. Slack*, 49 Mass. (8 Metc.) 450, 454.

Where a father, in the granting clause of a deed, conveyed to his daughter, her heirs and assigns, a certain tract of land, and afterwards, in the habendum clause, the conveyance is enlarged by the words "to have and to hold" said land and its appurtenances unto the daughter and her two children (naming them), "made equal as heirs," the expression "made equal as heirs" must be construed as providing that the three persons named should each have an equal interest in the property conveyed. *Hule v. McDaniel*, 31 S. E. 189, 105 Ga. 319.

"Equal among," when used in a will, means a division of the estate per capita; but where a testator made a bequest of money to his own daughter and a devise of land to his daughter-in-law, and the remainder of his estate to be divided "equal among" his heirs at law, an equal division of the estate between his daughter and the family of his deceased son was intended. *Kelley v. Vigas*, 112 Ill. 242, 245, 54 Am. Rep. 235.

### As division per stirpes.

Where testatrix devises certain property equally to her two sons, and in the second clause also gives and bequeaths to her sons in trust "for their children equal interests" in certain property, each son will take one-half of the property in trust for his children. *Butler v. Butler*, 30 S. W. 4, 5, 97 Ky. 186.

Where testatrix leaves, surviving her, two children and eight grandchildren, who are the immediate issue of a deceased son, and her will provides that her estate shall be divided in equal shares, the phrase "equal shares" is to be construed as equal shares per stirpes and not per capita, as P. L. 815, provides that the issue of a deceased child of an intestate shall take, by representation of their parents, such share only as would have descended to such parents at intestate's death. In re *Hoch's Estate*, 26 Atl. 610, 611, 154 Pa. 417.

"Equal parts," as used in a statute of descents providing that an intestate's property should go in equal parts, to the children, and such person as legally represents such children in case any of them be dead, meant equal per stirpes. *Fidler v. Higgins*, 21 N. J. Eq. (6 C. El. Green) 138, 156.

## EQUAL AND UNIFORM TAXATION.

The constitutional requirement that the Legislature shall provide for a "uniform and



equal" rate of assessment and taxation means that if the state levies a tax the rate must be equal and uniform throughout the state, and if the county levies it equal and uniform through the county; and so of any township, city, or village. *Hines v. Leavenworth City*, 3 Kan. 186, 197.

Taxes are said to be "equal and uniform" when no person or class of persons in the taxing district, whether a state, county, or other municipal corporation, is taxed at a different rate than are other persons in the same district upon the same value or the same thing, and where the objects of taxation are the same, by whomsoever owned, or whatsoever they may be. *Norris v. City of Waco*, 57 Tex. 635, 641.

A tax is "equal and uniform" which reaches and bears with the like burden upon all the property within a given district, county, etc. It bears the like burden when the valuation of each parcel is ascertained in the same mode, and when it is subject to the same rate of taxation, as other property within the district, county, etc. *People v. Whyler*, 41 Cal. 351, 355.

"Equality and uniformity" in the taxation of property means that taxes must be levied according to some fixed rate or rule of apportionment, so that all persons shall pay a like amount upon similar kinds of property of the same value. *The Railroad Tax Cases* (U. S.) 13 Fed. 722, 738.

Constitutional provisions that all taxes shall be "equal and uniform" only apply to the law which imposes the taxes. In other words, the want of uniformity must be the direct result of the law itself, and not the maladministration of a proper law. *Missouri, K. & T. Trust Co. v. Smart* (La.) 25 South. 443, 446, 51 La. Ann. 416.

Const. art. 9, § 1, directs that the Legislative Assembly shall provide by law for a uniform and "equal rate of assessment and taxation." It was held that the word "rate" was used in different senses in relation to assessment and taxation. An "equal and uniform" rate of assessment means proportional valuation; relative, not absolute, equality. And "equal and uniform" rate of taxation means that the percentage of taxation shall be the same, or absolutely equal. *Crawford v. Linn Co.*, 5 Pac. 738, 739, 11 Or. 482.

The "equation of taxation" in Const. art. 5, § 1, does not apply to taxes to pay the public debt existing at the adoption of the Constitution, or for special county purposes. *Street v. Craven County Com'rs*, 70 N. C. 644, 647.

Mr. Justice Bradley said in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232-240, 10 Sup. Ct. 538, 33 L. Ed. 892, and Mr. Chief

Justice Fuller in *Giozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation. The range of the state's power was expressed by Mr. Justice Bradley as follows: "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products. It may tax real estate and personal property in a different manner. It may tax visible property only, and not tax securities for payment of money. It may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the state framing their Constitution." And so Mr. Justice Miller, speaking for the court in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. Ed. 616, said: "The federal Constitution imposes no restraints on the state in regard to unequal taxation." The court, through Mr. Justice Lamar, in *Express Co. v. Selbert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035, was equally emphatic. He said on page 351, 142 U. S., and on page 253, 12 Sup. Ct.: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected, either for bearing its burdens or from being exempt from them, is not inconsistent with a perfect 'uniformity' and 'equality' of taxation, in the proper sense of those terms, and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principles of uniformity and equality in taxation, and of a just adaptation of property to its burdens." And it was said in *Merchants' & Manufacturers' Nat. Bank v. Pennsylvania*, 187 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236: "Indeed, this whole argument of a right under the federal Constitution to challenge the tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*." *Magoun v. Illinois Trust & Sav. Bank*, 18 Sup. Ct. 594, 599, 170 U. S. 283, 42 L. Ed. 1037.

"It is not necessary that all assessments and taxes should be equal and uniform in order to be valid. First, the aggregate amount and rate of assessment, and the aggregate amount and rate of taxation, vary in almost every county, city, township, and school district in the state. The aggregate rate in some places is as high as 5 per cent. in the valuation of the property, in other

places it is as low as 1 or 2 per cent, and yet the Constitution says that the Legislature shall provide for a uniform and equal rate of assessment and taxation. Now, does this mean a uniform and equal rate of assessment in taxation throughout the state, and for every part or portion thereof, and, if not, why not? There are reasons, and sufficient reasons, but they do not float upon the surface, and hence we would expect that strict constructionists would refuse to receive them, and would deny their validity even when shown to them. Upon this question see *Bright v. McCullough*, 27 Ind. 223 et seq., and cases there cited. It is universally admitted that such constitutional provision does not apply to special assessments or special taxes. Neither does it apply strictly to license taxes. Neither do we suppose that capitation taxes or poll taxes, or requirements to work on the roads or to train in the militia, come within said constitutional provision, though they are all 'taxes' in one sense. But those taxes which do come within the provision are not required to be, and are not always in practice, levied by a uniform rule. Railroad property is assessed in one manner, and other property is assessed in quite a different manner. The fact is that the Constitution only requires that ordinary and usual assessments and taxations shall be imposed at a uniform and equal rate. We do not wish to fix the boundaries of the operation of said constitutional provision, and we could not do it if we would." The only effect of this decision is that it announces the principle that the Legislature may, when dividing a county or township, relieve the personal property of the detached territory from all liability for previous debts of the county or township, while continuing the liability of all the other property, without violating the constitutional provision. *Ottawa County Com'rs v. Nelson*, 19 Kan. 234, 239, 27 Am. Rep. 101.

#### Double taxation.

The provision of the Constitution of California providing that taxation shall be equal and uniform prohibits double taxation. If a debt for money loaned, which is secured by mortgage, is taxed, and the mortgaged property is also taxed, it is double taxation, and a violation of the Constitution. *Savings & Loan Soc. v. Austin*, 43 Cal. 415, 476.

#### Exemptions.

The words "equal and uniform," in a constitutional provision that taxation shall be equal and uniform, and all property shall be taxed in proportion to its value, etc., apply only to a direct tax on property, but the Legislature may select and exempt such property as in its discretion it may think proper. *People v. Coleman*, 4 Cal. 46, 55, 60 Am. Dec. 581.

"Equal and uniform taxation," within the meaning of the constitutional provision requiring taxation to be equal and uniform, does not import that church and school lands and lands of the United States shall be taxed to the same extent as other property, and therefore a statute exempting such lands is not unconstitutional. *High v. Shoemaker*, 22 Cal. 363, 369.

The provisions of Const. art. 11, § 13, providing that taxation shall be equal and uniform throughout the state, and providing that all property in the state shall be taxed in proportion to its value, to be ascertained as directed by law, prohibits the Legislature from exempting any kind of property from taxation. And where the general revenue law subjects all solvent debts to taxation, any other law which singles out a class of such debts and exempts them from taxation is repugnant to the clause of the Constitution which declares that taxation shall be equal and uniform. *People v. Eddy*, 43 Cal. 331, 336, 18 Am. Rep. 143.

A provision in the Constitution that all taxes shall be equal and uniform does not prohibit the Legislature from exempting property of any person or corporation from taxation. *Columbia & P. S. R. Co. v. Chilberg*, 34 Pac. 163, 164, 6 Wash. 612.

The words "all property shall be taxed in proportion to its value," in a constitutional provision requiring equality and uniformity of taxation, do not require that all property shall be taxed and deny to the Legislature the right to exempt any. The purpose of their employment is to fix the rule for the taxation of property. The intent was to protect against the taxation of property except in proportion to its value, to be ascertained as directed by law. *Mississippi Mills v. Cook*, 56 Miss. 40, 56.

The phrase "uniform and equal taxation" upon every species of property taxed, as used in Const. art. 1, § 27, providing that the tax shall be ad valorem only and uniform upon every species of property taxed, authorizes the Legislature to exempt some property. Had it been intended that all property should be taxed, the words would have been "uniform upon all species of property"; but when the word "taxed" is added, the meaning plainly is that the Legislature may exempt certain property, yet upon whatever property a tax is laid the same shall be by one uniform rate according to its value. *City of Athens v. Long*, 54 Ga. 330, 331.

The constitutional provision for "uniform and equal taxation" requires that no one species of property shall be taxed higher than another species of property on which taxes shall be levied. If a tax at all, then, says the Constitution, is levied, it must be equal or in a uniform ratio, but

the right of the Legislature to exempt any property it might see fit from taxation altogether is not affected by such provision. *City of New Orleans v. Commercial Bank*, 10 La. Ann. 735, 736; *Same v. Davidson*, 30 La. Ann. 554, 555; *Same v. Fourchy*, Id. 910, 911.

Where the Constitution provides for an equal and uniform tax, a statute authorizing a license tax on all banks, but granting an exemption to a particular bank, is contrary to the great law of equality and uniformity, which requires that all the entire class shall be exempt, or that all composing that class shall be subject to the same imposition. *City of New Orleans v. Louisiana Sav. Bank & Safe-Deposit Co.*, 31 La. Ann. 637, 638.

#### License or occupation taxes.

Taxation is "equal and uniform" if all persons in the same calling, trade, and profession are taxed alike. *Albrecht v. State*, 8 Tex. App. 216, 84 Am. Rep. 787; *Texas Banking & Ins. Co. v. State*, 42 Tex. 636, 640; *Tied. Lim.* § 101, p. 282; *Cooley, Const. Lim.* 128, 138; *Hodgson v. City of New Orleans*, 21 La. Ann. 301. Under this rule a statute providing for an occupation tax on lawyers is not violative of a provision that all taxation must be equal and uniform. *Ex parte Williams*, 20 S. W. 580, 582, 31 Tex. Cr. R. 262, 21 L. R. A. 783.

The constitutional provision that taxes shall be equal and uniform applies only to a direct tax on property, and does not limit the power of the Legislature as to the objects of taxation, being intended only to prevent an arbitrary taxation of property according to kind or quality, without regard to value. *Phoenix Carpet Co. v. State*, 22 South. 627, 628, 118 Ala. 143, 72 Am. St. Rep. 143; *Beebe v. Wells*, 15 Pac. 565, 567, 37 Kan. 472; *City of Newton v. Atchison*, 1 Pac. 288, 290, 31 Kan. 151, 47 Am. Rep. 486. It refers to a property, and not to a license tax. Taxes cannot be levied by an "equal and uniform" rate except on the value. *City of Newton v. Atchison*, 1 Pac. 288, 290, 31 Kan. 151, 47 Am. Rep. 486.

The words "equal and uniform," in relation to taxation, do not by any fair rule of interpretation extend to occupation taxes. *People v. Coleman*, 4 Cal. 46, 55, 60 Am. Dec. 581.

#### EQUAL DEGREE.

The law of descent that if an intestate shall have no issue nor widow, and no father, mother, brother, nor sister, his estate shall descend to his nearest of kin "in equal degree," should be construed to exclude all others than those who stand in the same degree of kinship. *Van Cleve v. Van Fossen*, 41 N. W. 258, 259, 73 Mich. 342.

The term "equal degree" means those persons who stand in the same nearness of blood relationship to the intestate. *Helmes v. Elliott*, 14 S. W. 930, 931, 89 Tenn. 446, 10 L. R. A. 535.

The phrase "equal degree of consanguinity," as used in statutes of descent and distribution, is not the same as "next of kindred," but applies peculiarly to the descent of real estate, by its very structure referring to the common ancestor through whose blood the estate is supposed to come, and is most appropriately used to express the common-law rule which calculated only the degrees of the intestate from the common ancestor, and held all from his blood in the same degree. *Fidler v. Higgins*, 21 N. J. Eq. (6 C. E. Green) 138, 162.

#### EQUAL DISTANCE.

Code, § 1966, imposes a penalty on any railroad which shall charge for transportation of any freight over its road a greater sum than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance. Held, that the phrase "over any portion of the same railroad" is intended to secure equality and uniformity of charges, and to exclude the conclusion that "equal distance" means the same or identical distance. *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 440, 59 Am. Rep. 250.

#### EQUAL FACILITIES.

"Equal facilities," as used in Interstate Commerce Act, § 3, requiring carriers to afford all reasonable, proper, and equal facilities to connecting carriers for the interchange of traffic, means equal facilities under similar circumstances and conditions. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (U. S.) 63 Fed. 775, 778, 11 O. C. A. 417, 26 C. C. A. 192. It does not include an act which involves the use of the track or terminal facilities of the receiving company. *Id.* (U. S.) 59 Fed. 400, 402.

#### EQUAL FOOTING.

When a state is admitted into the Union upon an "equal footing" with the original states, all residents thereof who are endowed by Congress with political rights and privileges, or who, with the consent of Congress, are permitted to participate in the formation of the new state, become citizens of the United States by adoption, even though, being foreigners, they have never complied with the requirements of the naturalization laws. *Boyd v. Nebraska*, 12 Sup. Ct. 875, 143 U. S. 185, 36 L. Ed. 106 (reversing *State v. Boyd*, 48 N. W. 739, 749, 31 Neb. 682).

**EQUAL MOIETIES.**

A devise or bequest to several persons "in equal moieties" makes the objects tenants in common. *Stetson v. Eastman*, 24 Atl. 868, 870, 84 Me. 366.

**EQUAL PARTNER.**

As used by a witness in regard to an agreement to farm certain lands with defendant and others, stating that he went in equally to purchase and that they were to be equal partners in buying the land, the expression "equal partners" was clearly understood not in the technical sense, but in the popular one, as denoting a purchase on joint account, and therefore as merely synonymous with the former expression of "equal." *Richards v. Fraser*, 69 Pac. 83, 84, 136 Cal. 460.

**EQUAL PORTIONS.**

In a will, the general scheme of which was an equal division among all the testator's children, the words "equal portions" did not mean in equal aliquot parts, but in proportions equalized by charging advances previously made, deducting them from the respective shares, and replacing the amounts thus obtained as a part of the estate to be divided. *Cummings v. Bramhall*, 120 Mass. 552, 558 (citing *Treadwell v. Cordis*, 71 Mass. [5 Gray] 341).

**EQUAL PROPORTIONS.**

"Equal proportions," as used in *Laws 1874*, p. 654, providing that the taxes for gas, water, and ferry of a certain town should be assessed in equal proportions on all lots, means proportioned on the basis of equality. The proportion must be made on the comparative relation of one lot to the other in value or enjoyment of privilege, and does not mean that the assessment shall be in equal sums on all lots. *Cossitt v. Reimenschneider*, 39 N. J. Law (10 Vroom) 625, 626.

Where a deed of assignment provides that, if there shall not be money sufficient to pay the debts in full, then they should be paid in "just and equal proportions," it means that as the fund to be divided is to the amount of the debts, so is the debt of any individual to the dividend he will be entitled to receive. *Cheever v. Imlay* (Pa.) 7 Serg. & R. 510, 514.

**EQUAL PROTECTION OF THE LAW.**

"Equal protection of the law" is secured if the laws operate on all alike and do not subject an individual to an arbitrary exercise of the powers of government. *Duncan v. Missouri*, 152 U. S. 877, 882, 14 Sup. Ct. 570, 571, 38 L. Ed. 485; *Philbrook v. New-*

*man* (U. S.) 85 Fed. 129, 143; *State v. Cadi-gan*, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 668, 87 Am. St. Rep. 714.

Equal protection only extends to forbidding any discrimination as to the rights of the citizen, and places all the inhabitants of the state on an absolute equality before the law. "By 'equal protection' is meant equal security to any one in his private rights; in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the law affords for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens and charges than such as are imposed on all others under like circumstances. This protection attends every one everywhere, whatsoever be his position in society, or his association with others either for private improvement or pleasure. It does not leave him because of any social or official position which he may hold, or because he may belong to a political body or a religious society, or be a member of a commercial, manufacturing, or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman, and child, in all its broad domain, wherever they may go and in whatever relations they may be placed." *Northern Pac. R. Co. v. Carland*, 3 Pac. 134, 152, 5 Mont. 146 (citing *Santa Clara County v. Southern Pac. R. Co.* [U. S.] 18 Fed. 885). See, also, *In re Grice* (U. S.) 79 Fed. 627, 645.

The guaranty of "equal protection of the laws" means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989. The equal protection of the laws is a pledge of a protection of equal laws, and does not subject the individual to an arbitrary exercise of the power of the government. *Connolly v. Union Sewer Pipe Co.*, 22 Sup. Ct. 431, 439, 184 U. S. 540, 46 L. Ed. 679.

"'Equal protection of the laws' of a state is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them on the same condition as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty, and the pursuit of happiness which do not greatly affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for

a violation of the laws." *State v. Montgomery*, 47 Atl. 165, 168, 94 Me. 192, 80 Am. St. Rep. 386.

Const. U. S. Amend. 14, "did not create any legal new rights, but operated upon rights as it found them established, and declared that such as they were in each state they should be enjoyed by all persons alike. *Ward v. Flood*, 48 Cal. 36, 50, 17 Am. Rep. 405.

Where proceedings to disbar an attorney were the same usually resorted to in like cases, the attorney was not disbarred without "equal protection of the law." And a contention that such disbarment was arbitrary, within such definition, because he was not cited to answer some of the charges of which he was found guilty, cannot be sustained where he was found guilty of charges named in the citation sufficient to justify the judgment pronounced. *Philbrook v. Newman* (U. S.) 85 Fed. 139, 143.

Laws 1891, c. 320, § 1, providing that the Governor shall, without judicial proceedings, suspend any railroad commissioner who becomes interested in a railroad, does not deny to such commissioners the equal protection of the law, in violation of Const. U. S. Amend. 14, § 1. *State v. Wilson*, 28 S. E. 554, 121 N. C. 425.

#### Classification and punishment of crimes.

"As guaranteed every citizen by the federal Constitution" implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid on him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment. *Ho Ah Kow v. Nunan* (U. S.) 12 Fed. Cas. 252 (cited in *Re Tiburcio Parrott* [U. S.] 1 Fed. 481, 511); *Pace v. Alabama*, 1 Sup. Ct. 637, 638, 106 U. S. 583, 27 L. Ed. 207.

The provision in the Constitution that all persons are entitled to equal protection of the law has been construed to mean the protection of equal laws. *Yick Wo v. Hopkins*, 118 U. S. 356, 358, 6 Sup. Ct. 1064, 30 L. Ed. 220. Assuredly, one of the tests by which the equality of the law must be measured is the equality of punishment it prescribes against its violators. *People v. Duke*, 44 N. Y. Supp. 336, 339, 19 Misc. Rep. 292.

Code Ala. § 4184, provides that if any man and woman live together in adultery or fornication they shall be liable to a certain fine and imprisonment in the county

jail for six months. Section 4189 declares that, if any white person and negro commit such offense, each shall be liable to a fine larger in amount than that prescribed by section 4184, and to imprisonment in the penitentiary for from two to seven years. Held, that the two sections were consistent with each other, and not obnoxious to the fourteenth amendment of the federal Constitution, as denying to one person the equal protection of the laws. *Pace v. Alabama*, 1 Sup. Ct. 637, 638, 106 U. S. 583, 27 L. Ed. 207.

#### Classification of localities.

The "equal protection of the laws," within the meaning of the fourteenth amendment of the federal Constitution, contemplates the protection of persons and classes of persons against unjust discrimination by the state, and does not relate to territorial or municipal arrangements made for different portions of the state. Thus a state is not prohibited from prescribing the jurisdiction of its several courts, either as to their territorial limits, or the subject-matter, amount, or finality of their respective judgments or decrees, and provisions and statutes establishing one system of laws in courts in one portion of the territory of the state different from that in the remaining portion is not in violation of the provision. *Missouri v. Lewis*, 101 U. S. 22, 29, 25 L. Ed. 989. Under this principle, Act Feb. 1, 1879, making it unlawful to transport cotton in the seed during the nighttime within certain counties of the state, is not unconstitutional as denial of equal protection of the laws. *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128.

#### Classification of persons, etc.

By the term "equal protection of the laws," as used in the constitutional limitation that a state cannot deprive any one within its jurisdiction of the equal protection of the laws, is meant equal security under them to every one under similar terms in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort on the same terms with others to the courts of the country for the security of his person and property, the prevention and redress of wrong, and the enforcement of contracts, but also his exemption from any greater burdens and charges than such as are usually imposed upon all others under like circumstances. A state statute prohibiting all combinations in restriction of competition or trade, which exempts from its provisions agricultural products or live stock while in the hands of the producer, violates such provision of the Constitution. In *re Grice* (U. S.) 79 Fed. 627, 645. And an act providing for the examination and licensing of barbers, and that no person shall receive a certificate who at the time of his examination is an alien, violates such provision. *Templar v. Michigan State*

Board of Examiners of Barbers, 90 N. W. 1058, 1059, 131 Mich. 254.

"Equal protection of the laws," within the constitutional meaning of the guaranty, is not denied to any person by a statute which is applicable to all persons under like circumstances, and does not subject the individuals to an arbitrary power. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the meaning of the amendment. *Hawkins v. Roberts*, 27 South, 327, 332, 122 Ala. 130.

"Equal protection of the laws" means equal exemption with others of the same class from all charges and burdens of every kind. A classification which makes a distinction between corporations identically alike in organization, capital, and all other powers and privileges conferred by law, and limits the amount of charges to be made by one of such corporations for services, denies it equal protection of the laws. *Cotting v. Godard*, 22 Sup. Ct. 30, 42, 183 U. S. 79, 46 L. Ed. 92.

Const. Amend. 14, providing that no state shall deny to any person within its jurisdiction the "equal protection of the laws," means that the laws of the state must be equal in their benefit as well as equal in their burdens, and that less would not be the equal protection of the laws. This did not mean absolute equality in distributing the benefits of taxation. This is impracticable, but it does mean the distribution of the benefits on some fair and equal classification or basis. *Claybrook v. City of Owensboro* (U. S.) 16 Fed. 297, 301.

The constitutional provision of "equal protection of the laws" is violated by laws which hedge the right to labor, and to transact business, with conditions and exactions for one class which do not exist for others. *State v. Cadigan*, 50 Atl. 1079, 1081, 73 Vt. 245, 57 L. R. A. 666, 87 Am. St. Rep. 714.

"Equal protection of the laws," as used in Const. U. S. Amend. 14, which prohibits any state from denying to any person within its jurisdiction the equal protection of the laws, is so construed as to prevent the states from passing laws which make unjust discriminations among persons, based on differences of race or social condition. A law which provides a distinct mode of taxation for a particular designated class of property, which laws requires the application of the same methods to all constituents of such class, so that it will operate equally and uniformly on all persons in similar circumstances, is not prohibited by this amendment. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 612, 48 N. J. Law (19 Vroom) 146.

#### Same—Race discrimination.

A statute denying a Chinaman the right to give evidence in favor of or against any white person does not deny to him the "equal protection of the laws." The facts being proven, the law pronounces the same judgment upon him as upon another. Under the same facts the law provides him the same protection against threatened violence as it does the white man. He is entitled to the protection of the whole police power the same as any other inhabitant. Those committing crime against him are punished the same as though the crime had been committed upon a white man. The law affords him every means of bringing the facts to the knowledge of the courts for judicial action as is afforded to the white man. The mere fact that the rule operates to forbid him to bear testimony in an action in which he is interested as against a white man is not a denial of the equal protection of the laws. He is not excluded because he is the injured party and also a Chinaman, but because on other grounds he is an incompetent witness. *People v. Brady*, 40 Cal. 198, 199, 206, 213, 6 Am. Rep. 604.

The "equal protection of the laws," within the meaning of the clause of the federal Constitution, applies to the laws of a state in reference to the right to attend the public schools, and therefore an absolute exclusion of colored children would be in violation of the provision, but laws establishing different schools for white children and colored children are not in violation thereof. *Ward v. Flood*, 48 Cal. 38, 50, 17 Am. Rep. 405.

The prohibitions of the fourteenth amendment extend to all actions of the state denying equal protection of the laws, whether such action be by the legislative, executive, or the judicial department of the state. Though it cannot be said a mixed jury in a particular case is essential to the equal protection of the laws, and though a right to it is not given by the fourteenth amendment, yet if a state officer, in violation of the state laws, refuses, in a criminal proceeding against a colored person, to select persons of the colored race as jurors, solely because of their color, his act is prohibited by the constitutional amendment, though it is not such an act as will authorize the removal of the proceedings into the federal courts. *Ex parte Virginia*, 100 U. S. 313, 318, 25 L. Ed. 667.

While a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as a matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not always or absolutely necessary to the "equal protection of the law," he is entitled to demand that, in the selection of jurors

to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color. *Neal v. Delaware*, 103 U. S. 370, 394, 26 L. Ed. 567.

**Peonage.**

Act Ala. March 1, 1901 (Acts 1901, p. 1208), § 1, making it a penal offense where a person who has contracted in writing to labor for or serve another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with the party furnishing lands, or the lands and teams to cultivate it, either to furnish the labor or labor and teams to cultivate the lands, afterwards, without the consent of the other party, and without sufficient excuse, to be adjudged by the court, shall leave such other party or abandon such contract, or leave or abandon the leased premises or land and take employment of a similar nature from another person without first giving him notice of the prior contract, is void as in violation of the Constitution of the United States, in denying to the classes of citizens affected the equal protection of the laws. It attaches consequences to the breaches of their contract obligation, and erects barriers to their right to pursue their usual callings, which are raised up by law against no other class of man under like circumstances. It attempts to coerce performance of their contracts of personal service by means unknown to the law of the land in the same localities upon breach of like contracts by all other classes of citizens. *Peonage Cases* (U. S.) 123 Fed. 671, 691.

**Police power.**

The "equal protection of the laws" implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind. But the clause in the fourteenth amendment does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order, and safety of society, and adopt such measures as will advance its interests and prosperity. The fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. *Minneapolis & St. L. R. Co. v. Beckwith*, 9 Sup. Ct. 207, 129 U. S. 26, 32 L. Ed. 585; *State v. Pennoyer*, 18 Atl. 878, 880, 65 N. H. 113, 5 L. R. A. 709.

**Unequal taxation or exemption.**

Const. Amend. 14 must be construed as imposing a limitation upon the exercise of

all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws, and by "equal protection of the laws" is meant equal security under them to every one, on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort on the same terms as others to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. Unequal exactions of every form, or under any pretense, are absolutely forbidden and, of course, unequal taxation. It is not possible to conceive of "equal protection" under any system of laws where arbitrary and unequal taxation is permissible. *San Mateo County v. Southern Pac. R. Co.* (U. S.) 13 Fed. 722, 733.

The "equal protection of the laws" guaranteed by the federal Constitution implies not only that the means for the security of his private rights shall be accessible to him on the same terms with others, but also that he shall be exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances, including unequal exactions of any kind, among them that of unequal taxation. *Santa Clara County v. Southern Pac. R. Co.* (U. S.) 18 Fed. 385, 390.

U. S. Const. Amend. 14, art. 1, providing that no state shall deny to any person within its jurisdiction the "equal protection of the laws," does not mean that certain property for public uses shall not be exempt from taxation when the general public receive the benefit of such exemption. *Northern Pac. R. Co. v. Carland*, 8 Pac. 134, 152, 5 Mont. 146.

**EQUAL TO.**

Act May 11, 1897, § 4 (P. L. 53), providing that municipal authorities shall, before issuing any obligations for an increase of municipal indebtedness, assess and levy an annual tax which shall be "equal to" and sufficient for, and applied exclusively to, the payment of the interest and principal of such debt within a period not exceeding 30 years from the date of such increase of indebtedness, if strictly construed, would require that the amount to be raised by the tax should be exactly the same as, and no more or no less than, the amount of the principal and interest of the debt, and, if the moneys so raised are to be applied exclusively to such payment, then any possible surplus could be used for no other purpose.

*Barr v. City of Philadelphia*, 43 Atl. 335, 338, 191 Pa. 438.

"Equal to," as used in a contract by which defendants agreed to keep the number of boats in a freight line equal to the number of boats leased, the words meant "not less than," but would not necessarily restrict the number to "not more than" the number leased. In common use, words which are absolutely exact in mathematics may be inexact and vague. The phrase "equal to" excludes the idea of inferiority, and therefore, when we assert that two things are "equal to" each other, we give mathematical accuracy, because we deny the inferiority of either to the other; but when we say that one person or thing is "equal to" another, we do not necessarily deny its superiority to that other. The phrase, when coupled with an adverbial modification, contains an implication of superiority; as, to say that one person was at least "equal to" another in a certain respect, implies that he is or may be superior. *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law (9 Vroom) 505, 517.

Act July 12, 1882, c. 290, § 18, 22 Stat. 166 [U. S. Comp. St. 1901, p. 3497], amendatory of Rev. St. § 5208 [U. S. Comp. St. 1901, p. 3497], which prohibits the certification of checks "unless the drawer has on deposit, at the time such check is certified, an amount of money 'equal to' the amount of such check, means, 'at least equal,' or 'so much money as.'" *United States v. Potter* (U. S.) 56 Fed. 83, 92; *Same v. Dana*, Id.; *Same v. French*, Id.

### EQUAL TO SAMPLES.

A contract of sale of foreign refined rape oil, "warranted only equal to samples," meant that the oil to be delivered was to be equal to the samples in quality. *Nichol v. Godts*, 10 Exch. 191, 193.

### EQUALITY.

The term "equality," as used in Rev. St. § 1799, providing that in deliberations of creditors in insolvency proceedings, in case of any equality, the number of persons shall prevail, refers to equality in amount, and not in number. *Winkler v. His Creditors*, 34 La. Ann. 1221, 1223.

### EQUALIZATION.

The term "equalization" has an accepted significance throughout the entire country. It is the equalization of the several assessments made by the county assessors between the several counties, so that the aggregate amount of taxation shall be uniformly borne by the several counties. *Poe v. Howell* (N. M.) 67 Pac. 62, 65.

"Equalization," as used in the statute authorizing equalization of valuations, means jurisdiction to increase or diminish the valuation of personal property, and an addition or deduction of a given percentage to or from the assessed valuation. *Harney v. Mitchell*, County Sup'rs, 44 Iowa, 203, 204.

St. 1893, c. 70, art. 7, par. 5624, § 1, provides that the Board of Equalization shall examine the various county assessments and equalize them, and also requires such board to equalize the taxes throughout the territory. It was held that the board had no authority to raise the amounts as they appeared in the various county assessments, and thus to raise the aggregate amount of property in the territory above the total sum as it appeared in such assessments, the court saying: "The plain, evident meaning of the word 'equalization,' as here used, is to take the average of the assessments throughout all the various counties upon the aggregate amounts ascertained by the assessments, and to see that the counties respectively stand upon an equal footing. The power is a power to equalize the different assessments of values from the various counties constituting the aggregate amount of property in the territory, and is not a power to raise the aggregate amount of all the property in the territory. And so similar statutes throughout the United States, wherever we have been able to find them, have announced the same interpretation which is here given to this statute." *Gray v. Stiles*, 49 Pac. 1083, 1092, 6 Okl. 455.

### EQUALIZE.

To "equalize" is to make equal to, to take a number of objects and select one of such number for the standard, and make all others conform to it; and hence the power given to the State Board of Equalization to "equalize" the assessments of the various counties for the purposes of taxation authorizes them to determine from the returns made which of such returns, in the judgment of the board, most nearly represents an assessment based upon the true cash value of the property in such county, and may adopt such return as the standard or basis for equalization, and may add to or deduct from all the remaining returns such per cent. as will be required to cause the various other counties to conform to such standard or basis of assessed valuation, notwithstanding such action may result in increasing or diminishing the aggregate valuation as shown by the returns made by the several county clerks. *Wallace v. Bullen*, 54 Pac. 974, 6 Okl. 757.

To "equalize" means to make equal, to cause to correspond, as to equalize accounts or taxes, and is so used in St. 1893, c. 70, art. 6, § 2, providing that the board of



county commissioners shall hold a session for the purpose of "equalizing" the assessment rolls in their county between different townships. *Bardrick v. Dillon*, 54 Pac. 785, 787, 7 Okl. 535.

"Equalize," as used in Gen. St. D. C. § 186, providing for the creation of a board to "equalize" the property of railroad companies for taxation, must be with reference to the language of the Constitution requiring a uniform and equal rate of assessment, and must be construed to mean "to secure equality." *Chamberlain v. Walter* (U. S.) 60 Fed. 788, 792.

The Board of Equalization cannot "equalize" taxes and assessments without considering comparative values. The purpose of equalization is to bring the assessments of different parties to the same relative standard, so that no one may be compelled to pay a disproportionate part of the tax, and this involves the right of citizens to complain before the board, and have corrected any inequality in the assessment. The board must receive his complaint, hear evidence upon the question of any inequalities presented thereby, determine the facts, and equalize the assessments. *State v. Karr*, 90 N. W. 298, 299, 64 Neb. 514.

As the term "equalize" is used with reference to taxation, it is not synonymous with "discharge," and therefore the fact that the county commissioners acted on a petition of a railroad to equalize a tax did not deprive the commission of its right to act on a subsequent application to discharge the tax on the ground that, the commission having once acted, its power to act was extinguished. While perhaps the power to discharge might include the right to equalize, yet the authority to equalize would give no direct license to discharge. The ultimate object might possibly be obtained by equalizing to a minimum, yet that, if done in good faith, would be an extreme case, and an evident exception to the rule. *State v. Ormsby County Com'rs*, 7 Nev. 392, 397.

### EQUALLY.

In Laws 1861, c. 169, declaring that when a suit or proceeding is prosecuted or defended by the representatives of the decedent the opposite party shall not testify as to matters, which, if true, must have been equally within the knowledge of the deceased person, "equally" does not relate to the degree of knowledge possessed by the parties, but is used in the sense of "alike," so as to preclude a party's evidence where the facts to which he is called are known to both. *Kimball v. Kimball*, 16 Mich. 211, 215.

The term "equally interested," when used in reference to the interest of two or more

persons in reference to a business, imports equality in all respects. *Connolly v. Davidson*, 15 Minn. 519, 520 (Gil. 428, 429), 2 Am. Rep. 154.

Rev. St. § 891 [U. S. Comp. St. 1901, p. 672], making certified copies of the books of the Commissioner of the General Land Office "evidence equally" with the originals, does not forbid a party from showing by extrinsic proof, otherwise legitimate, what the contents of the lost original really were, when it is shown that the record itself, or the transcript from it, is not a true copy, and the party is not necessarily deprived of his rights on account of the defective record in the General Land Office. The words "evidence equally," as used in the act, do not mean that in all cases the copy should have the same probative force as the original instrument, but it should be regarded as of the same class in the grades of evidence as to written and parol, and primary and secondary. *Campbell v. Laclede Gaslight Co.*, 7 Sup. Ct. 278, 281, 119 U. S. 445, 30 L. Ed. 459.

In the statute of distribution of real estate, providing that if the intestate shall leave no child his estate shall descend equally to the next of kin, the word "equally" is not used in its verbal sense, as it is in the former part of the section, where it is said that the portions of all male children shall be equal, where it intends that they shall be on a level or to the same amount, but the term "equally," as an adverb, is used in one of its adverbial senses, and intends "in like manner" or "in the same manner" as had been before provided for the distribution among the children of the decedent; so that if a person die intestate and without issue, and leaving surviving brothers and sisters, his estate must be divided so that the brothers shall have equal portions and the sisters equal portions, but that each male portion shall, as provided by the general law of distribution, be double the amount of each female portion. *Auger v. Taylor* (Vt.) 2 Tyler, 260.

The word "equally," as used in an instruction that plaintiff could recover for personal injuries "unless you should conclude from the evidence that she by her own negligence contributed equally with defendant to her own injuries," can have no other meaning than that which is ordinarily given to the word. It means that the jury should return a verdict for plaintiff unless she contributed equally with defendant to her own injury, and cannot be construed in the sense of "likewise." *Gulf, C. & S. F. R. Co. v. Warick*, 35 S. W. 235, 236, 1 Ind. T. 10.

### As creating tenancy in common.

A devise or bequest to several persons "equally" makes the objects tenants in com-

mon. *Stetson v. Eastman*, 24 Atl. 868, 870, 84 Me. 366; *Loveacres v. Blight*, Cowp. 352.

In a will, even without the subsequent words "to be divided," "equally" makes a tenancy in common. *Rigden v. Vallier*, 8 Atk. 731, 733.

In a will "equally to be divided," "equally among," or "between," even in law perhaps, and certainly in equity, create a tenancy in common, but without those words it is a joint tenancy. *Morley v. Bird*, 3 Ves. Jr. 629, 631.

The words "share and share alike," "equally," "equally to be divided between them," "equally among them," and similar phrases and words, when used in wills, describing the manner in which certain property is to be divided between devisees of a certain description, are words indicating a severance of interests, and all have been held to create tenancies in common. *Shattock v. Wall*, 54 N. E. 488, 489, 174 Mass. 167.

#### EQUALLY CREDIBLE.

To be "equally credible," witnesses must have the same measure of intelligence, honesty, means of knowledge, and absence of bias. *Collins v. Stephens*, 58 Ala. 543, 545.

#### EQUALLY DIVIDED.

A will provided that certain property should be "equally divided" among the heirs of J., and heirs of N., and the heirs of S. Held, that the property should be equally divided among all the individuals included by the testator under the term "heirs" of J., N., and S. *Ward v. Stow*, 17 N. C. 509, 512, 27 Am. Dec. 238.

In construing a will directing that certain property be equally divided between certain beneficiaries, it is said "that 'equally' to be divided is no more than if one moiety had been devised to one and the other to the other, unless something appears contrary in the will." *Thrustout v. Peake*, 1 Strange, 12, 18.

A devise of lands to W. for life, with remainder after his death to his children, "to be equally divided between them, share and share alike," has been held to give the children a life estate only in the premises devised. *Silvey v. Howard*, 6 Adol. & E. 253, 256.

Where a testator settled his estate on the ancestor, with remainder to his heirs, "equally to be divided among them," the words "to be equally divided" prevent the application of the rule in *Shelley's Case*, and the first taker has only a life estate. "The rule in *Shelley's Case* only applies when the

same person will take the same estate, whether they take by descent or purchase, in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seignories, and to the right of creditors, that the first taker should have an estate or inheritance; but when the person taking by purchase would be different or would have different estates than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, the heirs taking as purchasers. The words "to be equally divided" include different persons than simply the word "issue," when used as a word of descent, for in the latter case the person or persons to take would be ascertained by the rules of descent, there would be representations, and the taking would be per stirpes; while in the former the words of descent would have no application, and there must be an equal division per capita. Hence, that use of these words prevents the application of the rule. *Mills v. Thorne*, 95 N. C. 362, 365 (citing *Ward v. Jones*, 40 N. C. 400).

#### As indicating a class.

Where testator and his wife were childless, and testator by his will provided that after the expiration of the life estate of his wife the property should be "equally divided between her relations and mine," the property was to be equally divided between those two classes, and each class took one-half. *Appeal of Young*, 83 Pa. 59.

As a general rule, "equally to be divided" in a will imports that each of the persons among whom division is to be made is to take the same share, and consequently they take separately as individuals. But that does not hold where the context shows clearly that certain devisees are intended to take as a class as the representatives of some ancestor. *Henderson v. Womack*, 41 N. C. 437.

Testator directed that his personal property be distributed in equal portions among the children of the brothers and sisters of the testator and his wife. "I mean and intend that the children of these parties above named, without any regard to numbers, shall be counted as one family, and the property to be equally divided amongst them all." Held that, while the words "equally divided amongst them all" may apply as well to a division amongst classes as amongst individuals, the testator in this case, for the purpose of defining his meaning and intention, made all of the devisees one class, one stock, one blood, one family, by language that could not be harmonized by any other construction or interpretation of the will, and that the distribution was to be per capita among them all, and not per stirpes. *West v. Rassman*, 84 N. E. 991, 995, 135 Ind. 278.

A provision in a will that the estate be "equally divided among my heirs" signifies plainly that all persons of the class mentioned, without limitation or distinction, are intended, and each is to take a particular proportion, expressed by the fraction of which one is the numerator, and the whole number of the class, whatever it may happen to be, is the denominator. *Best v. Farria*, 21 Ill. App. 49, 51.

"Equally to be divided" and "share and share alike" usually mean a division per capita and not per stirpes; but when the devise is not to the several children of brothers and sisters, but to the children of several brothers and sisters, and the classes are distinguished by the word "and" between each, it amounts to a classification, and the children of each class take the parent's share. *Hiestand v. Meyer*, 24 Atl. 749, 751, 150 Pa. 501.

#### As division per capita.

A will directing testator's property equally to be divided between certain beneficiaries "means a division per capita, and not per stirpes, whether the devisees be children or grandchildren, brothers and sisters, nephews and nieces, or strangers in blood to the testator." *Kean's Lessee v. Hoffecker* (Del.) 2 Har. 103, 29 Am. Dec. 836; *Brittain v. Carson*, 46 Md. 186, 188; *Daggett v. Slack*, 49 Mass. (8 Metc.) 450, 454; *Richards v. Miller*, 62 Ill. 417, 425; *Appeal of Bender* (Pa.) 3 Grant, Cas. 210, 212; *Hill v. Spruill*, 39 N. C. 244, 246; *Nichols v. Denny*, 37 Miss. 59, 61; *Purnell v. Culbertson*, 75 Ky. (12 Bush) 369, 371; *Bisson v. West Shore R. Co.*, 38 N. E. 104, 106, 143 N. Y. 125; *Ramsey v. Stephenson*, 57 Pac. 195, 196, 34 Or. 406 (citing *Kelley v. Vigas*, 112 Ill. 242, 245, 54 Am. Rep. 285).

Where a testator directed that two negroes should be sold and the proceeds equally divided between testator's legal heirs, the words "equally divided," as used in the bequest, prevented a division in the proportions prescribed by the statute of distributions, as would have been the case had the bequest been to the testator's legal heirs without the words "to be equally divided," and required a division per capita, each beneficiary being entitled to share equally with those included in the entire class. *Freeman v. Knight*, 37 N. C. 72, 76.

A will providing that testator's property should be "divided equally" among certain grandchildren and great-grandchildren indicated the testator's intention that the property should be distributed per capita. *Balentine v. Foster*, 30 South. 481, 483, 128 Ala. 838. In a will providing that after a legacy to the testator's wife the residue of his estate should be divided equally between his children, naming them, and his grandchildren, naming them, and further providing that those of his children who had not re-

ceived a certain amount of household goods similar to those which had been given to the other children should receive the same out of his estate in order to make them all equal, the word "equally" meant equal shares, and the children and grandchildren would take per capita. *Wells v. Newton*, 67 Ky. (4 Bush) 158, 159.

Where personal property is bequeathed to testator's wife, and at her death to "be divided equally" between the poor relations of testator and his wife, it is to be divided per capita, and not per stirpes, between the brothers and sisters of the testator, and the mother of the wife, the father being dead. *McNeilledge v. Galbraith* (Pa.) 8 Serg. & R. 43, 45, 11 Am. Dec. 572.

A will requiring the estate to be "divided" between a nephew, two nieces, and two children of another nephew means an equal division per capita. *Purnell v. Culbertson*, 75 Ky. (12 Bush) 369, 371.

The words "equally," "share and share alike," and "to be equally divided," when used in a will, mean a division per capita. Consequently a devise that property should be "equally divided" among the testator's heirs was equivalent to a direction that it should be divided among the heirs per capita. *Best v. Farria*, 21 Ill. App. 49, 51, 52.

A devise giving an estate to be "equally divided" among a cousin and children of the mother's cousin required the devisees to take per capita. *Farmer v. Kimball*, 46 N. H. 435, 439, 88 Am. Dec. 219.

The phrase "equally to be divided among them," "or share and share alike," when added to a will devising property to a beneficiary and his heirs, have been held to prevent the application of the rule in *Shelley's Case*, since they require a division per capita among the donees of the remainder, while under the law of descent the heirs take per stirpes and representatively, and to give the rule operation the same persons will take the same estate, whether they take by descent or purchase. *Howell v. Knight*, 6 S. E. 721, 722, 100 N. C. 254.

Testator directed his executors to invest the residue of his estate, and to pay the income to his wife for life, and at her death to divide the principal "equally" between his blood relations of the degree which the law permits. Held, that the word "equally" was used to denote the mode of distribution, and was used by the testator to mean "with equal regard to the rights of every one as defined by law," to wit, a division per capita. *Cummings v. Cummings*, 16 N. E. 401, 405, 146 Mass. 501.

#### As division per stirpes.

A provision in a will by which testator declared that it was his will that all the

remainder of his movable estate should be "divided equally" among certain persons should be construed as meaning that the devisees should take per stirpes and not per capita. *Roome v. Counter*, 6 N. J. Law (1 Halst.) 111, 114, 10 Am. Dec. 390.

Under a will wherein the testator directed an equal division of a portion of his estate, and that a certain balance should be "equally" divided between his two sons and the children of his daughter, the children of his daughter take per stirpes. *Appeal of Risk*, 52 Pa. (2 P. F. Smith) 269, 273, 91 Am. Dec. 156.

A will providing that testator's estate shall be "equally divided" between his brother, his two sisters, and the children of a deceased sister requires the estate to be divided into four parts. The failure to insert the words "each of" before "children" is conclusive of such fact. *Lachland's Heirs v. Downing's Ex'rs*, 50 Ky. (11 B. Mon.) 32, 34.

While it may be regarded as a general rule that, when the subject of the testamentary gift is to be "equally divided," the persons among whom the provision is to be made would take per capita, yet it is equally well settled that this rule does not apply where a contrary intention is discoverable in the will. *Bisson v. West Shore R. Co.*, 143 N. Y. 125, 38 N. E. 104. And where a testator devised his residuary estate to his wife for life, thereafter to his sister and brother, and after their death to the children of said brother and sister, the children of the sister took one half as representatives of their mother, and the children of the brother took the other half, as the rule yields to a very faint glimpse of a different intention. In re *Walker's Estate*, 80 N. Y. Supp. 653, 656, 39 Misc. Rep. 630.

#### As creating a tenancy in common.

The words "equally to be divided" in a will go to the quality of the estate, and not to the limitation of it, and create a tenancy in common. *Jackson v. Luquere* (N. Y.) 5 Cow. 221, 228; In re *Chapeau's Estate* (N. Y.) Tuck. Sur. 410, 419.

A devise of real estate to several persons, "equally to be divided" among them, creates a tenancy in common of the property as between all the devisees. *Gaskin v. Gaskin*, 2 Cowp. 657, 660; *Briscoe v. McGee*, 25 Ky. (2 J. J. Marsh.) 370, 372; *Larsh v. Larsh* (Pa.) Add. 310, 311; *Evans v. Brittain* (Pa.) 3 Serg. & R. 135, 138; *Martin v. Smith* (Pa.) 5 Bin. 16, 22, 6 Am. Dec. 395; *Midford v. Hardison*, 7 N. C. 164, 165.

A will devising property to be "equally divided" between certain persons creates a tenancy in common, whether used with reference to real or personal estate. *Sealy v. Laurens* (S. C.) 1 Desaus. 137, 139; *Owen v.*

*Owen*, 1 Atk. 494, 495; *Allison v. Kurtz* (Pa.) 2 Watts, 185.

A bequest of property "equally to be divided" between the legatees creates a tenancy in common, and not a joint tenancy. *Bolger v. Mackell*, 5 Ves. 509, 514; *Mackie v. Story*, 93 U. S. 589, 592, 23 L. Ed. 986; *Haws v. Haws*, 8 Atk. 524; *Jolliffe v. East*, 3 Brown, Ch. 24, 25; *Mason's Ex'rs v. Trustees of M. E. Church at Tuckerton*, 27 N. J. Eq. (12 C. E. Green) 47, 51.

The words "share and share alike," "equally," "equally to be divided between them," "equally among them," and similar phrases and words, when used in wills, describing the manner in which certain property is to be divided between devisees of a certain description, are words indicating a severance of interests, and all have been held to create tenancies in common. *Shattuck v. Wall*, 54 N. E. 488, 489, 174 Mass. 167.

A will leaving property to be "equally divided in equal shares" makes a tenancy in common, unless controlled by accompanying restrictive words. *Drayton v. Drayton* (S. C.) 1 Desaus. 324, 329.

Where testator provided that his property should be "equally divided between my brother" J. and "my brother G.'s children," J. took, as tenant in common, an equal part with each of the children of G. *Maddox v. State* (Md.) 4 Har. & J. 539, 540.

It has ever been considered a settled rule in the construction of a will that, where testator gives to two or more property, real or personal, "equally to be divided," or "share and share alike," or "in equal shares," or "to be divided equally between them," or other equivalent expressions indicating an intent that the objects of his bounty shall have their respective shares of the entire things granted, this shall be deemed a tenancy in common, and not a joint tenancy, unless there be other express provisions showing a clear intention on the part of the testator that they shall take as joint tenants, or that the survivor shall take the whole. *Emerson v. Cutler*, 31 Mass. (14 Pick.) 108, 114.

#### As relating to value.

Where a statute provides that, if any of the children interested in an estate die, their portion shall be "equally divided" among the surviving children, the statute is complied with though the shares of certain of the heirs consist chiefly of real estate, while the shares of the rest consist to a much greater extent of personal estate. *Howard v. Howard*, 19 Conn. 318, 318.

A clause in a will directing that the balance of testator's property, both real and personal, be "equally" divided among certain beneficiaries, means that the "shares shall be equal in quantity, and not that they are

to be given and held in the same manner." *Bannister v. Bull*, 16 S. C. 220, 227.

To be "equally divided" are words familiar in wills, and have a settled meaning. It must be understood, as applied to land, that the testator used them in their ordinary sense, as indicating not equality in area, but in value. *Sanderson v. Bigham*, 19 S. E. 71, 72, 40 S. C. 501.

### EQUALLY SHARED.

A devise of two houses to J. and H. generally, and then saying that the meaning was that the rents should be "equally shared" between them, made the devisees tenants in common, and not joint tenants. *Prince v. Heylin*, 1 Atk. 493.

### EQUIDISTANT.

"Equidistant," as used in a conveyance of lots providing that the front line of all buildings thereon shall be placed equidistant from and not less than 8 feet back from the street, should be construed to mean "parallel with." *Smith v. Bradley*, 28 N. E. 14, 154 Mass. 227.

### EQUIP.

"Equipping," as used in Dig. St. c. 18, § 1, providing that vessels running on any navigable waters of the state shall be liable for all debts contracted by the owners in equipping such boats or vessels, did not mean such articles as might be daily consumed and constantly replaced, but such as went towards the building, repairing, fitting, or equipping the vessel. It would not include money loaned to pay wages due the boatmen. *The P. H. White*, 10 Ark. (5 Eng.) 411, 414.

### EQUIPMENT.

#### Of boat.

In Rev. St. 1845, c. 20, § 1, div. 2, giving a lien for material furnished for the equipment of a boat, "equipment" should be construed to include the hire of a barge necessary in navigating a boat, for it should be considered as a material furnished for her equipment. *Gleim v. The Belmont*, 11 Mo. 112.

The word "equipment" is defined as the act of equipping or being equipped, as for a voyage or expedition. *Metz v. California Southern R. Co.*, 24 Pac. 610, 85 Cal. 329, 9 L. R. A. 431, 20 Am. St. Rep. 228.

#### Of coal mine.

One of the definitions of the word "equipment," as given by Mr. Webster, is the necessary adjuncts of a railroad, as cars, loco-

motives. The "equipments" of a coal mine are all its necessary adjuncts, and include pit mules, which are an essential part of its apparatus, and without which it cannot be operated. *Rubey v. Missouri Coal & Mining Co.*, 21 Mo. App. 159, 169.

#### Of institution.

In Act 1876, c. 260, exempting the "equipments" owned by a charitable or benevolent institution from taxation, such term "means the visible tangible furniture, fixtures, and apparatus on the premises which are usual and necessary for the operations therein conducted." It may include the library, silverware, and necessary furniture of a college building, but does not include the endowments or investment of the income from which the charitable work is sustained and the expenses defrayed. *Appeal Tax Court of Baltimore City v. St. Peter's Academy*, 50 Md. 321, 345.

#### Of railroad.

As applied to railroads, "equipment," means the necessary adjuncts of a railway, as cars and locomotives. *People v. St. Louis, A. & T. H. R. Co.*, 52 N. E. 292, 295, 176 Ill. 512.

"Equipment," as used in a mortgage of railroad property as "tracks, depots, real estate, and equipment," will be construed to refer to locomotives, cars, furniture, etc., with which a railroad is equipped. *Chicago, M. & St. P. Ry. Co. v. Hoyt*, 62 N. W. 189, 193, 89 Wis. 314.

"Equipments," as used in a statute giving laborers a lien on railroad equipments, means the rolling stock and other movable property used in operating the railroad. *St. Louis, A. & T. Ry. Co. v. Sandal (Tex.)* 3 Willson, Civ. Cas. Ct. App. § 379.

### EQUITABLE.

"Equitable" is defined by Webster as meaning "marked by due consideration for what is fair, unbiased, or impartial"; and, as used in a contract providing that the price of electric lights shall be fixed by an equitable agreement, the agreement provided for must be marked by due consideration for what is fair. *Gas Light & Coke Co. v. City of New Albany*, 139 Ind. 660, 667, 39 N. E. 462, 467.

Nothing can be deemed equitable, within the meaning of a statute conferring jurisdiction to grant equitable relief, which does not come within the limits of the jurisdiction granted, and what those limits are is a question of law inherent in the judgment rendered. *Appeal of Central Ry. & Electric Co.*, 35 Atl. 82, 84, 67 Conn. 197.

**EQUITABLE ACTION.**

As a proceeding, see "Proceedings."

An "equitable action" is that which does not immediately arise from a contract, but from equity in favor of a third person not a party to it, and for whose benefit certain stipulations have been made. Thus, if one stipulated in a contract entered into with another person, and as an express condition of that contract, that this person should pay a certain sum on his account, or give a certain thing to a third person not a party to the action, that third person has an equitable action, against the one who has contracted the obligation, to enforce the execution of the stipulations. *Cragin v. Lovell*, 3 Sup. Ct. 132, 135, 109 U. S. 194, 27 L. Ed. 908 (citing Code Prac. La. art. 35).

Legal actions are designed to afford redress for injuries already inflicted, and rights of person or property actually invaded. Equitable actions, however, are not only remedial in their nature, but may also be brought for the purpose of restraining the infliction of contemplated wrongs or injuries, and the prevention of threatened illegal actions which may be the occasion of serious injury to others. *Thomas v. Musical Mut. Protective Union*, 24 N. E. 24, 25, 121 N. Y. 45, 8 L. R. A. 175.

Although an action for money had and received is frequently called an "equitable action" by the authorities, courts of equity refuse jurisdiction in the absence of special circumstances, because the remedy at law is adequate and complete. But where the peculiar circumstances alleged in the bill entitle the complainant to come into a court of equity for discovery, and where the bill is for discovery as well as for relief, the objection that the suit is not one for equitable jurisdiction cannot prevail. *Wallis v. Shelby* (U. S.) 30 Fed. 747, 748.

**EQUITABLE ASSETS.**

"Equitable assets" are such as can be reached only by a court of equity. *Rutledge's Adm'r's v. Hazlehurst* (S. C.) 1 McCord, Eq. 466, 469; *City of St. Louis v. O'Neill Lumber Co.*, 21 S. W. 484, 487, 114 Mo. 74; *Helman v. Fisher*, 11 Mo. App. 275, 280. And where assets are of such a character that they are not vendible under an execution at law, and that no lien could be made or attached to them by any proceeding at law, but that they can only be reached and subjected to the demand of the creditor by the aid and the processes of a court of equity, they are for that reason, and that reason alone, equitable assets. Money which was owed by a city to a contractor, and which could not under the law be reached by a garnishment or mechanic's lien, but which was subjected in a suit in equity to a claim of

materialmen against the contractor, constituted an equitable asset, and as such was subject to equitable division *pari passu* among all such creditors of the contractor. *City of St. Louis v. O'Neill Lumber Co.*, 21 S. W. 484, 487, 114 Mo. 74.

The funds of a corporation after its insolvency are not equitable assets. Generally speaking, such assets are those which the debtor has made subject to his debts generally, that would not thus be subjected without his act, and which can be reached only by the aid of the court of equity. This term does not express the nature of property in the hands of the individual or corporation actually insolvent. On the estate of such persons there is no equitable lien to interrupt the free progress of their business or prevent a fair disposition of their property. *Catlin v. Eagle Bank of New Haven*, 6 Conn. 233, 243.

"Equitable assets" are such as may be used or subjected by the administrator in equity for the payment of debts of the testator, and include real estate devised to be sold for the payment of debts, and hence money raised by the sale of an estate so devised is "equitable assets," constituting a trust fund in the hands of the executor, subject to the control of the chancellor, and distributable among the creditors *pro rata* without regard to the dignity of their claim. *Cloudas' Ex'r v. Adams*, 34 Ky. (4 Dana) 603.

**Legal assets distinguished.**

"Equitable assets" of an estate are such as can be reached only by a court of equity, as distinguished from "legal assets," which are such as constitute the funds for the payment of debts according to their legal priority. *Rutledge's Adm'r's v. Hazlehurst* (S. C.) 1 McCord, Eq. 466, 469; *Helman v. Fisher*, 11 Mo. App. 275, 280.

"Legal assets" are such as are owned by the testator, as distinguished from "equitable assets," which are mere rights to enforce any equity claims to property, the title to which is in another. Thus an equity of redemption is but an equitable asset, while the leasehold may be a legal asset. *Deg v. Deg*, 2 P. Wms. 412, 416.

In Virginia the moneys arising from the sale of real property are denominated "equitable assets" in the hands of an executor or administrator, and those which arise from the sale of personal property are called "legal assets." *Backhouse v. Patten*, 30 U. S. (5 Pet.) 160, 167, 8 L. Ed. 82.

The interest which a creditor has in the land of his debtor, fraudulently conveyed, is a legal, not an equitable, asset. *Pulliam v. Taylor*, 50 Miss. 551, 555. Consequently the provision of Comp. Laws, § 4628, that in

case of a levy upon equitable interest of a judgment debtor the judgment creditor shall within one year institute proceedings to ascertain and determine the interest of the judgment debtor and to settle the right of parties in interest therein, does not require that a judgment creditor, having become a purchaser at an execution sale, bring an action to set aside a prior fraudulent deed of his debtor within one year from the time of the execution sale. *Orendorf v. Budlong* (U. S.) 12 Fed. 24, 26.

Under the intestate laws there was no distinction between legal and equitable creditors, or legal and equitable assets that had arisen from the estate of a decedent, and in the hands of his personal representative for the distribution among creditors. Therefore where decedent was indebted individually and also as a member of a partnership, and the partnership was insolvent and his partner had no assets, the individual and partnership creditors were entitled to share in the assets of the estate pro rata. In re *Sperry's Estate* (Pa.) 1 Ashm. 347, 351.

The established rule is that assets which can only be reached in equity must be distributed *pari passu* amongst all the creditors. Legal assets are such as constitute the fund for the payment of debts according to their legal priority, and hence the assets of a business conducted by a married woman must be distributed *pari passu* amongst her several creditors, because they are equitable assets, for they can only be reached in a proceeding in equity against her. *Heiman v. Fisher*, 11 Mo. App. 275, 280.

#### Proceeds of decedent's lands.

"Equitable assets," are those applicable to the payment of all creditors equally, *pari passu*; and hence where a testator devised all his estate, real and personal, to trustees in fee, in trust to pay his debts, and then to deposit the residue, the assets were equitable. *Benson v. Le Roy* (N. Y.) 4 Johns. Ch. 651, 654.

Where a testator subjected his whole estate to the payment of his debts, and empowered his executors to sell his land and convey to the purchaser, he thereby converted his whole real estate into equitable assets subject to the payment of all his debts equally. *Black v. Scot* (U. S.) 3 Fed. Cas. 507, 508.

"Moneys arising from the sale of real property in the hands of an executor or administrator are denominated 'equitable assets,' which are applied equally to all the creditors of the estate in proportion to their claims." *Backhouse v. Patten*, 30 U. S. (5 Pet.) 160, 167, 8 L. Ed. 82.

It may now be regarded as the settled doctrine that money arising from the sale of

real estate by an executor, in pursuance of a devise or power conferred on him for that purpose, is "equitable assets," constituting a trust fund and subject to the equitable control of the chancellor, and an undertaking by sureties of an executor that he shall administer the goods, chattels, and credits of the deceased according to law does not extend to or include such equitable assets or trust funds. *Speed's Ex'r v. Nelson's Ex'r*, 47 Ky. (8 B. Mon.) 499, 503.

#### EQUITABLE ASSIGNMENT.

Assignment distinguished, see "Assignment."

"An equitable assignment is such an assignment as gives the assignee a title, which, although not cognizable at law, equity will recognize and protect." *Holmes v. Evans*, 29 N. E. 233, 129 N. Y. 140; *Story v. Hull*, 32 N. E. 265, 267, 143 Ill. 506; *First Nat. Bank v. Coates* (U. S.) 8 Fed. 540, 542.

The doctrine of equitable assignments is a comprehensive one, but it is not broad enough to include a case where an agent was employed to collect a claim, but there was no agreement touching his compensation, the contract being silent as to what he was to receive or when or how he was to be paid, and no established usage in such cases was shown. The matter seemed to have been left to rest upon the principle of quantum meruit, and to be settled by agreement of the parties when the business was brought to a close. It is indispensable to a lien created under the doctrine of equitable assignment that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it. *Wright v. Ellison*, 68 U. S. (1 Wall.) 16, 22, 17 L. Ed. 555.

A transfer by a party of his right and claim for any commission or compensation for services rendered or to be rendered to any body corporate for a class of claims mentioned generally in the transfer is not such an assignment, even in equity, of a compensation subsequently earned, as will give the transfer priority against junior assignees, without notice, of portions of a fund designated and appropriated to answer their claims. Such an assignment is a blind assignment, and the party claiming under it cannot come into equity for priority against even junior assignees, in a case where the claims to these last are a fund specifically, and are, moreover, precise, well understood, and have been vigilantly protected. *Spain v. Brent*, 68 U. S. (1 Wall.) 604, 17 L. Ed. 619.

To constitute an equitable assignment, there must be an intention to assign, and a mutual assent or understanding that it is so. It need not be in writing, but it must be an appropriation of the money or prop-

erty to the use of the assignee. His claim must be adverse to the assignor, and not merely as agent. A power of attorney may constitute an assignment, if so expressed, or if proven from the accompanying circumstances that such is the intention. As between the assignor and assignee, these things constitute an equitable assignment. *Goodsell v. Benson*, 13 R. I. 225, 230.

In order to constitute an equitable assignment by a debtor to his creditor of a sum due to the debtor from a third person, there must not only be an agreement to pay the creditor out of the particular fund, but an appropriation of the fund, either by giving an order upon it, or by transferring it in such a manner that the holder would be authorized to pay it to the creditor directly, without further intervention of the debtor. An agreement to pay out a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any authority to collect, or any power of revocation; if he do, it is fatal to the claim of the assignee. *Commercial Nat. Bank v. City of Portland*, 60 Pac. 563, 564, 37 Or. 33.

An order, writing, or act which makes an appropriation of all funds amounts to an equitable assignment of the funds. The reason is that the fund, being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it held good in a court of equity. *Laclede Bank v. Schuler*, 120 U. S. 511, 516, 7 Sup. Ct. 644, 647, 30 L. Ed. 704 (citing *Spain v. Brent*, 68 U. S. [1 Wall.] 604, 17 L. Ed. 619).

The presence of a valuable consideration upon which an order or direction to pay is founded is an essential and necessary element of an equitable assignment. *Shaw v. Tonns*, 46 N. Y. Supp. 545, 20 App. Div. 39 (citing *Tallman v. Hoey*, 89 N. Y. 537; *Brill v. Tuttle*, 81 N. Y. 454, 457, 37 Am. Rep. 515).

An equitable assignment, being executory, must have a consideration to support it, without which equity would no more support it than would the law. *Kennedy v. Ware*, 1 Pa. (1 Barr) 445, 450, 44 Am. Dec. 145.

An order for the payment of money which is not immediately effective does not operate as an equitable assignment. *Nebraska Moline Plow Co. v. Fuehring*, 83 N. W. 69, 70, 60 Neb. 316.

The assignment passes an immediate equitable interest in the subject, although it

is not essential to the creation of the interest that it should be immediately enforceable by suit for specific performance to recover the interest. *Holmes v. Evans*, 129 N. Y. 140, 29 N. E. 233.

#### Check or draft.

A bill of exchange or draft payable generally, and not out of any particular fund or debt, will not before acceptance operate as an equitable assignment to the holder of the bill or draft of a debt due from the drawee to the drawer. *Lewis v. Traders' Bank*, 14 N. W. 587, 30 Minn. 124.

"An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment pro tanto, unless accompanied with such a relinquishment of control over the sum designated that the holder can safely pay it and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit. It is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank, which does not of itself operate as an equitable assignment." *Florence Min. Co. v. Brown*, 8 Sup. Ct. 531, 534, 124 U. S. 385, 31 L. Ed. 424. See, also, *Akin v. Jones*, 27 S. W. 669, 672, 93 Tenn. (9 Pickle) 353, 25 L. R. A. 523, 42 Am. St. Rep. 921.

#### As declaration of trust.

An equitable assignment is an agreement in the nature of a declaration of trust, which a chancellor, though deaf to the prayers of a volunteer, never hesitates to execute when it has been made on a valuable or even good consideration. *Appeal of Guthrie*, 92 Pa. 269, 272; *Nesmith v. Drum*, (Pa.) 8 Watts & S. 9, 10, 42 Am. Dec. 260; *Kennedy v. Ware*, 1 Pa. (1 Barr) 445, 450, 44 Am. Dec. 145; *Moeser v. Schneider*, 27 Atl. 1088, 1089, 158 Pa. 412; *Clark v. Sigua Iron Co. (U. S.)* 81 Fed. 310, 312, 26 C. C. A. 423.

#### Order for payment out of particular fund or property.

Any order, writing, or act which makes an appropriation of a fund is an equitable assignment of the fund. *Clark v. Sigua Iron Co. (U. S.)* 81 Fed. 310, 312, 26 C. C. A. 423; *Sanguinett v. Webster*, 54 S. W. 563, 571, 153 Mo. 343; *Brokaw v. Brokaw's Ex'r (N. J.)* 4 Atl. 66, 68; *Weaver v. Atlantic Roofing Co.*, 40 Atl. 858, 861, 57 N. J. Eq. 547; *New-*



by *v. Hill*, 59 Ky. (2 Metc.) 530, 531; *Beard v. Sharp* (Ky.) 65 S. W. 810, 811.

An order in the form of a direction to the drawee to pay a certain sum of money to the payee and charge it to the drawer's account is not in the nature of a bill of exchange requiring a written acceptance, but a direction for the payment of a specific sum out of a specific fund, which by the operation of the order is equitably assigned to the payee. *Foster v. Dayton* (N. Y.) 10 Daly, 225, 228.

An order to pay, when given by a creditor upon his debtor, is an equitable assignment of the fund for the personal property upon which it is drawn. *The Elmbank* (U. S.) 72 Fed. 610, 612.

An oral or written declaration may be as effective as the most formal instrument. An order for or payable out of the particular fund, not only as between the drawer and payee, but as regards the drawee, will so operate, though not accepted by him. *Crook v. First Nat. Bank*, 52 N. W. 1131, 1132, 83 Wis. 31, 35 Am. St. Rep. 17.

An equitable assignment of a fund, to create a lien upon such a fund, is a distinct appropriation of the fund by a debtor, and an agreement that the creditor should be paid out of it. *Wright v. Ellison*, 68 U. S. (1 Wall.) 16, 22, 17 L. Ed. 555.

An "equitable assignment" is the setting apart of certain property or funds to pay a certain debt, or for some other specific purpose, creating an equitable lien or charge on the fund. *Ketchum v. St. Louis*, 101 U. S. 306, 317, 25 L. Ed. 299 (citing *Will. Eq. Jur.* 462).

An "equitable assignment" of a fund is a transfer of the assignor's interest in the fund, with the intent to so transfer without the retaining of any control over the fund by the assignor, any authority to collect, or any power of revocation. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor. "An agreement to pay out of a particular fund, however, is not an equitable assignment. A covenant in the most solemn form has no greater effect." A bill of exchange or check is not an equitable assignment pro tanto of the funds of the drawer in the hands of the drawee, but an order to pay out of a specified fund has always been held to be a valid assignment in equity, and to fulfill all the requirements of the law. *Christmas v. Russell*, 81 U. S. (14 Wall.) 69, 84, 20 L. Ed. 762.

To constitute an assignment, there must be an actual or constructive appropriation which confers a present right on the assignee, although the circumstances may not admit of its immediate exercise. A cove-

nant to pay a debt with the proceeds of goods when sold, or out of an outstanding demand when collected, will not operate as an assignment, because it implies that the covenantor is to retain a control over the fund, and that more remains to be done on his part to make the transfer effectual. *American Pin Co. v. Wright*, 46 Atl. 215, 216, 60 N. J. Eq. 147.

An order drawn on a particular fund creates an equitable assignment thereof, although not accepted by the assignee. Thus an order on an insurance company for a certain sum given subsequent to a fire, and payable out of the moneys due on the policy, though not accepted by the insurance company, is an equitable assignment. *Slobodsky v. Curtis*, 78 N. W. 522, 525, 58 Neb. 211.

A mere executory agreement by a debtor to pay a certain debt out of a designated fund then due or to become due cannot operate as an equitable assignment, since the alleged assignor would in that case retain control over the subject-matter. *Allison v. Pearce* (Tenn.) 59 S. W. 192, 195.

An order drawn by persons on their lawyer for the proceeds of an action against another, which they declared in the order to have been appropriated to payment of their note, on which the payee of the order was one of their sureties, is an equitable assignment of the fund. *Nesmith v. Drum* (Pa.) 8 Watts & S. 9, 10, 42 Am. Dec. 260.

An agreement between a debtor and a creditor which provided that the debt should be paid out of a specific fund coming to the debtor, and that the creditor should be limited to such fund, and that if the fund failed the debt should be extinguished, created an equitable assignment pro tanto of the fund. *Gillett v. Hickling*, 16 Ill. App. (16 Bradw.) 392, 400.

A written order by the beneficiary of a will, for whom a trust fund was held by his father's executors, directing them to pay a certain sum to the order of a certain person from the proceeds of the sale of the real estate of the testator, signed by the beneficiary, was an equitable assignment pro tanto of the fund. *Brokaw v. Brokaw's Ex'rs* (N. J.) 4 Atl. 66, 68.

To make an equitable assignment, there must be such an appropriation of the subject-matter as to confer a complete and present right upon the party intended to be provided for, even where the circumstances do not admit of its immediate exercise. Where an attorney agreed with his client to conduct certain litigation for which he should receive as compensation a specified percentage of the amount recovered by the client, who reserved the right within 60 days to substitute a cash fee in place of such percentage, it was held that the agreement con-

stituted an equitable assignment to the attorney of an interest in the subject of litigation. *Holmes v. Evans*, 29 N. E. 233, 129 N. Y. 140.

The term "equitable assignment" includes a written acknowledgment by one person as being indebted to another, which binds the former to pay the debt with money from an inheritance to be collected by an attorney, which right is deposited with the attorney with orders to pay the debt from the money when collected. *Moeser v. Schneider*, 27 Atl. 1088, 1089, 158 Pa. 412.

### EQUITABLE CLAIM.

In *Spaulding v. Warner's Estate*, 52 Vt. 29, the court considered the question whether equitable demands could be allowed by commissioners on the estates of deceased persons, and made a distinction between claims of a purely equitable character and those recoverable at law but for some technical rule. It is there said that when the claim is of such a nature that the right of the party presenting it to recovery, as well as the extent of such recovery, is apparent and readily ascertainable, and the claim capable of being enforced in his favor except for some technical rule of the common law, the commissioners have jurisdiction; but when the resort to chancery is necessary to ascertain and establish the right of recovery or the extent of that right, the claim is of a purely equitable character, and the commissioners have no jurisdiction over it. *Purdy v. Purdy's Estate*, 30 Atl. 695, 67 Vt. 50.

### EQUITABLE CONSTRUCTION.

"A true equitable construction consists in showing, by principles of natural good sense, that a particular case is not comprehended in the meaning of a law, because if it were so comprehended some absurdity would naturally follow." *Smiley v. Sampson*, 1 Neb. 56, 91 (quoting *Puffendorf*).

### EQUITABLE CONVERSION.

The doctrine of equitable conversion is a branch of the general equitable doctrine of trusts, and it has been adopted solely for the purpose of executing trusts, and it is essential to the application of the doctrine of conversion that the property should be subject to a trust or imperative direction for conversion. *Condit v. Bigalow*, 54 Atl. 160, 162, 64 N. J. Eq. 504.

"Equitable conversion" has been defined to be that change in the nature of property by which, for certain purposes, real estate is considered as personal, and personal estate as real and transmissible, and descendible as such. It is an application of the maxim that equity regards that as done which

ought to be done. It is not essential that there should be an express declaration in the instrument that the land shall be treated as money though not sold, or that the money shall be treated as land though not actually laid out in the purchase of it. Such direction may arise by necessary implication from the nature of the instrument or the language employed. But there must be an expression in some form of an absolute intention that the land shall be sold and turned into money, or that the money shall be expended in the purchase of land. The test is, has the will or deed absolutely directed that the conversion be made? In order to work a conversion while the property remains unchanged in form, there must be a clear and imperative direction to convert it. If the act of converting is left to the option, discretion, or choosing of the trustees or others charged with making it, no equitable conversion will take place, because no duty to make the change rests on them." *Haward v. Peavey*, 21 N. E. 503, 504, 128 Ill. 430, 15 Am. St. Rep. 120 (citing 3 Pom. Eq. Jur. § 1159 et seq.).

By "equitable conversion" is meant a change of property from real into personal, or from personal into real, not actually taking place, but presumed to exist only by construction or intendment of equity. *Bisp. Eq. § 307*. "Equity regards that done which ought to be done." If, therefore, the provisions of a will make it the duty of the executor to sell the lands and pay over the proceeds to the legatees, equity will regard the conversion of such lands into money as having taken place at the death of the testator, so that the legatees will take the proceeds as personal property. *Glover v. Conde*, 163 Ill. 566, 45 N. E. 173, 35 L. R. A. 360. It is well settled that this duty may also be implied from the terms and provisions of the will, and, while it must clearly appear, it is not necessary that it be expressly enjoined. *Greenwood v. Greenwood*, 53 N. E. 101, 103, 178 Ill. 387 (citing *Pom. Eq. Jur. § 1160*; *Jarm. Wills*, 549; 6 Am. & Eng. Enc. Law, 665).

"Equitable conversion" is defined as a constructive alteration in the nature of property, by which in equity real estate is regarded as personalty, or personal estate as realty. 7 Am. & Eng. Enc. of Law (2d Ed.) p. 464. A contract for the sale of real estate, which is valid and enforceable in equity, operates as a conversion. The vendor's interest thereafter, in equity, is in the unpaid purchase price, and is treated as personalty; the vendee's interest is in the land, and is realty. *Clapp v. Tower*, 93 N. W. 862, 863, 11 N. D. 556.

"Equitable conversion" is a fiction by which, for certain specific purposes, and to the limited extent required for such pur-

poses, realty may be treated as personalty, or personalty as realty, as in the case of real estate owned by a partnership, which is treated as personal property. In *re Robinson's Estate*, 43 Atl. 207, 208, 191 Pa. 239.

The doctrine of equitable conversion is based on the rule that what is to be or ought to be done should be treated as if done already. It is a fiction, therefore, invented to sustain and carry out the intention of the testator or settlor, never to defeat it. Its application requires constant watchfulness to guard against the tendency to become a formal rule *de jure*, without regard to its real purpose and necessity. It should never be overlooked that there is no real conversion. The property remains all the time in fact realty or personalty as it was, but for the purpose of the will, so far as it may be necessary, and only so far, it is to be treated in contemplation of law as if it had been converted. *Yerkes v. Yerkes*, 50 Atl. 186, 200 Pa. 419.

To work a conversion of real estate into realty there must be either (a) a positive direction to sell, (b) an absolute necessity to sell in order to execute the will, or (c) such a blending of realty and personalty by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the same as money. In the first the intention to convert is expressed; in the latter two it is implied. A bare power of sale, like a discretionary power given in a will, does not work a conversion until exercised. *Darlington v. Darlington*, 28 Atl. 503, 504, 160 Pa. 65.

Equitable conversion arises from an express, clear, and imperative direction, or from a necessary implication of such express direction. The question of conversion is one of intention, and the question is, is it the testator's intent to have his real estate converted into personalty immediately upon his death? Citing *Clift v. Moses*, 116 N. Y. 144, 157, 22 N. E. 393. A will does not effect the equitable conversion of realty into personalty, because of a naked power of sale given to the executors, where the amount of the legacies does not exceed the value of testator's personal property. In *re Cobb's Estate*, 36 N. Y. Supp. 448, 449, 14 Misc. Rep. 409.

To constitute an equitable conversion, the direction to sell and convert the property must be absolute or imperative. *Fosdick v. Town of Hempstead*, 8 N. Y. Supp. 772, 774, 55 Hun. 611; *Bournonville v. Goodall*, 10 Pa. (10 Barr) 133, 135, 138.

To constitute a conversion of real estate, in the absence of actual sale, it must be made the duty of and obligatory upon the trustees to sell it in any event. Such con-

version rests upon the principle that equity considers that as done which ought to have been done. A mere discretionary power to sell produced no such result. In *re Hardenbrook*, 52 N. Y. Supp. 845, 846, 23 Misc. Rep. 538 (citing *White v. Howard*, 46 N. Y. 144; *Stag v. Jackson*, 1 N. Y. [1 Comst.] 206).

Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. *Appeal of Clarke*, 39 Atl. 155, 160, 70 Conn. 195.

A conversion of land into money is effected by a will directing testator's farm to be sold after his wife's death and the proceeds equally divided between his children. In *re Thomman's Estate*, 29 Atl. 84, 85, 161 Pa. 444.

Equitable conversion is a doctrine by which partnership lands remain personal property until the indebtedness of the partnership is paid and the equities between the partners are adjusted. *Weid v. Johnson Mfg. Co.*, 57 N. W. 374, 377, 86 Wis. 552.

#### EQUITABLE CREDITORS.

Under the intestate laws there was no distinction between legal and equitable creditors, or legal and equitable assets that had arisen from the estate of a decedent, and in the hands of his personal representative for the distribution among creditors. Therefore, where decedent was indebted individually and also as a member of a partnership, and the partnership was insolvent, and his partner had no assets, the individual and partnership creditors were entitled to share in the assets of the estate *pro rata*. In *re Sperry's Estate (Pa.)* 1 Ashm. 347, 351.

#### EQUITABLE DEFENSES.

The term "equitable defense" includes all matters which would, before the adoption of the Code, have authorized an application to a court of chancery for relief against a legal liability, and authorized affirmative relief to be granted to the party pleading it. *Kelly v. Hurt*, 74 Mo. 561, 570.

Within the rule that the bona fide holder takes negotiable paper free from all equitable defenses, "equitable defenses" are those defenses which do not appear on the face of the paper, and which do not absolutely destroy the existence of the papers as a monetary obligation. *Hagan v. Bigler*, 49 Pac. 1011, 5 Okl. 575.

#### EQUITABLE EASEMENT.

The especial easements created by the derivation of ownership of adjacent proprietors from a common source, with specific intentions as to buildings for certain pur-

poses, or with implied privileges in regard to certain uses, are sometimes called "equitable easements," and are analogous to the easements that abutting owners on a street may have as a property, implied from the nature of said building itself, and originating, not in a common grant perhaps, but in a common compact, express or implied, concerning the street and their uses. Such an easement is violated when the owner of property abutting on an alley, by his excavations and lack of precaution, permits the alley to give way, thereby injuring the sidewalk of the opposite owner. *United States v. Peachy* (U. S.) 36 Fed. 160, 162.

### EQUITABLE EJECTMENT.

"Equitable ejectment," in Pennsylvania, is a proceeding which is used as substitute for a bill in chancery to enforce specific performance of a contract for the sale of land. *Riel v. Gannon*, 29 Atl. 55, 56, 161 Pa. 289.

The action of ejectment is often a substitute for a bill in equity, and we have in our practice what is known as an "equitable ejectment." It is used constantly to enforce specific performance of contracts for the sale of real estate, and in some other instances. It is a convenient and plastic remedy, and more speedy than a bill in equity. And a bill by a wife to recover her separate earnings or property from her husband may be treated as an action in equitable ejectment. *McKendry v. McKendry*, 18 Atl. 1078, 1079, 131 Pa. 24, 6 L. R. A. 503.

### EQUITABLE ELECTION.

The general rule in equity as to equitable election may be stated as follows: "Where a will assumes to give one of its beneficiaries property of another person for whom provision is likewise made, the latter cannot take the provision made for him in the will and also hold the property, but must elect which he will take; that by taking a beneficial interest under the will he is held thereby to confirm and ratify every other part of the will; that if an heir prefers to take by descent, then a court of equity will compel him so to elect; and, if he prefers to take as heir, it will not allow him also to have any other property or benefit under the will." *Drake v. Wild*, 39 Atl. 248, 250, 70 Vt. 52 (quoting *Huston v. Cone*, 24 Ohio St. 11; *Hyde v. Baldwin*, 34 Mass. [17 Pick.] 303; 1 Chit. Pr. 363; Pom. Eq. Jur. §§ 461, 471).

"The doctrine of equitable election itself is, in our judgment, not founded on intention, but is, as stated by Mr. Pomeroy, 'a positive rule of law covering the devolution and transmission of property by instruments of donation, and is invoked wholly irrespective of the intention of the donor, though in a vast majority of cases it un-

doubtedly does carry into effect the donor's real purpose and desire.' The doctrine rests, as we think, upon the equitable principle that he who seeks equity must do equity. We approve the statement of the doctrine in *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696: 'The doctrine \* \* \* means, as the term is ordinarily used, that where two inconsistent rights or claims are presented to the choice of a party by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under an instrument and then repudiate it.' " *Barrier v. Kelly*, 83 South. 974, 979, 82 Misc. 238, 62 L. R. A. 421.

### EQUITABLE ESTATE OR INTEREST.

An equitable estate is an estate acquired by operation of equity, such as the estate or title of a person for whose use or benefit lands are held in trust by another, the latter having the legal estate, and the estate of a mortgagor after the mortgage has become forfeited by nonpayment and before foreclosure. *Brown v. Freed*, 43 Ind. 253, 256.

The term "equitable interest," in an agreement for sale, cannot be said to be ambiguous, because it may mean one or another description of equitable interest. *Ashworth v. Mounsey*, 9 Ex. 175, 187.

An equitable interest in land is such an interest only as might furnish a ground for equitable relief against a trustee to enforce the execution of a trust or an equitable chose in action. *McIlvaine v. Smith*, 42 Mo. 45, 55, 97 Am. Dec. 295.

An equitable interest is such an interest as a court of equity can pursue and appropriate to the discharge of debts. *Leathwhite v. Bennett* (N. J.) 11 Atl. 29, 30.

The interest which a man has in lands, tenements, or hereditaments which can be enforced only in a court of chancery is an equitable interest or estate. *Avery's Lessee v. Dufrees*, 9 Ohio (9 Ham.) 145, 147.

In law, the legal estate is the whole estate, and the holder of the legal title is the sole owner. But this title may be held for the beneficial interest of another, which interest has come to be called an "equitable estate." It is not, however, strictly speaking, an interest in the land itself, but a right which can be enforced in equity. In re Qualifications of Electors, 35 Atl. 213, 19 R. I. 387.

"Equitable estates" is the name applied to the collateral obligations of trust which were not known at law as interests in lands; trusts being cognizable only in equity. A simple trust supposes the legal estate

merely to be vested in the trustee, and that the cestui que trust is entitled in equity to the rents and profits, and has power to dispose of the lands, and a right to call on the trustee to execute a conveyance to him. Where a trust deed did not give the cestui que trust seisin or possession of the land, or any power to dispose of any estate in the land, or to enjoy the occupancy and collect the rents, and he could not call on the trustee to execute any conveyance to himself, the deed did not vest in the cestui que trust an equitable estate in the land itself. *McIlvaine v. Smith*, 42 Mo. 45, 56, 97 Am. Dec. 295.

An "equitable estate" in lands is not an equivalent of an "equitable title" to lands, so that a person purchasing lands at a sale under execution, who has acquired an equitable interest therein by the failure of the parties in interest to redeem within a year, but who has demanded and received a deed from the sheriff, is not entitled to redeem such lands as a person holding the "legal or equitable title thereof." *Rev. St. 1891, § 768; Robertson v. Vancleave*, 29 N. E. 781, 129 Ind. 217, 15 L. R. A. 68.

#### **EQUITABLE ESTOPPEL.**

See "Estoppel in Pais."

#### **EQUITABLE EXECUTION.**

The term "equitable execution" has properly been applied to the appointment of a receiver with power of sale. *Hatch v. Van Dervoort*, 84 Atl. 938, 940, 54 N. J. Eq. 511.

#### **EQUITABLE GARNISHMENT.**

In nearly all of the United States, statutes have been enacted the usual purport of which is that, when an execution has been returned wholly or partly unsatisfied, the judgment creditor may maintain an action against the judgment debtor and any other person to compel the discovery of anything in action or other property belonging to the judgment debtor, and of any money, thing in action, or other property due to him or held in trust for him, and to procure satisfaction of judgment out of such property. 5 Enc. Pl. & Prac. p. 415. The proceeding under these statutes may be called "equitable garnishment" for the sake of brevity, and in order to distinguish it from ordinary garnishment or trustee process. *Geist v. City of St. Louis*, 57 S. W. 766, 156 Mo. 643, 79 Am. St. Rep. 545.

An action, brought in a court of equity against a contractor and the city for whom the contract was being performed, to subject money in the hands of the city, owing to the contractor, to the claim of plaintiff for materials furnished for such work, has been called an "equitable garnishment." Never-

theless, strictly speaking, there is no such thing as an equitable garnishment, any more than an equitable indictment or an equitable bill of attainder; and that such expression has been used does not justify the contention that the law of garnishment should apply to the distribution of such money, so that the first person bringing an action therefor should be entitled to priority. *City of St. Louis v. O'Neill Lumber Co.*, 21 S. W. 484, 487, 114 Mo. 74.

#### **EQUITABLE JETTISON.**

In order to make a loss by the ejection of cargo an equitable jettison, there must be, first, a common peril threatening the destruction of vessel and cargo; second, the sacrifice must be voluntary and of selection; third, it must appear that the goods sacrificed were the price of safety to the rest. The ejection of goods on the deck of a propeller when they were on fire, causing imminent peril to vessel and cargo, and certain to be themselves consumed, was not an equitable jettison, though the vessel and the remainder of the cargo were saved thereby, since (1) the loss could not be attributed to the jettison, as the goods were of no value by reason of the certainty of their destruction by fire; (2) that for the same reason they could not be regarded as voluntarily sacrificed, (3) nor selected for that purpose, (4) nor as ejected so much to deliver the remainder from a common peril as to remove the very cause of peril. Furthermore, it may be said that fire does not constitute a sea peril, and that sea perils alone justify a general average. *Slater v. Hayward Rubber Co.*, 26 Conn. 128, 136.

#### **EQUITABLE LEVY.**

The lien in equity created by the filing of a creditors' bill and the service of process upon the effects of a judgment debtor has been aptly termed an "equitable levy." *Hunke v. Doid*, 32 Pac. 45, 48, 7 N. M. 5; *Miller v. Sherry*, 69 U. S. (2 Wall.) 237, 249, 17 L. Ed. 827.

An "equitable levy" is the lien given by the commencement of a creditors' suit to subject real property, conveyed by the debtor, in payment of the debt, and the filing of a lis pendens. *Mandeville v. Campbell*, 61 N. Y. Supp. 443, 446, 45 App. Div. 512.

The filing of a creditors' bill by judgment creditors has often been termed an "equitable levy," entitling those who filed the bill to priority. *George v. St. Louis Cable & W. R. Co.* (U. S.) 44 Fed. 117, 120.

#### **EQUITABLE LIEN.**

Maritime lien as, see "Maritime Lien."

An equitable lien is a right, not recognized at law, to have a fund or specific prop-

erty, or the proceeds, applied in full or in part to the payment of a particular debt or class of debts. *Burdon Cent. Sugar-Refining Co. v. Ferris Sugar Mfg. Co.* (U. S.) 78 Fed. 417, 421.

"An equitable lien is not an estate or property in the thing itself. It is the very essence of this condition that, while the lien continues, the possession of the thing remains with the debtor or the person who holds the proprietary interest subject to the incumbrance." *St. Joseph Hydraulic Co. v. Wilson*, 33 N. E. 113, 116, 133 Ind. 465 (quoting 3 Pom. Eq. Jur. § 1233).

An equitable lien is neither a *jus in re* nor a *jus ad rem*, but simply a right to possess and retain property until some charge attaching to it is paid or discharged. *Becker v. Saunders*, 28 N. C. 380, 381; *Field v. Lang*, 32 Atl. 1004, 87 Me. 441.

"Equitable liens" are a right of a special nature over the thing, which may, by proper process, be sold or sequestered under a judicial decree, and the proceeds in the one case, or the rents and profits in the other, applied upon demand of the party holding the lien, but such party is not entitled to the possession of the thing, or to the rents and profits, except under a judicial decree. This is a distinguishing feature between equitable and legal liens. *Field v. Lang*, 32 Atl. 1004, 87 Me. 441.

Equitable liens did not depend upon possession, nor, strictly speaking, did they constitute a *jus in re* or a *jus ad rem*, but more properly constituted a charge upon the thing. 2 Story, Eq. Jur. § 1215; *Peck v. Jenness*, 48 U. S. (7 How.) 612, 12 L. Ed. 841. At common law, though ordinarily the delivery of possession by the one entitled to a lien destroyed or terminated the lien, yet by contract the parties might agree to continue the lien after delivery, or, in other words, might agree that the property, after delivery, should be subject to be taken and sold if the purchase price or other charge thereon was not paid. *Gregory v. Morris*, 98 U. S. 619, 24 L. Ed. 740. In equity, the lien consisted in the right to subject the property, even though not in possession of the lienor, to the payment of the debt or claim as a charge upon the property. *Bouvier* defines a "lien" to be "a hold or claim which one has upon the property of another, as security for some debt or charge." When, therefore, a statute declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt due or charge due, what is meant is that the person shall have the right to hold the property for, or subject it to, the payment of the claim or charge. On the other hand, if the statute declares that the person shall have the right, under the given circumstances, to hold certain property for, or subject

it to, the payment of a certain claim or charge, this, in like manner, creates and confers a lien, although the word "lien" may not be used in the statute. It is the right to hold or subject the property to the payment of the claim of debt that constitutes the lien, and the mere words used in the statute are immaterial, so long as the substantial right itself is created. *The Menominee* (U. S.) 36 Fed. 197, 199.

An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of general consideration of right and justice as applied to the relations of the parties and the circumstances of their dealings. A lien necessarily excludes any idea of ownership by the party claiming it. A lien, whether implied or by contract, confers no right of property upon the holder. It is neither *jus ad rem* nor *jus in re*. *Fallon v. Worthington*, 22 Pac. 960, 962, 13 Colo. 559, 6 L. R. A. 708, 16 Am. St. Rep. 231.

An equitable lien exists independently of any express agreement, and equity enforces it on the principle that a person having gotten an estate of another ought not in conscience to keep it as between them. Included in this class of liens is the vendor's lien. *Kilbourne v. Wiley*, 83 N. W. 99, 100, 124 Mich. 370.

Creditors, in filing a creditors' bill to reach equitable assets or a fund not subject to a levy and sale on execution, acquire, by filing the bill, what is termed an "equitable lien," which gives them a prior right over other creditors subsequently seeking relief against the same fund. This equitable lien is not, however, a *jus in re*; it is not a vested property right, like the common-law lien of a person in possession for labor or care or maintenance, or like a maritime lien or hypothecation, with a similar vested property interest without possession. It is nothing more than a provisional equitable attachment of the fund for the purpose of satisfying any decree that may be obtained in that cause. It is therefore contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the plaintiff to appropriate the fund. In *re Lesser* (U. S.) 100 Fed. 433, 436.

In the case of the appropriation by a trustee of trust funds, an equitable lien exists only when the trust money is directly or indirectly traceable to the fund sought to be charged. *Holden v. Piper*, 37 Pac. 34, 35, 5 Colo. App. 11.

#### EQUITABLE MERGER.

Equitable merger is largely a question of intent, actual or presumed, and when no

intent is proven or apparent this principle may or may not be deemed to attach in any given case, just as merger is or is not to the interest of the owner of the several and independent rights. *Pennock v. Eagles*, 102 Pa. 290, 295.

### EQUITABLE MORTGAGE.

Where a vendor holds the legal title under an unexecuted contract for the conveyance of the land upon the payment of the purchase money, the vendor's security is something stronger than a mortgage, because the legal title is retained as security. It has been called an "imperfect" or "equitable" mortgage, which is a more appropriate term than "vendor's lien." In many of the best-considered cases it is treated as if it had the similitude of a mortgage subject to foreclosure in the same way as a mortgage is foreclosed. *Gessner v. Palmateer*, 28 Pac. 789, 790, 89 Cal. 89, 13 L. R. A. 187.

In addition to those formal instruments which are properly entitled to the designation of "mortgages," deeds and contracts which are wanting in one or both of those characteristics of a common-law mortgage are often used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages. Equity comes to the aid of the parties in such cases and gives effect to their intentions. Mortgages of this kind are therefore called "equitable mortgages." *Ketchum v. St. Louis*, 101 U. S. 806, 317, 25 L. Ed. 999.

"An 'equitable mortgage' may be defined as a transaction which has the intent, but not the form, of a mortgage, and which a court of equity will enforce to the same extent as a mortgage; and it has been held that an agreement for a mortgage is, in equity, a specific lien upon land. *Payne v. Wilson*, 74 N. Y. 848. But in the case at bar the plaintiff makes no agreement for a mortgage, the contract simply providing that he may make the final payment by giving a mortgage as therein provided, if he so desires, and binding the defendant to accept such mortgage in lieu of such final payment. The contract aforesaid, therefore, is not an equitable mortgage." *Davidson v. Fox*, 73 N. Y. Supp. 533, 535, 65 App. Div. 262.

An equitable mortgage results from different forms of transactions, in which there is present an intent of the parties to make a mortgage, to which intent, for some reason, legal expression is not given in the form of an effective mortgage; but in all such cases the intent to create a mortgage is the essential feature of the transaction. Thus an equitable mortgage has been held to result from a defectively executed legal mort-

gage, or from an agreement to execute a mortgage, if the agreement be certain in terms and clearly proven, or from a deed, absolute in form, shown to have been in fact intended to operate as a mortgage. *Western Nat. Bank v. Nat. Union Bank*, 46 Atl. 960, 962, 91 Md. 613.

Deeds and contracts used by parties for the purpose of pledging real property, or some interest in it, as security for a debt or obligation, and with the intention that they shall have effect as mortgages, though wanting in some of the characteristics of a common-law mortgage, are yet given effect by equity, and are called "equitable mortgages." Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage. *Cummings v. Jackson*, 38 Atl. 763, 765, 55 N. J. Eq. 805.

There are as many kinds of equitable mortgages as there are varieties of ways in which parties may contract for security by pledging some interest in the lands. Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage—that is, of course, if it is not a legal mortgage. An express reservation in a deed of a lien upon the land conveyed creates an equitable mortgage. When the deed is recorded, every one is bound to take notice of the incumbrance. *Hall v. Mobile & M. R. Co.*, 58 Ala. 10, 23.

### Absolute deed.

An equitable mortgage arises whenever an agreement shows a clear intention to make some particular property a security for the debt or obligation mentioned therein. Thus a deed executed and delivered to a party, which was made to a third person as trustee for the purpose of securing the debt due to the person to whom it was delivered, constitutes an equitable mortgage, though the name of the trustee was not given. *Dulany v. Willis*, 29 S. E. 824, 95 Va. 606, 64 Am. St. Rep. 815.

The term "equitable mortgage" is properly used to designate an absolute conveyance of land as security for borrowed money, and the fact that no notes or other evidence of indebtedness are executed is immaterial. *Bradley v. Merrill*, 34 Atl. 160-162, 88 Me. 319.

### Agreement to execute mortgage.

The deposit of title deeds, with an agreement to execute a legal mortgage to secure the debt of a third person, constitutes an equitable mortgage. *Bullowa v. Orgo*, 41 Atl. 494, 495, 57 N. J. Eq. 428.

The doctrine of equitable mortgages is difficult to define or explain. It seems to be settled, however, that an agreement in writing to give a mortgage will create a lien on

the property specified in the agreement as against general creditors. But a bond conditioned on the execution of a mortgage on property, merely described as being "in township 65 and 66" of a certain county, and as lying "south of Grant City about one or one and one-half miles," did not describe the land with sufficient certainty to constitute an incumbrance thereon. *Carter v. Holman*, 80 Mo. 498, 504.

An agreement to mortgage a piece of land will in equity be treated as an equitable mortgage, and the court, proceeding on the footing somewhat of a specific performance, will give the benefit of the security which the party covenanted to execute. *Everman v. Robb*, 52 Miss. 653, 659, 24 Am. Rep. 682.

#### **Assignment of land certificate.**

Where the owner of a certificate of entry of land from the United States assigns such certificate as security for a debt, with the condition of defeasance on the payment of the debt, such assignment creates an equitable mortgage on the land covered by such certificate. *Stover's Heirs v. Bounds' Heirs*, 1 Ohio St. 107.

#### **Attempted mortgage.**

The term "equitable mortgage" includes an attempted mortgage by a tenant on crops of the leased premises before they are planted. Such crops are not subject to mortgage at common law, but they have what is termed a "potential existence," and a mortgage of them, though not good as a conveyance or reservation, is valid as an executory agreement enforceable in equity. *Kelley v. Goodwin*, 50 Atl. 711, 712, 95 Me. 538.

#### **EQUITABLE PLAINTIFF.**

An equitable plaintiff is he who, not from the legal title to the right of action, is in equity entitled to the thing sued for. *United States v. Henderlong* (U. S.) 102 Fed. 2, 4.

#### **EQUITABLE RATE OF INTEREST.**

In England, when it appears that a trustee or executor has improperly or unnecessarily kept balances or any considerable portion of trust moneys in his hands, he is charged with interest on what he has so retained. This interest is generally at a rate lower than the legal rate, and is called an "equitable rate of interest." In re *Ricker's Estate*, 35 Pac. 960, 968, 14 Mont. 153, 29 L. R. A. 622.

#### **EQUITABLE REMEDY.**

The appointment of a receiver is an equitable remedy. *Betts v. Connecticut Indemnity Ass'n*, 44 Atl. 65, 66, 71 Conn. 751.

#### **EQUITABLE RIGHTS.**

By the constitutional provisions abolishing the distinctions between law and equity proceedings, the distinction between legal and equitable remedies was abolished. But it soon became manifest to all jurists that the class of rights which for want of a better definition were loosely called "equitable," and which had only been included under that name because the common-law methods were not adapted to enforce them, differed from other rights in their essential nature, and not in form only, and that, by whatever name they were called, they could only be efficiently protected and made available by the means known as "equitable." *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 284, 285, 42 N. W. 831, 5 L. R. A. 226, 13 Am. St. Rep. 438.

#### **EQUITABLE TITLE.**

An "equitable title" is not a title, but is a mere right in the party to whom it belongs to have the legal title transferred to him. *Thygerson v. Whitbeck*, 16 Pac. 403, 404, 5 Utah, 406.

By the term "equitable title," as used in a statement of the rule that statutes relating to transfers between husband and wife have been, if not to convert the wife's equitable title into a legal one, at least to clothe it with all the incidents of a legal title, is meant the title communicated by direct transfer from husband to wife by way of gift or payment, which title had theretofore been recognized in equity. *Barrows v. Keene*, 8 Atl. 713, 715, 15 R. I. 484.

An equitable title exists where the legal title is vested in one person and the beneficial interest inures to another person, who may be named in the deed or who may not be named at all, whose right may exist by parol. Such a title would arise where the title to land for which a wife had paid the purchase money was in her husband, the money having been derived from a source independent of her husband, and in which the husband had never had any interest. *Beringer v. Lutz*, 41 Atl. 643, 644, 188 Pa. 364.

#### **EQUITABLE WASTE.**

"Equitable waste" is defined to consist of such acts as at law would not be esteemed to be waste under the circumstances of the case, but which, in the view of a court of equity, are so esteemed from their manifest injury to the inheritance, although they are not inconsistent with the legal rights of the party committing them. *Gannon v. Peterson*, 62 N. E. 210, 213, 193 Ill. 372, 55 L. R. A. 701 (citing *Story*). Among the instances given are such as these: Where a mortgagor in possession falls timber on the es-



state, and thereby renders the security insufficient; and where a tenant for life, without impeachment of waste, pulls down houses, or does other waste wantonly or maliciously. *Crowe v. Wilson*, 5 Atl. 427, 428, 65 Md. 479, 57 Am. Rep. 343.

### EQUITABLY.

"Equitably," as used in a special act of Congress requiring the Court of Claims to investigate a claim made against the United States, and to ascertain, determine, and adjudge the amount "equitably" due, if any, for such loss and damage, means "no more than that the rules of law, applicable to the case, shall be construed liberally in favor of the claimants." *McClure v. United States*, 6 Sup. Ct. 321, 323, 116 U. S. 145, 29 L. Ed. 572 (citing *Tillson v. United States*, 100 U. S. 43, 46, 25 L. Ed. 543).

#### As fairly.

"Equitably," as used in Rev. Code, § 2221, providing that lands of an estate may be sold by order of the probate court when the same cannot be equitably divided among the heirs and devisees, is synonymous with "fairly." *Warnock v. Thomas*, 48 Ala. 463, 465.

"Equitably," as used in a bond conditioned for the payment of such damages as a person enjoined may sustain by reason of an injunction if the court should eventually decide that the complainant was not equitably entitled to it, should not be construed to mean "fairly," and has no reference to the bona fides of the complainant in the application. It has no reference to the fairness of the application for the injunction at the time when it was made, but is forfeited by a dismissal of the bill. *New York & L. B. R. Co. v. Dennis*, 40 N. J. Law (11 Vroom) 340, 358.

The word "equitably," taken in its ordinary sense means fairly, justly, and impartially. The word was so used in an allegation that certain funds should be "equitably" apportioned. *Hackett v. Equitable Life Assur. Soc.*, 63 N. Y. Supp. 1092, 1094, 50 App. Div. 266.

### EQUITY.

See "Perfect Equity"; "Wife's Equity."

Equity is not the chancellor's sense of moral right, or his sense of what is just and equal. It is a complex system of established law. *Savings Inst. v. Makin*, 23 Me. (10 Shep.) 360, 366.

Equity has been well defined to be "the correction of that wherein the law, by reason of its universality, is deficient." (Grotius.) Courts of equity have grown into use

not by altering or changing the principles of law or interpretation of contracts or established usages of other courts, but as mere helpmates to the various remedies necessary to the ends of justice. *Lynch v. Postlethwaite (La.)* 7 Mart. (O. S.) 293, 304.

"Equity, says Lord Coke, is a construction made by the judges that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth." *Holmes v. Inhabitants of Paris*, 75 Me. 559, 561; *Read v. Dingess* (U. S.) 60 Fed. 21, 29, 8 C. C. A. 389.

The modern doctrine is that to construe a statute liberally or according to its equity is nothing more than to give effect to it according to the intention of the lawmaker, as indicated by its terms and purposes. *Read v. Dingess* (U. S.) 60 Fed. 21, 29, 8 C. C. A. 389.

"Equity" has been defined to be a right existing in foro conscientiae, but which cannot be enforced by the strict rule of the law. This may be correct as a definition of a dormant equity, but a subsisting equity, by the laws of this state, that recognize no distinction between law and equity, either in rights or their judicial preservation, confers a right of property by as strong a sanction as that which exists by a right purely legal. *Hamilton v. Avery*, 20 Tex. 612, 633.

The origin of the high court of chancery in England was wholly due to the inability, and, to a limited extent, the unwillingness, of the common-law courts to entertain and give relief in every case, and thus meet all the requirements of justice. The common-law courts paid such deference to forms and precedents that they became slaves to them. Their jurisdiction was thus circumscribed. They adhered to certain precise writs and rigid forms of action, which were not sufficiently comprehensive to give adequate redress in some cases of injustice and wrong, or to give any redress in many others. In such cases the aggrieved person was remediless, except he could get a hearing of the King himself. Petitions by those in such case were therefore frequently presented to the King, asking for relief by him as a matter of grace, because it could not be got of his court. From the fact that the King usually referred such petitions to his secretary, called his "chancellor," they came in course of time to be presented to the chancellor directly by the suitors themselves; and thus gradually, and at a time which history cannot enable us to precisely fix, the court of chancery became established. As is seen, its jurisdiction was wholly extraordinary. Relief was afforded by it only in those cases wherein the common-law courts

could give no redress at all, or could not give adequate redress. Thus side by side there existed the court of chancery and the common-law courts, each with a distinct jurisdiction; the test of the chancery's jurisdiction in any given case being that the suitor could either get no relief, or could not get adequate relief, in a court of law, and therefore necessarily there grew up not only two distinct systems of practice in these courts, but also two systems of substantive jurisprudence, that in the court of chancery being the system which we call "equity"; and, though the court of chancery is gone, the system of equity jurisprudence remains, and is still administered, but by the same court which also administers the common-law system. *Dalton v. Vanderveer*, 29 N. Y. Supp. 342, 343, 8 Misc. Rep. 484.

A court of chancery, says 1 Pom. Eq. Jur. §§ 34, 35, as a regular tribunal for the administering of equitable relief and extraordinary remedies, is usually spoken of as dating from a decree of King Edward III, but it is certain that the royal action was merely confirmatory of a process which had come on through many preceding years. The delegation made by this order of the King conferred a general authority to grant relief on all matters of what nature soever requiring the exercise of the prerogative of grace. This authority differed wholly from that upon which the jurisdiction of the court of law was based. These latter tribunals acquired jurisdiction in each case which came before them by virtue of a delegation from the crown contained in the particular writ on which the case was founded, and a writ for that purpose can only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common-law courts under their ancient organization and that of the English court of chancery. These distinctions have never existed in the United States. The highest courts of law and of equity, both state and national, derive their jurisdiction either from the Constitution or from the statutes. This distinction, as far as inherent powers are concerned, has been destroyed in this state by the statute which provides that there shall be but one form of action hereafter for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a "civil action." *Parmeter v. Bourne*, 35 Pac. 586, 587, 8 Wash. 45.

It has often been decided that the terms "law" and "equity," as used in the Constitution, giving to the courts of the United States jurisdiction in cases in law and equity, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption, do not restrict the jurisdiction conferred by it to the very rights and

remedies then recognized and employed, but embraces as well, not only rights newly created by statutes of the states, as in cases of actions for the loss occasioned to survivors by the death of a person caused by the wrongful act, negligence, or default of another, but new forms of remedies to be administered in the courts of the United States according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it according to course and analogy of the common law. *Ellis v. Davis*, 8 Sup. Ct. 327, 334, 109 U. S. 485, 27 L. Ed. 1006.

#### As according to practice in equity.

"Equity," as used in Gen. St. c. 86, § 79, permitting the defendant in an action to set up in his answer an equity which he possessed, must be one which, according to the rules governing courts of equity under the former system, would entitle the defendant to relief wholly or in part against the liability set forth in the complaint as the basis of plaintiff's action. *Barker v. Walbridge*, 14 Minn. 469, 475 (Gil. 351, 353).

Gen. St. c. 86, § 79, permitting certain equities to be set up in an answer, cannot be construed to mean mere claims that the defendant has against the plaintiff. An equity, within the meaning of the statute, must be one which, according to the rules governing courts of equity, would entitle the defendant to relief, wholly or in part, against the liability set forth in the complaint as the basis of plaintiff's action. The test of its sufficiency must be whether, had the same facts been presented by a bill in chancery, would that could have entertained the bill and granted the relief sought? If such facts constitute a cause of action at law, it must be shown that in such action the party would not have an adequate remedy. *Birdsall v. Fischer*, 17 Minn. 76, 80 (Gil. 100, 102).

Act 1868, known as the "Relief Law," providing that the jury, under certain circumstances, may reduce the plaintiff's claims according to equities between the parties, does not mean whim of the jury, nor mere mercy, but that fair and honest duty which each owes to the other, growing out of the contract, or arising between them. The mere fact that at the date of the contract the defendant was worth a certain amount, and that at the trial he was worth much less—it not appearing that this was in any way the fault of the complainant—does not constitute an equity. *Butler v. Weathers*, 39 Ga. 524, 528.

#### Common law distinguished.

See "Common Law."

#### As equality.

"Equity" is synonymous with "equality," and hence, when the assets of a savings

bank have been reduced in value below the amount due the depositors, a petition may be maintained for an abatement of taxes to a corresponding extent under Laws 1895, c. 90, § 1, providing that any bank which may claim to be taxed inequitably may apply for an abatement. *In re Wolfeborough Sav. Bank*, 39 Atl. 522, 523, 69 N. H. 84.

The term "equity," in English and American law, is derived from the Roman "equitas," which, according to Sir Henry Maine (Ancient Law, 55, 56), has as its primal meaning either the idea of equal, proportionate distribution, or the idea of leveling, in the sense of removing inequalities. *Miller v. Kenniston*, 30 Atl. 114, 86 Me. 550.

Equity, in governing the conduct of a trustee clothed with the trust of paying debts from a trust fund, means equality. It has therefore been held that the creditors are to be paid pro rata, not by preference, unless the nature of the debt is such as to require it, as if it be a mortgage or other lien debt. *Frost v. Redford*, 54 Mo. App. 845, 859.

#### Estate distinguished.

The word "estate" is clearly distinguishable from an equity, for "estate" and "equity" are not synonymous words, either in meaning or substance. *Tewksbury Tp. v. Readington Tp.*, 8 N. J. Law (3 Halst.) 319, 323.

#### As natural right or justice.

*Swan & C. St. p. 578*, authorizes a recovery by civil action according to the justice and equity of the case. Held, that the word "equity" was evidently employed in that statute in its broadest sense, as meaning consonance to natural right, not in its technical sense, for the purpose of conferring jurisdiction. The remedy given was by civil action, leaving its character, whether legal or equitable, to be determined by the nature of the relief that should be appropriate to the particular circumstances of each case. *Black v. Boyd*, 83 N. E. 207, 209, 50 Ohio St. 46.

"Equity" may be defined to be natural right or justice, as addressed to the conscience, independent of express or positive law; a system of jurisprudence, the object of which is to render the administration of justice more complete, either by the application of rules to cases not provided for by positive law, or by adopting remedies more exactly to the exigencies of particular cases. *Burrill*, Law Dict. tit. "Equity"; 3 Bl. Comm. 429.

"Equity," within the meaning of a submission to arbitration, directing the arbitrators to act upon the principles of equity, to the end that each of the parties may have from the other all that he is equitably entitled to, cannot be construed to be limited

to equity in a narrow or restricted meaning. It is equity in its broadest and most generous sense. It means good conscience, fair dealing, justice. It is in the spirit of the precept to live honestly, to injure no man, and to render to every man his dues. It is the Golden Rule—to do by others as we would that others should do by us. *In re Curtis-Castle Arbitration*, 30 Atl. 769, 770, 64 Conn. 501.

Code, § 8121, provided that, on an appeal from a justice of the peace, the case shall be tried "according to the equity and justice." Held, that the term "equity and justice," as there used, meant that a mere technical objection, not affecting the merits, such as defects in the summons or other process before the justice, should not be regarded as material on the appeal. *Abrams v. Johnson*, 65 Ala. 465, 470.

#### Law synonymous.

"Equity," as used in the oath administered to a special jury, by which they were sworn to give a true verdict according to the "equity" on the opinion they entertained of the evidence produced, to the best of their own knowledge, is a convertible term with "law," and means, not that the verdict should be given according to some vague and undefinable opinion which the jury might entertain of equity, but according to a system of jurisprudence, governed by established rules and bounded by a fixed precedent, from which the jury were not permitted to depart, however liable to objections these rules and precedents might be, in their judgment. *Thornton v. Lane*, 11 Ga. 459, 538.

#### Equity of partners.

The term "equity of partners" is used to designate the right of each of them to have the firm's property applied to the payment of the firm's debts. *Colwell v. Weybosset Nat. Bank*, 17 Atl. 913, 16 R. I. 288.

#### EQUITY CASES.

Civil actions, cases, etc., distinguished, see "Civil Action—Case—Suit—etc."

"Equity cases," as used in Code 1849, § 47, authorizing the Supreme Court to transfer equity cases to the superior court of the city of New York, meant suits in equity commenced under the previous system, and did not authorize the transfer of an action under the Code, although the subject of the suit and relief demanded were matters of exclusive equity, cognizant under the former system of pleading and practice. *Giles v. Lyon*, 4 N. Y. (4 Comst.) 600, 603.

#### EQUITY COURT.

See "Court of Equity."

**EQUITY JURISDICTION.**

When "equity jurisdiction" is spoken of, there is not meant the power of a court to try the dispute, in the sense that a county court cannot try an action in ejectment, or a state court offenses against the federal government, but the question whether the action in equity will lie. *Anderson v. Carr*, 19 N. Y. Supp. 992, 993, 65 Hun. 179.

There is a clear distinction between the term "jurisdiction," in its strict meaning, and as generally used in equity jurisprudence. In its strict meaning, it imports only the power residing in a court to hear and determine an action; but, as applied to the power of a court of equity, it is ordinarily used with more limited signification, and imports, not the power to hear and decide, but the cases and occasions when that power is exercised. *People v. McKane*, 28 N. Y. Supp. 981, 985, 78 Hun. 154.

**EQUITY JURISPRUDENCE.**

Equity jurisprudence may properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as distinguished from that portion of remedial justice which is exclusively administered by a court of common law. There is a clear distinction between the court which administers and the jurisprudence to be administered and the jurisdiction exercised. The court must necessarily be existent before it can exercise jurisdiction at all, so that it is a separate and independent thing, both in thought, logic, and fact, from the matter of its jurisdiction. *Jackson v. Nimmo*, 71 Tenn. (3 Lea) 597, 609.

**EQUITY OF REDEMPTION.**

An equity of redemption is an interest in the land mortgaged, which will descend to the heir of the mortgagor, who, in legal contemplation, continues to be owner of the land for every beneficial purpose. *Welles v. Parker*, 1 Pa. Com. Pl. 25; *Bank of U. S. v. Platt's Heirs*, 5 Ohio (5 Ham.) 540, 541.

The term "equity of redemption," in Delaware, when used in the law of mortgages, includes the title to the mortgaged land, with the right to redeem it from the incumbrance of the mortgage. *Seals v. Chadwick* (Del.) 45 Atl. 718, 720, 2 Pennewill, 881.

The term "equity of redemption" is used in common speech to describe the title of a mortgagor, without regard as to whether the condition has been broken. *Holmes v. Jordan*, 39 N. E. 1005, 1006, 163 Mass. 147.

Where a court of equity interposes its authority to extend to the mortgagor further time to redeem, although his remedy is lost by law, this is called an "equity of redemp-

tion." *State v. Laval* (S. C.) 4 McCord, 336, 340; *Hanover Fire Ins. Co. v. Brown*, 25 Atl. 989, 990, 77 Md. 64, 39 Am. St. Rep. 386.

When a deed is made for the purpose of securing an existing debt, there is always an interest in the property remaining in the grantor—what is called an "equity of redemption"; his right to pay the amount of the debt, and have the property reconveyed. *Platt v. McClong* (N. J.) 49 Atl. 1125, 1127.

The privilege and residuum of interest, when the property conveyed in the mortgage is more than sufficient to pay the debt, constitute what is known as the "mortgagor's equity of redemption." *McGough v. Sweetser*, 12 South. 162, 163, 97 Ala. 861, 19 L. R. A. 470.

An equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law; and it is accordingly held to be descendible by inheritance, devisable by law, and alienable by deed, precisely as if it were an absolute inheritance at law. *Walker v. King*, 44 Vt. 601, 612 (citing 4 Kent, Comm. 459).

The equity of redemption in mortgaged lands, such as exists before foreclosure, is a substantial interest in the land itself, which the probate court may, under its statutory jurisdiction, order sold by the personal representative for the payment of debts. *Rainey v. McQueen*, 25 South. 920, 923, 121 Ala. 191.

Equity of redemption is a right in equity to relieve land from an incumbrance, and to be restored to the possession and enjoyment of it in fee. *Yeo v. Mercereau*, 18 N. J. Law (3 Har.) 387, 390.

The equity of redemption in property is the interest remaining after the incumbrance has been paid. *McNaughton v. Burke*, 89 N. W. 274, 275, 63 Neb. 704.

An equity of redemption is an estate in the land which may be devised or taken on execution, and which may descend to heirs. It is subject to dower. If the purchaser of an equity of redemption takes an assignment of the mortgage, both estates may stand, though united in the same person, when substantial justice may be promoted. The mortgage will be upheld, or not, according to his intention or interest, for mergers are not favored in courts of law or in courts of equity. In such a case the widow of the mortgagor, who joined in the mortgage, will be entitled to dower in an equity of redemption; she not having joined in a release of such equity. *Simonton v. Gray*, 34 Me. 50, 51.

The terms "redemption" and "equity of redemption," belonged to a system of law that gave the legal estate, defeasibly before default, and absolutely afterward, to the

mortgagee, and while that system prevailed, were descriptive of the mortgagor's right to go into equity on the condition of paying his debt, to redeem a forfeited estate and demand a reconveyance. These descriptive words yet survive and are in use, although the ideas they once represented have long since become obsolete. *Kortright v. Cady*, 21 N. Y. 343, 365, 78 Am. Dec. 145.

Though the right of a mortgagor to intervene after default, and before judicial sentence, and discharge the mortgage, is usually termed his "equity of redemption," it is not so in fact or in equity, in the sense which recognized the legal estate in the mortgagee, defeasible before and absolute after default, and which, on the condition of paying his debt, allowed him to redeem a forfeited estate and demand a conveyance. His equity of redemption is the right to redeem from the mortgage; to pay off the mortgage debt, until this right is barred by a decree of foreclosure; but, until this right is barred, his estate, in law or in equity, is just the same after as it was before default. It is a right, however, of which the law takes no cognizance, and is enforceable only in equity, and has nothing to do with our statute of redemptions. *Sellwood v. Gray*, 5 Pac. 196, 198, 11 Or. 534.

In a suit to have an absolute deed by a mortgagor to a mortgagee, in consideration of the mortgage debt, decreed a mortgage, a complaint alleged that the mortgagor's equity of redemption at the time of conveyance was of certain value. It was contended that this term, as applied to mortgages, described nothing; it being a misuse of language to apply the name of "equity of redemption" to the legal estate of the mortgagor. It was held that, as used in a complaint, it must be construed to refer to the interest which the mortgagor would have had in the land subject to the mortgage, and thus, though not technically correct, it sufficiently alleges that the interest of the mortgagor was of such value. *Bradbury v. Davenport*, 46 Pac. 1062, 1064, 114 Cal. 593, 55 Am. St. Rep. 92.

In holding that, where a statutory right of redemption had been prevented from sales under execution issued on a judgment rendered in an action at law, there was no equitable right of redemption, the court said: "We do not intend to hold that there may not be, under some circumstances, an equitable right of redemption. This phrase, 'equitable right of redemption,' must not, however, be taken according to the ordinary significance of the words, nor must it be taken in its broadest and fullest extent. All that we intend to hold is that a party having a right of redemption, which he has attempted to exercise under and according to the statute, but which he has failed to effectuate by reason of some excusable fact, or where he

has attempted to make it, and his right has been refused by the officer holding the execution, or where, by reason of collusive judgments, which are fraudulent as to him, he is unable to complete his statutory redemption, he may file a bill in equity setting up the facts on which his right rests—the facts which constitute his excuse or which obstruct his redemption—and, making due proof, obtain a decree which shall establish it." *Paddock v. Staley*, 58 Pac. 363, 366, 13 Colo. App. 363.

The words "equity of redemption" have acquired a thoroughly different meaning from that which they originally bore, and in this state, at least, ever since the act of 1791, they are uniformly used to express exactly the opposite idea from that which they were intended to convey. Originally they signified, as the words naturally import, a mere equitable right which the mortgagor had to redeem the land which he had conveyed to his mortgagee, while now those words signify the legal estate remaining in the mortgagor, and subject to the incumbrance of the mortgage. As long as a mortgage was regarded as a conveyance, the true theory was that, while the mortgage vested the legal estate in the mortgagee, yet it was impressed with a trust to reconvey to the mortgagor upon payment or tender of the mortgage debt; and this trust, being a mere equitable right in the mortgagor to go into the court of equity and demand a reconveyance upon performance of the conditions of the mortgage, was then very appropriately styled the "equity of redemption." But when a mortgage was deprived of its character and effect as a conveyance, and was a mere lien to secure the payment of the debt, the words "equity of redemption" became wholly inappropriate to express the nature of the right remaining in the mortgagor, although constantly so used both in the acts of the Legislature and in judicial decisions, and these words, whenever found either in the acts of the Legislature or any judicial decision, must be regarded as signifying the legal estate remaining in the mortgagor, and hence a "release of the equity of redemption" means nothing more than a release of the legal estate. *Navassa Guano Co. v. Richardson*, 2 S. E. 307, 311, 26 S. O. 401.

The word "redeem" means "repurchase." The words are synonyms, and the first has come into use with lawyers to describe the right of a mortgagor of lands by reason of the old practice which prevailed in England of making absolute conveyances of land by way of mortgage, with a covenant to reconvey upon the payment of the debt—an actual real conveyance being made. The form of conveyance by way of mortgage now and for many years past in use in this country dispenses with the necessity of a reconveyance, but the phrase "equity of re-

demption" is still used to describe the mortgagor's right. *Pace v. Bartles*, 20 Atl. 352, 359, 47 N. J. Eq. 170.

The equity of redemption, within the meaning of the law with reference to mortgages, is regarded as the land; and its owner is the owner of the land for most purposes, while the estate in fee of the mortgagee is, except for a limited purpose, regarded as personal estate and mere security. *McKelvey v. Creevey*, 45 Atl. 4, 5, 72 Conn. 464, 77 Am. St. Rep. 321.

An equity of redemption under a mortgage is a subsisting estate in the land of the mortgagor, his heirs, devisees, assignees, and representatives; and courts of general equity jurisdiction have held that not only such had the right of redemption, but that it exists in every other person who has acquired any interest in the lands mortgaged by operation of law or otherwise in privity of title. *True v. Haley*, 24 Me. (11 Shep.) 297, 298.

The words "equity of redemption" do not mean what they would naturally import, for it is beyond dispute that the interest which is commonly called the "equity of redemption" is liable to levy and sale under an execution; and it is equally clear that if it were what the words import—a mere equity—it would not be liable to levy and sale under an execution. It is plain, therefore, that what is miscalled the "equity of redemption" is in fact the legal estate in the land, subject to the incumbrance created by the mortgage, and that the release of the equity of redemption must be regarded as the conveyance of the land to him who holds the title. *Simons v. Bryce*, 10 S. C. 354, 373.

The equity of redemption must not be confounded with a right of redemption. A mortgagor has an equity of redemption until the sale, and not afterward. After sale he has a right of redemption, if the statute gives it. *Mayer v. Farmers' Bank*, 44 Iowa, 212, 216.

#### **EQUITY TERM.**

An equity term of court is one where no jury was called, no criminal work done, and no cases tried which required the impanelling of a jury. *Hesselgrave v. State*, 89 N. W. 295, 63 Neb. 807.

#### **EQUIVALENT.**

The term "equivalent," in regard to the operation of chemicals, means equally good. *Tyler v. Boston*, 74 U. S. (7 Wall.) 327, 330, 19 L. Ed. 93; *Matheson v. Campbell* (U. S.) 69 Fed. 597, 602.

It is difficult to lay down a rule as to what evidence is equivalent to two witnesses,

it being peculiarly within the province of the jury to determine as to such matter; and the whole duty of the court is compelled with when it calls the attention of the jury to the fact that the statute provides that no person shall be convicted of a crime punishable with death without the testimony of two witnesses, or that which is equivalent thereto. *State v. Smith*, 49 Conn. 376, 385.

#### **Of cash.**

It is not easy to conceive what is intended to be embraced by the use of the words "its equivalents," as used in a deed of assignment requiring the assignee to convert the assets into cash or its equivalents, but to be equivalent to cash must be something commercially as good as cash, or, as we take it, something that could readily be converted into cash at a fixed price, and is not the same as an authority to the assignee to sell on credit. *Kellogg v. Muller*, 4 S. W. 361, 362, 68 Tex. 182.

A provision of a contract providing that the parties were to be paid "in cash or its equivalent," without further explanation, means anything besides money that the parties might agree to take; and where they agreed to take, and did take a note and mortgage, or drafts, the contract will be deemed to have been fulfilled and completed. *Hassard-Short v. Hardison*, 23 S. E. 96, 97, 117 N. C. 60.

#### **Of commercial paper.**

A contract whereby one of the parties agreed that payment should be made in the paper of a certain corporation, or its equivalent, meant that such party might make such payment, if it should be convenient for him to do so, in any other notes of equal value. *Robinson v. Nobles' Adm'r*, 33 U. S. (8 Pet.) 181, 199, 8 L. Ed. 910.

#### **Of funds.**

A promissory note providing for its payment in lawful funds of the United States, or its equivalent, is payable in such paper currency as passed at par with gold and silver, being the only legal tender in the United States. *Ogden v. Slade*, 1 Tex. 13.

A promissory note payable at New York in "New York funds," or "their equivalent," is payable in their value in specie, or in current paper which passes at a discount. *Hasbrook v. Palmer*, 11 Fed. Cas. 766.

#### **Of gold or specie.**

A promissory note for a certain number of dollars, payable in gold or its equivalent, should be construed to include gold, or the payment of so many dollars in United States notes issued by the Secretary of the Treasury of the United States under the legal tender act, and which are made by said act a legal tender in payment of debts, as are

equal in value to the number of dollars named in the note, in gold. The meaning of the note was that the obligation might be discharged in something having the character of dollars, and, as the promise was to pay dollars, then the equivalent intended must have been an equivalent in dollars which are a legal tender in payment of debts. *Holt v. Given*, 43 Ala. 612, 616; *Ohisholm v. Arrington*, Id. 610, 612.

The use of the word "equivalent" in a bond payable in specie or its equivalent shows an understanding of the parties thereto that currency less valuable than specie should not be received in payment of the bond. *Paup v. Drew*, 51 U. S. (10 How.) 218, 223, 13 L. Ed. 394.

#### **EQUIVALENT (In Patent Law).**

See "Mechanical Equivalent"; "Substantial Equivalent."

The word "equivalent," as used in the patent law, means equal in force and effect. *Alaska Packers' Ass'n v. Letson* (U. S.) 119 Fed. 599, 611.

Those things are equivalent which perform the same function in substantially the same way, as applied to primary inventions. *Edison Electric Light Co. v. Boston Incandescent Lamp Co.* (U. S.) 62 Fed. 397, 399; *Pacific Cable R. Co. v. Butte City St. R. Co.* (U. S.) 58 Fed. 420, 421; *Powell v. Leicester Mills Co.* (U. S.) 103 Fed. 476, 487; *Dryfoos v. Wiese*, 8 Sup. Ct. 354, 357, 124 U. S. 37, 31 L. Ed. 362; *Farmers' Mfg. Co. v. Spruks Mfg. Co.* (U. S.) 119 Fed. 594, 599.

"Equivalent," in patent law, means that the patent, in respect to each of the respective ingredients comprising the invention, covers every other ingredient which in the same arrangement of the parts will perform the same function, if it was well known as a proper substitute for the one described in the patent at the date thereof. *Norton v. Jensen* (U. S.) 49 Fed. 859, 868, 1 C. C. A. 452.

The term "equivalent" has two meanings, as used in patent cases. The one relates to the results that are produced, and the other to the mechanism by which those results are produced. *Johnson v. Root* (U. S.) 13 Fed. Cas. 823, 828.

The doctrine of equivalents is allowed to patentees of inventions consisting merely of combinations of old ingredients. As said in *Imhaeuser v. Buerk*, 101 U. S. 655, 25 L. Ed. 945, the term "equivalent," as applied to such an invention, is special in its classification, and somewhat different from what is meant when the term is applied to an invention consisting of a new device or an

entirely new machine. Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent, in respect to each of the respective ingredients comprising the invention, covers every other ingredient which in the same arrangement of the parts will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. *Norton v. Jensen* (U. S.) 81 Fed. 494, 498.

The term "equivalent," as applied to a combination of old elements, is special in its signification, and materially different from what is meant when the term is applied to an invention consisting of a new device or an entirely new machine. As a general definition, a mechanical equivalent that may be properly substituted for the omitted mechanical element, device, or agency in a patented machine is one that performs the function by applying the same force to the same object through the same mode and means of application. In a combination patent for improvement only in the arrangement and application of old ingredients, the patentee is not entitled to invoke broadly the doctrine of mechanical equivalents, so as to cover a device not specifically included in his claim and specifications. *Carter Mach. Co. v. Hanes* (U. S.) 70 Fed. 859, 865.

An equivalent, in the law of patents, is defined to be any act or substance which is known in the arts as a proper substitute for some other act or substance employed already as an element in an invention, whose substitution for that other act or substance does not in any manner vary the idea of means. It possesses three characteristics: (1) It must be capable of performing the same office in the invention as the act or substance whose place it supplies; (2) it must relate to the form of embodiment alone, and not affect in any degree the idea of means; (3) it must have been known in the arts at the date of the patent as endowed with this capability. *Duff Mfg. Co. v. Forgie* (U. S.) 59 Fed. 772, 775, 8 C. C. A. 261 (citing 1 Robb, Pat. Cas. § 247).

The range of equivalents, in regard to the infringement of patents, depends upon the extent and nature of the invention. *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310, 38 L. Ed. 121. It is an abuse of the term "equivalent" to employ it to cover every combination or device in a machine which is used to accomplish the same result. *Beach v. Hobbs* (U. S.) 92 Fed. 146, 150, 151, 34 C. C. A. 248 (citing *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1186).

The word "equivalent," as used in patent law, indicates a substance which has similar properties and produces substantially

the same effect as another substance. *Matthews v. Skates* (U. S.) 16 Fed. Cas. 1123, 1125.

"Equivalent," in the law of patents, is any act or substance which is known in the arts as a proper substitute for some other act or substance employed as an element in the invention, whose substitution for that other act or substance does not in any manner vary the idea of means. It possesses three characteristics: It must be capable of performing the same office in the invention as the act or substance whose place it supplies; it must relate to the form or embodiment alone, and not affect in any degree the idea of means; and it must have been known to the arts at the date of the patent as endowed with this capability. *Duff Mfg. Co. v. Forgie* (U. S.) 59 Fed. 772, 775, 8 C. O. A. 261.

"Equivalent," as applied to a combination of old elements, is special in its signification, and materially different from what is meant when the term is applied to an invention consisting of a new device or of an entirely new machine. As a general definition, a mechanical equivalent that may be properly substituted for an omitted mechanical element, device, or agency in a patented machine is one that performs the same functions by applying the same force to the same object through the same mode and means of application. *Carter Mach. Co. v. Hanes* (U. S.) 70 Fed. 859, 865.

Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which in the same arrangement of the parts will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent; hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer, if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use. *Imhaeuser v. Buerk*, 101 U. S. 647, 655, 25 L. Ed. 945.

Though it is evident that chloride of zinc is no equivalent for chloride of sodium for all possible conditions and for all purposes, and in combination with all other substances, yet if it contributes to produce the same composition of matter by the same chemical action, in combination with the ingredients of the product claimed to be an infringement of a patented product, as the chloride of sodium produces in the patented product. It is to all intents and purposes the

equivalent of chloride of sodium. *Woodward v. Morrison* (U. S.) 30 Fed. Cas. 553, 559.

The word "equivalent," as used in the description of a patent by which the patentee claimed a patent for the arrangement of tar paper or its equivalent between adjoining blocks of concrete pavement, must be held to mean some flexible or manageable substance, but does not include the use of sand and cement for filling the spaces between the separate blocks of concrete. *Schilling v. Cranford* (U. S.) 4 Mackey, 450, 466.

## ERASE.

The word "erase," as used in inspection laws regulating the inspection of flour, and providing that if flour which has been marked "Condemned" should, on appeal, be adjudged merchantable, the inspector shall erase the word "Condemned," means to blot out by erasure. *Cloud v. Hewitt* (U. S.) 5 Fed. Cas. 1083, 1085.

Under Laws 1893, c. 80, § 4, providing that a voter, if he desires to vote for any candidate on any other part of the ballot, may erase the name of the candidate for that office on his ticket, etc., a voter may erase the name of a candidate by crossing it out, as one of the definitions of "to erase" is to cross out, and a cross would indicate the intention to erase it as well as drawing a line through it. *Vallier v. Brakke*, 64 N. W. 180, 185, 7 S. D. 343.

## ERECT—ERECTION.

Other erection, see "Other."

To "erect" means to build up; to construct. *Eichleey v. Wilson* (Pa.) 42 Wkly. Notes Cas. 525, 527; *McGary v. People* (N. Y.) 1 Cow. Cr. R. 338, 343.

"Erect" means to raise and set up in an upright or perpendicular position; to raise, as a building; built or constructed; and, in defining a house as a building erected for public or private use, "erected" applies to any erection, as the construction of a tent of poles and canvas for private use, and makes it a house. *Favro v. State*, 46 S. W. 932, 89 Tex. Cr. R. 452, 73 Am. St. Rep. 950.

"Erection of any building," within an indenture relating to a party wall, and providing "that the adjoining party may at any time use as much of the wall as he may choose for the erection of any building," paying the value of so much of it as he shall then use, does not arise where, at the time the contract was entered into, such adjoining party had a building one story high on his land, with one side of wood, resting by per-



mission on the other's land, and such owner took down the wooden side of his building, and the other built the wall four stories higher, leaving spaces for the timbers of the adjoining owner's building, who adjusted the timbers into the spaces, and so used the party wall; there not having been any erection of a building by such adjoining owner, within the meaning of the agreement. *Shaw v. Hitchcock*, 119 Mass. 254, 256.

The words "construct and erect" are the usual words employed in a building contract, and they are effective words of sale, to pass the title to the building materials, when erected, from the builder to the owner of the land. The words "construct and erect," as used in a contract to construct and erect, at a certain brewery, refrigerating machinery and plant, are used in the same meaning as in ordinary building contracts, and do not imply that a bailment is being created. *Ott v. Sweatmen*, 31 Atl. 102, 109, 166 Pa. 217.

Greater New York Charter, § 610, providing that the board of park commissioners may enact ordinances for the government and protection of all parks, and shall at all times be subject to all ordinances in respect to any "erection or incumbrance" thereon, does not apply to a portion of a house erected by the owner of contiguous property, a part of which encroaches on the property. *Ackerman v. True*, 66 N. Y. Supp. 140, 143, 31 Misc. Rep. 597.

In Rev. St. § 57, providing that no public road shall be laid out through any buildings or any inclosures or erections for the purpose of trade or manufacture, or any yards or inclosures necessary to the use or enjoyment thereof, without the consent of the owner, the term "erection" implies some structure superimposed on the land; that is, something through which a highway may be laid, and which would be rendered useless thereby. *People v. Kingman*, 24 N. Y. 559, 564.

In the statutes relating to the prohibition of nuisances, providing that if any person or persons shall erect any building in a public highway, by which the passage of travelers will be obstructed, etc., the same shall be deemed a common nuisance, "erect" refers to the building of a new building or the moving of an old one into the highway, and does not refer merely to the leaving of a building in a highway, which had been built there by a former owner. *State v. Brown*, 16 Conn. 54, 57.

The words "erected under one general contract," in Rev. St. 1889, § 6729, providing that when the improvements consist of two or more buildings, etc., erected under one general contract, it shall not be necessary to

file a separate mechanic's lien upon each building, "are not to be confined to a case where the owner may contract for the completion of the buildings in one general contract. These words will include a case where the entire building is not let to the contractor, but where the lienor furnishes to the owner for all the buildings material, which goes into such erection, notwithstanding such material may compose only a part of such erection." *Deardorff v. Roy*, 50 Mo. App. 70, 74.

In a note of a railroad company payable on condition that at a specified time it should have erected a regular station for freight and passengers at a specified place, "erected" means more than the erection of a station house. It means to set up or to establish a regular station. The word "erect" may mean to build, or it may mean to set up or found or establish or institute, according to the context. *Port Huron & N. W. Ry. Co. v. Richards*, 51 N. W. 680, 90 Mich. 577.

#### Additions, alterations, and repairs.

"Erection," as used in a statute giving a county commissioners' court power to levy a special tax for the erection and repair of public buildings, would include a power to erect additions to a building, and would not require that the building be torn down, and a new one erected, in order for the commissioners to exercise the power. *Brown v. Graham*, 58 Tex. 254, 256.

It is not necessary that a new building should be distinct from and independent of an older building, in order to be deemed a building erected. Thus wings added to a house are regarded as buildings. *Nelson v. Campbell*, 28 Pa. (4 Casey) 156; *Harman v. Cummings*, 43 Pa. (7 Wright) 322. So, also, are kitchens attached to buildings. *Delione v. Long Branch Com'rs*, 25 Atl. 274, 275, 55 N. J. Law, 108 (citing *Lightfoot v. Krug*, 35 Pa. [11 Casey] 348).

Act June 16, 1836, giving a mechanic a lien for work done in the erection of a building, includes work performed in adding a story to a building, and in constructing a new building beside the old one, of equal dimensions, and joining the two with one roof, with interior connections. *Driesbach v. Keller*, 2 Pa. (2 Barr) 77, 79.

Adding a story to a house already erected is erecting a building, within the meaning of an ordinance providing that no person shall erect any building in a certain portion of the city, except of certain materials. "There is no difference in the meaning of the word 'erect' when applied to the whole building, and when applied to a part of a building. In both cases it means 'to build.'" *Carroll v. City of Lynchburg*, 6 S. E. 133, 84 Va. 803.

Every change, alteration, or addition in or to an existing structure does not constitute an "erection or construction of a building," within the meaning of that phrase as used in laws giving mechanics' liens. The change or alteration must be such that the whole structure, as changed or altered, would commonly be regarded as another new and different building; and the addition of a back building to a main structure—as, for instance, a bathhouse and kitchen to a residence—is not an erection or construction of a building. *Rand v. Mann* (Pa.) 3 Phila. 429.

Where a building, partly brick and partly frame, was removed, and after its removal a cellar was dug under it and walled up, and a new chimney built, and the house newly weatherboarded and plastered, it was a building "erected," within the meaning of the mechanic's lien law. In *re Burling's Estate* (Pa.) 1 Ashm. 377, 378.

"Erected," as used in a mechanic's lien law, giving a mechanic's lien on every building erected by mechanics, is not used strictly, and applied to the erection of new buildings, but includes, as well, a structure which was so completely changed in repairing that in common parlance it may be properly called a "new building" or a "rebuilding." Thus, where every part of an old building is removed, except the back wall and part of the side walls, and the openings in them are changed, and the whole internal structure and external form of the building are changed, both as to its length and height, such a building is erected, within the meaning of the law. *Armstrong v. Ware*, 20 Pa. (8 Harris) 519, 520.

The addition of a basement to a frame house is not an erection, within the meaning of the mechanic's lien law. *Miller v. Oliver* (Pa.) 8 Watts, 514, 515.

A statute authorizing a mechanic's lien for labor performed or materials furnished in erecting or constructing a building does not warrant a lien for remodeling or repairing a house, the walls of which were allowed to stand, though newly faced, and in which the owner continued to live while the work was being done. *Perigo v. Vanhorn* (Pa.) 2 Miles, 359, 362.

"Erection," as used in a mechanic's lien act authorizing a mechanic's lien to be filed on buildings for work and materials in the erection or construction thereof, means the original building of the house or other building, and cannot be construed to include the repair, alteration, or addition to houses or other buildings already constructed. *Appeal of Hancock*, 7 Atl. 773, 775, 115 Pa. 1; *Rynd v. Bakewell*, 87 Pa. 460; *Appeal of Wetmore*, 91 Pa. 276, 279; In *re Howett*, 10 Pa. (10 Barr) 379, 380.

"Where the structure of a building is so completely changed that in common parlance

it may be properly called a new building or a rebuilding, the process of change is such an erection or construction of a building as to be within the meaning of that phrase as used in laws giving mechanics' liens. *Smith v. Nelson* (Pa.) 2 Phila. 113, 114.

The power to erect a monument at testator's grave, given to executors by Gen. Laws, c. 196, § 17, includes the power of doing, at the expense of the estate, what is reasonably necessary to be done, to keep the monument in proper condition during the time of administration, and to make it as durable, suitable, and sufficient as its purpose requires. *Bell v. Briggs*, 4 Atl. 702, 63 N. H. 592.

The words "erection, alteration, or repair of buildings and structures," within the meaning of the mechanic's lien law, giving a lien for labor or materials furnished in the erection, alteration, or repair of buildings or structures, "seem to be quite plain in their signification, and insusceptible of any interpretation but the common one of building, altering, or repairing a house. Words in a statute are to be taken in their usual sense in which they are understood by people generally, unless there be some technical sense in which they must be considered in order to give the intended effect to the law, or the circumstances under which they are employed warrant applying a different sense to them. It has been held in *France v. Woolston* (Del.) 4 *Houst.* 557, that glazing and painting were within the terms of the statute; but in *Capelle v. Baker* (Del.) 3 *Houst.* 344, the terms were held not to include an architect's bill for a plan of a building. The terms do not include upholstering a hall. *McCartney v. Buck* (Del.) 12 Atl. 717, 719, 8 *Houst.* 34.

#### Burial vault.

A person who breaks into a burial vault is guilty of breaking into a building or other erection or inclosure, within the statute defining burglary. *People v. Richards*, 15 N. E. 371, 373, 108 N. Y. 137, 2 Am. St. Rep. 373; *Id.*, 44 Hun, 278, 282.

#### Cleaning street.

There is a sense in which to lay out and establish a public park may be held to be an erection or construction, but it cannot be said of the cleaning of the streets of the city. This is a work into which the elements of erection or construction do not enter, and therefore the restraining of the cleaning of the city streets does not fall within the prohibition of the act prohibiting the court in which the application for injunction is made from granting injunctions against the erection or use of any public work of any kind erected or in progress of erection under the authority of the act of the Legislature till the question of title and damages has been

settled by the court of law. *City Sewage Utilization Co. v. Davis* (Pa.) 8 Phila. 625, 626.

#### Dock.

The construction of a dock near a ferryboat landing, designed for the purpose of trade with river boats, and for landing and piling lumber, as well as for the protection and use of the ferryboats, is a fixture or erection, within a statute providing that no public or private road shall be laid out through any fixtures or erections used for the purposes of trade. *Flanders v. Wood*, 24 Wis. 572, 576.

#### Greenhouse.

A greenhouse is an erection and improvement, within a lease requiring the lessee to yield up all erections and improvements made or set up during the term. *West v. Blakeway*, 2 Man. & G. 729, 737.

#### Fixtures.

A covenant in a lease to deliver up in good order "all future erections and additions" to or upon the premises is limited, in purpose and effect, to new buildings added to—putting such erections and additions upon the same footing in respect of the obligation to keep in repair, as the buildings upon the premises at the time of the execution of the lease; and cannot be so extended as to deprive the tenants of the right to remove trade fixtures, much less personal property, put on the premises by them during the term. *Holbrook v. Chamberlin*, 116 Mass. 155, 162, 17 Am. Rep. 146.

#### Painting.

A statute giving mechanics a lien for labor or materials furnished for erecting a building should be construed to include the painting of a house. The term "erecting" is not merely to lift the walls of the house into the air. If the builder protects the walls from the action of the elements by covering them with a coat of paint or stucco, he has used those materials in erecting the house. *Martine v. Nelson*, 51 Ill. 422, 423.

The term "erection," in the mechanic's lien law, giving liens for work done and material furnished in, and for the erection, alteration, or repair of, any house, building, or structure, in pursuance, etc., "contemplates and includes the entire construction of any such house, building, or structure; and whatever is contributed, either in labor or materials, in the making or furnishing any part of them, is within the purview and intention of the statute. Work done and materials furnished by a painter on a building at a time prior to its completion constitutes a part of the erection, entitling him to a lien. *France v. Woolston* (Del.) 4 Houst. 557, 561.

#### Park.

"To construct a thing is to put together its several parts in their proper place and order, and to erect is to found and form, as well as to build or raise and set up. A park is made up in part of walks and roads, which are new constructions, and of ornamentations, with shrubbery and trees, which are set up in the places in which they are planted, and of booths and summerhouses, which are erected or built." *City Sewage Utilization Co. v. Davis* (Pa.) 8 Phila. 625, 627; *City Sewerage Utilization v. Board of Health* (Pa.) 1 Leg. Gaz. R. 402, 403.

#### Purchase authorized.

A statute authorizing a town to erect a town hall does not authorize the town to purchase a building already constructed. *Barker v. Town of Floyd*, 66 N. Y. Supp. 216, 217, 32 Misc. Rep. 474.

Under the act granting swamp lands to an educational institution, by which it was provided that, if the said seminary shall fail to erect the building in pursuance of the grant, the grant shall be forfeited, the grant is not forfeited, though the seminary does not construct said building itself, but accomplishes that object by consolidating with another organization, and thus procures the building it needs. *Kiefer v. German-American Seminary*, 10 N. W. 50, 46 Mich. 636.

"Erect," as used in a bequest to erect a charitable foundation, imports that the land necessary therefor is to be purchased, and authorizes such purchase. *Attorney General v. Parsons*, 8 Ves. 186, 191.

#### Remodeling for different use.

Where a dwelling house is enlarged, remodeled, and fitted up as a livery stable, designed and adapted for such use, it is erected for such use, within St. 1810, c. 124, providing that no building shall be erected within a certain distance of any church. *Hastings v. Aiken*, 67 Mass. (1 Gray) 163, 165.

"Erecting," as used in an ordinance inflicting a punishment for erecting and causing to be erected wooden buildings within certain limits, would include the changing of a frame blacksmith shop into a cabinetmaker's warehouse and shop, and enlarging the same. *Douglass v. Commonwealth* (Pa.) 2 Rawle, 262, 264.

In a statute prohibiting the erection of wooden dwelling houses, the term "erection" does not extend to the alteration and repair of a building originally erected for a meeting house, and subsequently used for a joiner's shop, and afterwards extensively repaired and converted into a dwelling house. *Booth v. State*, 4 Conn. 65, 67.

**Removal to new site.**

Gen. St. c. 161, § 2, making it criminal to burn in the nighttime any building erected for public use, will be construed to include a building which has been moved to a certain site, as well as a building originally erected on such site. *Commonwealth v. Horrigan*, 84 Mass. (2 Allen) 159.

A statute forbidding the erection of a wooden building within certain prescribed limits of a city should be literally construed to mean the construction of some structure, and hence the removal of a building from one part of a lot to another, and its permanent location in the place to which it is moved, was not within the statute. *Brown v. Hunn*, 27 Conn. 382, 384, 71 Am. Dec. 71.

The words "erection" and "construction," as used in *Sayles' Supp.* art. 3164, giving a lien on a house to any person furnishing tools for the erection thereof, to secure payment for the tools so furnished for the construction of the house, etc., seem to be synonymous in their meaning, and in common acceptance, when applied to a house, they mean the building of it by putting together the necessary material and raising it; but it does not require a strained sense to bring the removal of a house from the place where it has been put together, and placing it in position or setting it up in another place, within the meaning of these words as used in the law. *Burke v. Brown*, 30 S. W. 936, 10 Tex. Civ. App. 298.

Gen. St. c. 150, § 1, giving a lien in favor of any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used, in the erection, alteration, or repair of any building or structure on real estate, does not give a lien for labor performed or furnished in the removal of a building. *Trask v. Searle*, 121 Mass. 229, 230.

**Scaffold.**

"Erection," as used in St. 6 & 7 Geo. IV, c. 29, § 7, making it a felony to attempt to destroy any staith, building, or erection, used in conducting the business of any mine, the word "erection" was a larger term than "building," and would include a scaffold erected at some distance above the bottom of a mine for the purpose of working a vein of coal which was on a level with the scaffold. *Regina v. Whittingham*, 9 Car. & P. 234.

**Sidewalk.**

"Erection," as used in a statute giving a lien in favor of mechanics for work performed toward the erection, construction, or finishing of buildings, cannot be construed to include flagging the sidewalks, yards, and approaches of buildings which are being

erected. *McDermott v. Palmer*, 8 N. Y. (4 Seld.) 383, 386.

**Veranda.**

A veranda affixed to the ground by means of posts is an erection, within a lease requiring the tenant to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term. *Penry v. Brown*, 2 Starkie, 408.

**Water trough or channel.**

In 1 Rev. St. p. 514, § 57, providing that no public road shall be laid out through any buildings or any fixtures or erections for the purpose of trade or manufacture, without the consent of the owner, "erections" cannot be construed to include the channel by which water is conducted, from a creek to a sawmill. The term "erection" implies some structure superimposed on the land, and under this act it means something which a highway may be laid through, and which would be rendered useless by that act. *People v. Kingman*, 24 N. Y. 559, 562.

A wooden trough by which water is conveyed from a spring to a pool at a distance from a mine for the purpose of washing the ore is an "erection used in carrying on the business" of the mine, within St. 7 & 8 Geo. IV, c. 31, § 2, providing that if any "building or erection used in carrying on any trade or manufacture, or branch thereof," shall be feloniously demolished, pulled down, or destroyed, the inhabitants of the place in which any of said offenses shall be committed shall be liable to yield full compensation to the person or persons damaged by the offense. *Barwell v. Winterstoke*, 14 Adol. & El. 704, 708.

**ERECTED.**

In 2 Rev. St. p. 667, § 4, making it a felony to set fire to or burn any building erected for the manufacture of cotton or woolen goods, or both, "erected" means a factory building actually constructed, and not the frame of a building, or a building partially constructed, and in the process of erection or construction. A building erected is quite distinct from a building being erected. Where the frame of the whole building was not up at the time of the fire, and that part which had been raised was not entirely enclosed, the floors not laid, the stairs not up, and no part of it ready for occupation, or substantially ready for the reception of the machinery, or for use and occupation for any purpose, it can scarcely be called a building erected for any purpose. A building is a fabric or edifice constructed for use, and "to erect," when used in connection with a house, church, or factory, is "to build," and neither can be said to be erected until they are built—completed. *McGary v. People*, 45 N. Y. 153, 160.

In a subscription in which the subscriber agreed to give a certain amount when a building should be erected, if erected within a certain time, "erected" cannot be construed to mean "completed." "There is a great difference between erecting and completing. A building may be said to be erected when the walls are up, and the material on the ground to complete it." *Johnston v. Ewing Female University*, 35 Ill. 518, 529.

## ERRONEOUS.

As used in Act Feb. 1874, providing that all actions to recover from the city of Covington the amount of any taxes or assessments which may be illegally and erroneously collected shall be prosecuted within six months after the cause of action arose, the words "illegally and erroneously collected" are broad enough, and were evidently intended, to cover every case where citizens have paid taxes which the city has no right to exact, no matter whether the property was within the taxing power, or whether the method pursued in collecting was unauthorized. *City of Covington v. Voskotter*, 80 Ky. 219, 221.

When a court has made an erroneous ruling upon the record, or upon the facts which are disclosed in the proceedings before it, it is an error in law, and the judgment is said to be "erroneous in law." Such error may be corrected by the court which committed it, upon motion for a new trial or a motion for a rehearing, as the case may be; otherwise, when the error is not committed in a court of last resort, the remedy is by appeal or writ of error. *Cruger v. McCracken*, 30 S. W. 537, 538, 87 Tex. 584.

### As deviating from law.

"Erroneous" means deviating from law. *Thompson v. Doty*, 72 Ind. 336, 338.

The expression "erroneous and illegal" can only be taken to mean deviation from the law because of a mistaken construction thereof. *Thompson v. Doty*, 72 Ind. 336, 338.

### Illegal distinguished.

There is a distinction between an erroneous and illegal assessment. An erroneous assessment is when the officers have power to act, but err in the exercise of the power; and an illegal assessment is where they have no power to act at all. *Ford v. McGregor*, 23 Pac. 508, 509, 20 Nev. 446.

### As inequitable.

The word "erroneous," as used in the title of the act for refunding of erroneous assessments in the city of Troy, was not used in the sense of "illegal," but that the assessments were inequitable merely. *People v. Molloy*, 54 N. Y. Supp. 1084, 1087, 35 App. Div. 136.

### Irregular distinguished.

An "erroneous" judgment is one rendered according to the course and practice of the courts, but contrary to law, as where it is for one party when it ought to be for the other, or for too little or too much. An "irregular" judgment is one contrary to the course and practice of the courts, as a judgment without service of process, or without disposing of a plea properly entered. *Wolfe v. Davis*, 74 N. C. 597, 599.

There is a great difference between erroneous process and irregular (that is, void) process; the first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning; the party may justify under the first until it be reversed, but he cannot justify under the last, because it was his own fault that it was irregular and void at the first. *Paine v. Ely* (Vt.) N. Chip. 14, 24.

### Void distinguished.

There is a distinction between "erroneous" and "void" as used with reference to acts from a judiciary body, the general rule being that, where the body has jurisdiction of the subject-matter and of the person affected, its judgment in the case will not be void though it may be erroneous. If the judgment is merely erroneous it can be attacked, and the error corrected, only by appeal or by a direct proceeding to set it aside; while if it be absolutely void it is a nullity from the beginning, and may be treated as such without further proceedings to have such nullity judicially declared. *Kelley v. People*, 4 N. E. 644, 645, 115 Ill. 583, 56 Am. Rep. 184.

Where a court having jurisdiction gives a wrong judgment, such judgment is merely erroneous and not void; but where a judgment is rendered by a court having no power so to do, it is void. It is as though there had been no judgment or process; it is *coram non iudice*. *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211.

## ERRONEOUS CONCLUSION.

An erroneous conclusion drawn by the court from the facts in the exercise of its legal judgment is an error of law, and not an error in an inference of fact. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 121, 70 Conn. 159, 43 L. R. A. 305; *Hayden v. Allyn*, 11 Atl. 31, 34, 55 Conn. 280.

## ERRONEOUS JUDGMENT.

An erroneous judgment is one rendered contrary to law. *McKee v. Angel*, 90 N. C. 60, 62.

An erroneous judgment is one rendered according to the course and the practice

of the courts, but contrary to law; that is, based upon an erroneous application of legal principles. *Stafford v. Gallops*, 31 S. E. 265, 266, 123 N. C. 19, 68 Am. St. Rep. 815.

### ERRONEOUS PROCEEDINGS.

All questions arising on judicial sales, when their validity is questioned in an ejectment, must be those of authority, not of irregularity or error in awarding, executing, or confirming process, or acts in pursuance of it. If the power of the court is once brought into action, no tribunal can declare its proceedings nullities. If an act is necessary to be done before its power to sell can be exercised, it will be presumed it had evidence of it, unless the contrary expressly appears. Irregularities must be corrected by the court which issues the process, and erroneous proceedings must be reversed on a writ of error, or they are binding. *Thompson v. Phillips* (U. S.) 23 Fed. Cas. 1070, 1082.

The words "erroneous proceedings," as used in Civ. Code, § 570, providing that the court shall have power to vacate a judgment for erroneous proceedings against an infant, married person, etc., are such as do not of themselves disclose the error committed, but are such as appear to be correct except when viewed in the light of extraneous facts adduced to avoid them. *Richardson v. Matthews*, 25 S. W. 502, 58 Ark. 484.

### ERRONEOUSLY ENTERED UP.

"Erroneously entering up" a judgment expresses only an error in the clerical act of placing it upon record, and implies that the judgment enrolled is not the judgment rendered or given. *Blatchford v. Newberry*, 100 Ill. 484, 491.

### ERROR.

See "Assignment of Error"; "Clerical Error"; "Fundamental Error"; "Invited Error"; "Motion in Error"; "Reversible Error"; "Technical Error."

Any error, see "Any."

In a contract exempting a telegraph company from all liability for delay, error, or remissness in sending a telegram, "error" implies the sending or delivering a wrong message, or to the wrong place or person, and the company is not exempted thereby from a total failure to send or deliver a message. *Baldwin v. United States Telegraph Co.* (N. Y.) 54 Barb. 505, 512, 6 Abb. Prac. (N. S.) 405, 423.

#### As error in law.

"Error in a judgment," as used in Code, § 8154, providing that for error in a judgment against a minor, shown by him within

12 months after arriving at full age, the judgment may be vacated, "is not error in fact, but 'error' in the ordinary legal sense of the term; that is, error in law, apparent on the record, and such as would be a ground for reversal on writ of error at common law, and on appeal under the Code." *Bickel v. Erskine*, 43 Iowa, 213, 222.

There are errors of two kinds—errors in law and errors in fact. Writs for error in fact never lie to draw in controversy any matter of fact litigated in the original suit or put in issue by the pleadings. Error in law lies where, upon the facts apparent, the record or judgment is improper; but no writ of error lies to re-examine a question of fact depending upon the evidence in the original suit, nor to re-examine a mixed question of law and fact. *Campbell v. Patterson*, 7 Vt. 86, 89.

#### As error of judgment.

The word "error" in Code 1873, § 841, providing that the county auditor may correct any clerical or any other error in the assessment or tax books, etc., does not include errors of judgment on the part of the assessor, but perhaps covers all cases where the record does not disclose the true facts, and in which the matter of judgment or discretion is not involved. It includes a clerical error in increasing the amount of the assessment, made in copying when the assessment was entered on the rolls. *Smith v. McQuiston*, 79 N. W. 130, 131, 108 Iowa, 363.

#### Fault or negligence distinguished.

The words "fault" and "error" are not synonymous. "Fault" imports blame; "error" may arise from ignorance or mistake alone. *The Manitoba* (U. S.) 104 Fed. 145, 154.

"The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform, and, bringing to bear all his professional experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence. No one can be charged with carelessness when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty,

may be called a mistake, but not carelessness." *McDonald v. The Tom Lysle* (U. S.) 48 Fed. 690, 692.

#### **Irregularity distinguished.**

In the exercise of the power of eminent domain, municipal corporations should be held to an observance of all substantial provisions respecting the mode of procedure which were prescribed and intended for the protection of the citizen and to prevent a sacrifice of his property. If there be an omission of any of the essential jurisdictional requisites, the proceedings will be void. If however, the defect is not so radical as to deprive the council of jurisdiction, but is only a deviation from certain minor provisions designed to secure method and convenience in the procedure, it may properly be termed an "irregularity" only. *Dill, Mun. Corp.* §§ 60, 605; *Black, Interp. Laws*, 340, and cases cited. The distinction is expressly stated by Chief Justice Peters in *Cobbossee Nat. Bank v. Rich*, 81 Me. 164, 16 Atl. 506: "Generally speaking, it is the difference between substance and form, between void and voidable, or between void action and imperfect action. 'Error' or 'nullity' goes to the foundations, and discovers that the proceedings have nothing to stand upon; while 'irregularity' denotes that the court was acting within its jurisdiction, but failed to consummate its work in all respects according to the required forms. The one applies to matters which are contrary to law, the other to matters which are contrary to the practice authorized by the law. One relates more to the act, the other to the manner of it. It may be stated as a general rule, that in doubtful cases the courts incline to treat defects in legal proceedings as irregularities rather than as nullities." *Wilson v. Simmons*, 36 Atl. 380, 385, 89 Me. 242.

#### **In assessment.**

"Error in any assessments or returns," as used in Act 1869, § 5, providing that the board of supervisors may correct any manifest clerical or other "error in any assessments or returns" made by any town officer to such board, does not mean errors of the assessors in making the assessment, but in the assessments or returns made to the board of supervisors; that is, in the assessment roll, the record, and return of the action of the assessors. *Hernance v. Ulster County Sup'rs*, 71 N. Y. 481, 485.

Laws 1885, p. 823, No. 227, § 5, provides that the township board may review assessments made for drainage purposes for any error or inequality. Held, that the word "error" does not mean that the board may change the assessment district and exclude any lands which in its judgment are not benefited. *Thomas v. Walker Tp. Board*, 116 Mich. 597, 602, 74 N. W. 1048, 1049.

The levying by the township highway commissioners of a road and bridge tax on a day other than that prescribed by the statute is not a mere error or informality in the proceeding of the officers connected with the levying of the tax, not affecting the substantial justice of the tax itself, so as not to render the tax invalid. *Chicago & N. W. Ry. Co. v. People*, 64 N. E. 380, 381, 197 Ill. 411.

#### **In bill of lading.**

In the receipt of a common carrier, the last sentence of which was as follows: "Consignees of goods of this line are requested to notice any error in regard to this line within twenty-four hours, or the company will consider their liability ended"—"errors" means mistakes in the number or numbers of packages delivered to different persons, and does not mean waste or negligence. *Sanford v. Housatonic R. Co.*, 65 Mass. (11 Cush.) 155, 157.

#### **In description.**

In a contract for the sale of a vessel, which provides that the vessel is to be taken with all her faults, without any allowance for any defect or error whatever, "error" should be construed to mean an "unintentional misdescription," and hence the description of a vessel in the contract is not a warranty. *Per Pollock, C. B.*, in *Taylor v. Bullen*, 5 Exch. 779, 784.

"Between a 'latent ambiguity' and a 'mistake or error in description' in a conveyance there is a manifest difference. The former may be explained, and the description aided by parol evidence in a court of law, while the other requires the jurisdiction of a court of equity for its correction. In the case of latent ambiguity in the description of land in a conveyance, the title is not thereby defeated, but parol evidence may be introduced to show the identity of the subject-matter of the conveyance; in the case of an error or mistake in the conveyance, however, if such error or mistake is material to the description, no title passes, and the remedy of the purchaser is by bill in equity for a reformation of the instrument." *Donehoo v. Johnson*, 24 South. 888, 890, 120 Ala. 438.

#### **In election.**

"Error," as used in Code, § 627, providing that "if the ballots for any officer are found to exceed the number of voters in the poll lists, that fact shall be certified with the number of the excess in the return, and if it be found that the vote of the precinct where the error occurred would change the result in relation to a county officer, if the person elected were deprived of so many votes, then the election shall be set aside as to him in the precinct where such excess occurs and a new election ordered therein;

but if the error occurs in relation to a township officer, the trustees may order a new election or not, in their discretion"—means excess. *Rankin v. Pitkin*, 50 Iowa, 313, 314.

#### ERROR (Writ of).

See "Writ of Error."

#### ERROR APPARENT.

The expression "error apparent," as used in the rule of law that one of the causes for which a bill of review may be maintained is that there may be error in law apparent on the face of the decree, means such as appears on the face of the proceeding, and that includes all that was included in the issue. *Dingess v. Marcum*, 24 S. E. 624, 626, 41 W. Va. 757 (citing *Henry v. Davis*, 13 W. Va. 230).

"Error apparent on the face of a decree" means not a decree merely erroneous and improper in itself because of inadmissible or improper evidence, or contrary to or unsupported by proof, but a decree that is erroneous from the statement of facts as assumed and set forth in the body of the decree itself. *Eaton v. Dickinson*, 35 Tenn. (3 Sneed) 397, 400.

"Error apparent in a decree" is such error of law as appears, assuming the facts to be such as are stated in the decree, not errors of fact apparent from the proofs. *Burson v. Dosser*, 48 Tenn. (1 Heisk.) 754, 759.

#### ERROR OF FACT.

That is called "error of fact" which proceeds either from ignorance of that which really exists, or from a mistaken belief in the existence of that which has none. Civ. Code La. 1900, art. 1821; *Deligny v. Her Creditor*, 19 South. 614, 48 La. Ann. 483.

With reference to a mistake in a contract, or as an excuse for a person's actions, an error of fact takes place either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist. *Norton v. Marden*, 15 Me. (3 Shep.) 45, 46, 32 Am. Dec. 132; *Mowatt v. Wright* (N. Y.) 1 Wend. 355, 360, 19 Am. Dec. 508; *Wheaton v. Olds* (N. Y.) 20 Wend. 174, 176.

#### Error in judgment.

An error in fact which may be corrected on motion within five years is some error in the process, such as nonage of the parties, or, at common law, the coverture of the plaintiff, and an error in the judgment or decree itself cannot be regarded as an error in fact. *Kihlholz v. Wolff*, 8 Ill. App. (8 Bradw.) 371, 373.

#### Error in reaching verdict.

On certiorari to a justice court, misconduct of the jury in agreeing that each juror would set down the amount of damages which he thought ought to be allowed, and the amounts so set down should be added together and the sum divided by the number of jurors, and the result should be returned as their verdict, may be assigned as error in fact. Justices do not have power to set aside a verdict thus irregularly found, and, unless the irregularities of this kind can be corrected in this way, the evil would be without remedy, and that is a principle too pernicious in its consequences to be admitted. This is a matter which does not take place before the justice, and he, of course, cannot be compelled to notice it in his return. It is a matter the Supreme Court could not examine into on affidavits, and there is no good reason why it should not be assigned for error in fact, and, if not true, the defendant should take issue upon it. *Harvey v. Rickett* (N. Y.) 15 Johns. 87.

#### Error not appearing on record.

Code, § 386, authorizing the county court on appeal to affirm or reverse the judgment of the court below for error of law or fact, has no reference to an erroneous finding of the judge or jury upon the evidence, but refers to those errors of fact not appearing from the record or evidence, such as infancy, coverture, etc., of some of the parties who have not properly appeared. *Kasson v. Mills* (N. Y.) 8 How. Prac. 377, 379.

The phrase "error of fact," as used in Code 1851, § 386, authorizing county courts to reverse judgments of justices for errors of fact as well as of law, means such facts as affect the regularity and validity of the proceedings on record, and still do not operate on it, such as death, infancy, or coverture of one of the parties; and such phrase has no reference to any error or mistake of the jury in finding the facts. *Adsit v. Wilson* (N. Y.) 7 How. Prac. 64, 69.

Prior to the adoption of the Code, providing (section 386) that if an appeal from a justice court is founded on an error in fact in the proceedings, not affecting the merits of the action and not within the knowledge of the justice, such alleged error may be determined on affidavits, the terms "error in fact" had acquired a definite legal significance. They included cases where the action had been prosecuted or defended by a married woman, or by an infant, for whom no next friend or guardian had been appointed, and cases where parties, witnesses, and jurors misconducted themselves to the prejudice of the party against whom the judgment was recovered. 2 Burr. Pr. 152. In these cases, and perhaps others of the same general nature, the party defeated in the action could, by the practice then existing,



allege the disability or misconduct relied on as an error in fact, and, if that was denied, an issue of fact was formed, which the law required to be tried and determined by a jury. 2 Burr. Pr. 152-154. It was the object of the Code to abolish this complicated, troublesome, and expensive proceeding. The Code did not undertake to declare what errors of fact are, nor did it extend the legal signification of the terms used. *Tanner v. Marsh* (N. Y.) 53 Barb. 438, 440.

Error in fact occurs when, by some reason of some fact which is unknown to the court, it renders a judgment which is void or voidable. This may take place by reason of the coverture, infancy, or death of one of the parties, when the fact is not shown by the record at the time the judgment is rendered. *Cruger v. McCracken*, 30 S. W. 537, 538, 87 Tex. 584.

The expression "error in fact not arising on the trial," as used in Code, § 1290, authorizing the setting aside of a final judgment for error in fact arising on the trial, may be defined as some erroneous proceeding concerning the action, affecting some party thereto, and not appearing upon the record. Where a court orders judgment directing a sale in a partition action in a case in which a sale is prohibited by statute, it is not an "error in fact" within the meaning of the section, but is a judicial defect. *Prior v. Hall*, 13 Civ. Proc. R. 83, 87.

#### Want of jurisdiction.

"Errors of fact," in Code, § 366, providing that if a justice's appeal is founded on the error in fact affecting the merits of the action the court may determine the alleged error in fact on affidavits, and may in its discretion inquire into and determine the same upon examination of the witnesses, do not include error which deprives the justice of jurisdiction over the person of defendant by issuing the wrong process to bring him into court. *Tanner v. Marsh* (N. Y.) 36 How. Prac. 140.

#### ERROR OF LAW.

The term "error of law" includes the ignorance of the legal consequences of the known existence or nonexistence of facts. *Mowatt v. Wright* (N. Y.) 1 Wend. 355, 360, 19 Am. Dec. 508.

The phrase "errors of law occurring during a trial" "refers to such errors as are strictly errors at law, and not errors involving discretion, and that is confined strictly to errors occurring during the trial of the case." *Scherrer v. Hale*, 22 Pac. 151, 152, 9 Mont. 63.

"Errors in law," within statutes relating to appeals, are such errors in rules and

instructions, and the like, as may occur during the progress of the trial and before the rendition of the verdict or decision. To designate an alleged error in a conclusion of law based upon a finding of fact as an "error in law occurring at the trial" is therefore a misnomer. *McKenzie v. Bismark Water Co.*, 71 N. W. 608, 612, 6 N. D. 361.

He is under an "error of law" who is truly informed of the existence of facts, but who draws from them erroneous conclusions of law. Civ. Code La. 1900, art. 1822.

#### ERYSIPÉLAS.

The modern theory is that erysipelas is the result of some specific poison which enters the system through the exposure of a wound, but the nature of the poison and the method of operation are not well understood. *Dickson v. Hollister*, 123 Pa. 421, 428, 16 Atl. 484, 10 Am. St. Rep. 533.

#### ESCAPE.

See "Negligent Escape"; "Voluntary Escape."

The escape of a person in custody on execution is either voluntary or negligent. In the former case the escape is not purged by his return. It is otherwise in case of a negligent escape, if he returns before suit is instituted against the sheriff. *Cortis v. Dalley*, 47 N. Y. Supp. 454, 455, 21 App. Div. 1.

An escape is either negligent or voluntary; negligent where the party escapes without the consent of the officer, and voluntary where the officer permits him to go at large. After voluntary escape, if the party was in custody on a writ of execution, he cannot be retaken, and the officer would be liable to an action for false imprisonment if he retook him. *Lansing v. Fleet* (N. Y.) 2 Johns. Cas. 3, 1 Am. Dec. 142; *Jones v. Pope*, 1 Saund. 34, 35; *Atkinson v. Jameson*, 5 Term R. 25. And if the creditor assents that his debtor be discharged, he cannot be again arrested, but the debt is discharged. After a negligent escape the officer may in all cases retake the party, or, if the defendant voluntarily return before suit, it is equivalent to recaption on fresh pursuit. An officer is not bound, in order to retain his arrest, to keep his hands upon a prisoner, or to secure him either by cords or keepers, and may allow reasonable liberties. Thus where, on the arrest of a person for neglecting or refusing to pay the tax assessed against him, he delivered a watch to the officer as a pledge for his appearance at a time and place designated by the officer, and was permitted to go, there was no escape. *Butler v. Washburn*, 25 N. H. 251, 253.

The very term "escape" presupposes that the person escaping has been within the custody and under the control of an officer. The officer must have the debtor in custody before there can be any default on his part. *Saffler v. Dike*, 81 N. Y. Supp. 593, 82 App. Div. 485 (citing *Partridge v. Westervelt*, 13 Wend. 501).

An "escape" is defined, in 1 Russ. Crimes, 467, to be "when one arrested gains his liberty before he is delivered in due course of law," and in 2 Whart. Cr. Law, § 2606, as "the departure of a person from custody." Under these definitions, an indictment which charges that a person was arrested by defendant by authority of a warrant for bastardy, and that defendant, subsequently, unlawfully, and negligently permitted the prisoner to escape, is valid at common law. *State v. Ritchie*, 107 N. C. 857, 858, 12 S. E. 251.

#### As evade.

"Escape," as used in Act of Alabama approved Feb. 22, 1868 (Pamph. Acts, 3), providing that, whenever the assessor shall discover persons who or property which have escaped taxation, he shall assess a tax thereon for such years as such persons have escaped taxation, means to "avoid the notice of, to pass unobserved, to evade." One who has been assessed by the assessor, though imperfectly, cannot be included within these definitions. *Lehman, Durr & Co. v. Robinson*, 59 Ala. 219, 240.

#### As flight.

"Escape," as used in Laws 1851, p. 225, § 137, providing that when arresting a person without a warrant the officer must inform him of his authority and the cause of arrest, except when he is in the actual commission of a public offense, or when he is pursued immediately after escape, is not used in the technical sense of an escape from custody, but rather in the sense of flight from the scene of the crime to avoid being arrested and brought to justice. *People v. Pool*, 27 Cal. 572, 579.

"Escape," as used in Code, § 5038, which provides that notice of the cause of arrest need not be given where the person arrested is in the actual commission of the offense, or is pursued immediately after the escape, is used in its popular sense, which is "to flee from, to avoid, to get out of the way," etc. *Lewis v. State*, 40 Tenn. (3 Head) 127, 147.

"Escape," as used in Rev. St. 1878, § 731, subd. 34, allowing the sheriff compensation for time and expenses incurred in pursuit of any person accused of felony who shall "escape pursuit," is not used in its technical sense as meaning an escape from custody or actual imprisonment, because it is joined

with the word "pursuit," and the two words together can apparently have no reasonable application save to a case where the accused eludes arrest entirely. *Schneider v. Waukesha County*, 79 N. W. 228, 103 Wis. 266.

The word "escape," as used in an instruction that it was incumbent on defendants charged with murder to have endeavored to escape from the deceased to justify the taking of life in self-defense, would ordinarily be given the meaning of "to get away" or "to flee," and as used in that sense is prejudicial. *State v. McCann*, 49 Pac. 216, 16 Wash. 249.

The word "escape," as a verb, according to Mr. Webster, may mean "to flee from, to get out of the way of, to hasten away," etc.; and as a noun, "the act of fleeing from danger," etc. And, such being its meaning, it is not necessary to the right of self-defense that a person having otherwise the right to exercise it cannot escape the danger by fleeing from the assailant, and an instruction to that effect is erroneous. *Hammond v. People*, 64 N. E. 980, 983, 199 Ill. 173.

The use of the word "escape," in an instruction that defendant shall be acquitted if the killing seemed to defendant to be necessary in order to escape the danger, is erroneous, especially where the defendant was assaulted in his own yard and near his dwelling house; in such an instance he is not required to escape or flee further. *Eversole v. Commonwealth*, 28 S. W. 816, 817, 95 Ky. 623.

The verb "to escape" is defined by Mr. Walker "to fly, to avoid, to pass unobserved"; and the noun "escape," "flight, or act of getting out of danger; a low, violent, or privy evasion out of lawful restraint." The term "escape" presupposes a former confinement, or abiding in a certain place or condition, out of which a party delivers himself by his own act, or is delivered by the act or aid of another with his concurrence. Children born in Alabama of a negro woman who is a fugitive slave cannot be regarded as fugitive slaves or slaves which have "escaped" from service in another state, within the meaning of the federal Constitution, and of the act of Congress of 1793, governing proceedings for the recovery of fugitive slaves. *Fields v. Walker*, 23 Ala. 155, 185.

#### As get beyond authority or control.

"Escape," as used in Pen. Code, art. 218, providing for the punishment of any person who has been convicted of a misdemeanor or petit offense, and afterwards hired under authority of law, who shall escape from his employer or person hiring him during the term for which he may have been hired, means an actual escape; that is, such as takes place when the prisoner gets out of

prison or any place in which he may be confined, or from and out of the authority of the person in whose custody he is, and unlawfully gains his liberty, freed from the authority and control of the power entitled to restrain him. A prisoner hired out who is merely refractory about doing his work, but continued on the farm of his employer, and never left the place except to go to town occasionally, and rode about the employer's place, though without his consent, is not guilty of an escape. In common acceptance, "escape" means to flee from, to avoid, to become free from danger. *Carter v. State*, 14 S. W. 350, 351, 29 Tex. App. 5 (citing *Webster*, Dict.).

#### Unauthorized prison liberties.

Every liberty given to a prisoner not authorized by law is an "escape." Hence it is held that where a coroner, having an execution against a deputy jailer, arrested him, and, the sheriff not being at the jail, nor any keeper authorized by him, the coroner left the prisoner at the jailhouse, the sheriff was guilty of an escape. *Colby v. Sampson*, 5 Mass. 310, 312.

Code Civ. Proc. § 155, defines the word escape as applied to a prisoner for debt, as follows: "The going at large beyond the liberties by a prisoner, without the consent of the party at whose instance he is in custody, is an escape." Such an escape forfeits the undertaking for liberties. *Flynn v. Union Surety & Guaranty Co.*, 70 N. Y. Supp. 403, 404, 61 App. Div. 170.

Act March 30, 1801, provides that it shall be an "escape" for the sheriff to permit or suffer any prisoner in custody on execution to go or be at large out of his prison. Act March 30, 1801, provides that it is the duty of the sheriff to allow prisoners liberties of the jail on their giving a bond with sufficient sureties, the condition of which is "that such person shall remain a true and faithful prisoner, and shall not at any time nor in any way escape or go without the limits of the liberties of the prison." Held, that the going beyond the liberties of the prison by a prisoner, though neither a technical voluntary or negligent escape, since the sheriff, though aware of the escape, had no right under the statute to restrain the prisoner, nevertheless constituted an escape for which the sheriff could be held responsible, and for which the sheriff could hold his bondsmen though the person might voluntarily return. *Tillman v. Lansing* (N. Y.) 4 Johns. 45, 48.

"Escape" is to allow a prisoner greater liberty than the law allows. At common law it is not "an escape" to allow prisoners confined for debt the liberty of all the apartments within the jail walls, for confinement within the walls is *salva et arcta custodia*;

but where the jailer makes a prisoner for debt a turnkey, and intrusts him with the keys of the outer doors of the jail as well as the inner doors at all times, by night and by day, it is "an escape." *Steele v. Field* (U. S.) 22 Fed. Cas. 1210, 1221.

In an action against a sheriff for permitting a debtor in his custody on execution to escape, it appearing that when the debtor was placed in the jail he received a key thereof from the sheriff, which key was retained by the debtor so long as he continued in the jail, the court said: "Custody implies physical force sufficient to restrain a prisoner from going at large. When that physical force is removed, it is in the eye of the law an 'escape.' No moral obligation can be received as a substitute for it. Although promises may be made and may be observed to remain in close jail, the moment compulsion and force are withdrawn there is no legal custody; the prisoner becomes a free agent, and there is no longer any imprisonment, and the precept of the sheriff is disobeyed." *Wilkes v. Slaughter*, 10 N. C. 211, 218.

#### Unlawful departure.

"Escape," as applied to slaves, means the departure of such slaves without the license or consent and against the will of their master. *Jones v. Vansandt* (U. S.) 18 Fed. Cas. 1047, 1052.

"Escape," as used in a bail bond conditioned that a prisoner would remain in the custody of the keeper without committing any manner of escape, meant no more than a departure from the prison limits without lawful authority. *Mason v. Halle*, 25 U. S. (12 Wheat.) 370, 377, 6 L. Ed. 690.

"Escape," as used in Code Cr. Proc. art. 845, providing that in case the defendant, pending an appeal in a criminal case, shall make his escape from custody, the jurisdiction of the Court of Appeals shall no longer attach in the case, should be construed to mean actually and completely withdrawing himself from custody, getting free and going at large, such being its ordinary and popular or vernacular meaning. Mr. Abbott, in his Law Dictionary, says: "In its ordinary popular sense, the word suggests only the voluntary withdrawal of a person from custody, and this is an actual and complete one. The word should only be considered applicable where a person in custody gets free and goes at large. The technical sense includes more than this. It includes wrongful or careless relaxation or imprisonment by an officer in charge. This is called an 'escape' even in cases where the prisoner does not go at large. The meaning of the word must be considered in three aspects: As a default in duty by the sheriff or jailer, subjecting him to liability for damages at the suit of a creditor; injury by the escaping,

as the misconduct or even offense by the officer; and as calling for a pursuit and recaption. Considered in the second and third of these aspects, the word probably has substantially the same meaning. A person does not commit the crime of 'escaping,' nor is authority for recaption necessary, unless there is a voluntary and complete departure from custody." *Lloyd v. State*, 19 Tex. App. 187, 152.

The former technical definition of the word "escape" was of breaking from custody of a person held or confined for nonpayment of debts. The common legal definition of the term, however, means a violation or private evasion out of some lawful custody, which therefore does not include a voluntary departure of a person held in custody from the place of confinement for a short period of time and for a specific purpose, it being the intention that the person should return as soon as the purpose was accomplished. *Wheeler v. State*, 17 Pac. 856, 857, 39 Kan. 163.

An "escape," within the meaning of the law which makes it an offense to escape from the custody of the law, is any departure from prison, or from the custody of an officer, which is not authorized by law, with intent to escape from the restraint of the law. It is not necessary that the prisoner should escape by means of force and violence. It is sufficient if the jailer or person in custody of the prisoner negligently allows him to go. *Riley v. State*, 16 Conn. 47, 51.

## ESCHEAT.

"Escheat" is an obstruction in the course of descent, and consequent destruction of the tenure, by some unforeseen contingency, in which case the land naturally reverts back, being a kind of reversion to the original grantor of the fee or the lord of the fee. Bl. Comm. 15. In American law "escheat" signifies a reversion of property to the state in consequence of the want of any individual competent to inherit. The state is deemed to occupy the place and hold the rights of the feudal lord. 4 Kent, Comm. 423, 424. "Escheat," which was one of the incidents of feudal tenures, is sometimes mentioned as marking the feudal origin of our titles, and the allegiance which we owe to the state is often spoken of as "fealty." Escheat with us depends upon positive statute, which makes the state heir of property on default of known kindred of the deceased. There is nothing about it now but the name which is feudal. *Wallace v. Harmstad*, 44 Pa. (8 Wright) 492, 501.

"Escheat" originally signified anything coming accidentally, or by chance. The general acceptance of the term, according to the common law, means the reversion of

lands to the paramount lord of fee when the person last seised has died without heirs, or his blood has been attainted. It denotes an obstruction in the course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally returns by a kind of reversion to the original grantor, or lord of the soil. *Marshall v. Lovelass*, 1 N. C. 412, 445.

Title to land by escheat originated from and was a consequence of the feudal law, whereby, upon the failure of heirs of the person last seised who might lawfully take the estate by succession, it fell back or reverted to the original grantor, his descendants or successors. And as, under the general doctrine of tenures in the American states, the state occupies the place of feudal lord by virtue of its sovereignty, it is universally asserted that, when the title to land falls for lack of heirs or devisees who may lawfully take, it reverts or escheats to the state as property to which it is entitled. Consequently a provision that property should escheat to the state where the owner should be absent for the term of seven years and not be known to exist, if it provided for the taking of property on such contingency, did not provide for escheat, but for forfeiture. In the opinion of the court, however, such statute was only meant to provide that the absence of one who was not known to exist for the length of time mentioned should be presumptive evidence of his death, as one of the necessary elements of title by escheat. *Hughes v. State*, 41 Tex. 10, 17.

The term "escheat" was used in the feudal law of England to designate the reversion of the estate on a grant in fee simple upon a failure of the heirs of the owner. "When the blood of the last person seised became extinct, and the title of the tenant in fee failed from want of heirs, the land resulted back, or reverted, to the grantor or lord of the fee from whom it proceeded, or to his descendants or successors." *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 499, 57 Am. Dec. 470.

There are various methods whereby, at common law and under the English statutes, property is said to "escheat," that word being used to signify every failure to pass title in the ordinary course of descent to legal heirs or representatives, whether for realty or personalty, and whether for breach of condition, crime, or default of inheritable qualities. Under the Constitution of Michigan, which was accepted and ratified by Congress, providing that all fines, penalties, forfeitures, and escheats accruing to the territory of Michigan shall accrue to the use of the state, and the territorial act providing that on the death, intestate, of the owners of property in the state, leaving no heirs who could inherit, the property should

escheat to the territory, where an alien died intestate, owning lands in the territory before the act of 1827, which authorized aliens to hold or inherit lands, and left no heirs other than aliens, the property escheated to the territory. *Crane v. Reeder*, 21 Mich. 24, 70, 4 Am. Rep. 430.

Rev. St. 1899, § 7382, provides that all moneys received into the state treasury after the final settlement of executors, administrators, assignees, sheriffs, or receivers, which are unclaimed, shall be known and designated as "escheats." *Union Trust Co. v. Glover*, 74 S. W. 436, 438, 101 Mo. App. 725.

"Escheat" is where, upon failure of heirs, the estate of an intestate falls to the state. *Civ. Code Ga.* 1895, § 3575.

## ESCROW.

A deed delivered to a third person, to be delivered to the purchaser on the happening of a contingency or the performance of certain conditions on his part, is a deed delivered in escrow. *Thomas v. Sowards*, 25 Wis. 631; *Hubbard v. Greeley*, 84 Me. 340, 348, 24 Atl. 799, 17 L. R. A. 511; *Gaston v. City of Portland*, 19 Pac. 127, 130, 16 Or. 255; *Clark v. Gifford* (N. Y.) 10 Wend. 310, 311, 313; *Jackson v. Catlin* (N. Y.) 2 Johns. 248, 259, 3 Am. Dec. 415; *Berry v. Anderson*, 22 Ind. 36, 39; *Watson v. Coast*, 14 S. E. 249, 251, 35 W. Va. 463; *Jordon v. Pollock*, 14 Ga. 145, 156; *Ashford v. Prewitt*, 14 South. 663, 666, 102 Ala. 264, 48 Am. St. Rep. 37; *Appeal of Baum*, 4 Atl. 461, 462, 113 Pa. 58; *Mudd v. Green*, 12 S. W. 139, 140, 12 Ky. Law Rep. 348; *Massman v. Holscher*, 49 Mo. 37, 89; *Nash v. Fugate* (Va.) 32 Grat. 595, 305, 34 Am. Rep. 780. Thus where a deed, in pursuance of an agreement between the parties, was deposited with a third person to be delivered back to the grantor in case he should give the grantee certain security for a debt within a limited time, otherwise to be delivered to the grantee, the deed was in escrow, subject to the agreement of the parties until the expiration of the time limited. *Raymond v. Smith*, 5 Conn. 555, 559. But where no condition is connected with its delivery to such third party, it is not an escrow, but the party is a mere custodian. *Watson v. Coast*, 14 S. E. 249, 251, 35 W. Va. 463.

An "escrow" is defined to be a deed delivered to a third person, to be a deed of the party on a future condition. It is to be delivered to a stranger, mentioning the condition, and has relation to the first delivery. *Hagood v. Harley* (S. C.) 8 Rich. Law, 325, 328.

An escrow is a conditional delivery to a stranger, to be kept by him until certain conditions are performed, and then to be

delivered to the grantee; and, until the condition is performed and the deed delivered over, the estate does not pass, but remains in the grantor. *Patrick v. McCormick*, 4 N. W. 312, 314, 10 Neb. 1.

An escrow differs from a deed in one particular only, and that is the delivery. Not only must there be sufficient parties and proper subject-matter to the consideration, but the parties must have actually contracted. The actual contract of sale on the one side, and the purchase on the other, is as essential to constitute the instrument an escrow as that it be executed by the grantor; and, until both parties have definitely assented to the contract, the instrument executed by the proposed grantor, though in form a deed, is neither a deed nor an escrow; and it makes no difference whether the instrument remains in the possession of the nominal grantor, or is placed in the hands of a third party pending the proposals for the sale or purchase. *Fitch v. Bunch*, 30 Cal. 208, 209 (citing *Miller v. Sears*, 27 Pac. 589, 590, 91 Cal. 232, 25 Am. St. Rep. 176).

"There are different characteristics in what is called an 'escrow.' An escrow may be general, or may have a special condition or character attached to it. The general rule is that a deed left as an escrow takes effect from the second delivery—that is, after the condition is performed—but there may be a relation back to the first delivery, so as to give the deed effect from that time, in cases of necessity, to avoid injury to the operation of the deed from events happening between the first and second delivery." *Cagger v. Lansing* (N. Y.) 57 Barh. 421, 427.

An escrow is an obligatory writing, usually, but not necessarily, in the form of a deed, delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee or the happening of a certain contingency, and then to be delivered by the depositary to the obligee, when it becomes of full force and effect. The depositary is the agent of both parties to the same. The contract of deposit is not recoverable at the mere will of either of the parties, nor will the death of either of them abrogate the contract. *Davis v. Clark*, 48 Pac. 563, 564, 58 Kan. 100.

A lucid definition of what is an "escrow" is given by Shepherd, at page 58. "The delivery of a deed as an escrow," he says, "is said to be when one makes and seals a deed and delivers it unto a stranger until certain conditions be performed, and then be delivered to him to whom the deed is made, to take effect as his deed." Where a deed was executed by a husband and wife for lands of the wife, but it was not delivered in her lifetime, and it was refused by

the grantee and returned to the grantors during the life of the wife, it cannot be made to pass her estate, after her death, on the ground that it was an escrow. *Shoenberger's Ex'rs v. Hackman*, 37 Pa. (1 Wright) 87, 84.

Where A., in order to secure a deposition from B., agrees to give him a release from all claims, to take effect when the litigation in which the deposition is to be used is ended, and to be held meanwhile by C., and B., at the time of giving the deposition, picks it up and puts it in his pocket, but afterwards, at the request of C., delivers it to him to be held until the close of the litigation, and admits that he so understood the agreement, the transaction is an escrow. *Wolcott v. Coleman*, 1 Conn. 375, 381.

An escrow is an obligatory writing, usually, but not necessarily, in the form of a deed delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depository to the obligee, when it becomes of full force and effect. *Easton v. Driscoll*, 18 R. I. 318, 320, 27 Atl. 445.

A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and on delivery by the depository it will take effect. While in the possession of the third person and subject to condition, it is called an "escrow." Civ. Code Cal. 1903, § 1057; Civ. Code S. D. 1903, § 925; Civ. Code Mont. 1895, § 1455.

#### Conditions or contingencies.

Where a party executed a deed of land, in consideration of love and affection, to two of his sons, and delivered it to a third party to be delivered to the sons in case the grantor should die without making a will, which he did, the court observed it was questionable whether this deed was to be viewed as an escrow, as the grantees had nothing to do on their part in order to make the deed absolute, which is usually the case where a deed is delivered as an escrow. *Ruggles v. Lawson* (N. Y.) 13 Johns. 285, 286, 7 Am. Dec. 375.

A deed is delivered as an escrow when the delivery is conditional—that is, when it is delivered to a third person to keep until the thing be done by the grantee—and it is of no force until the condition is fulfilled. The condition may consist in the payment of money, as well as in the performance of any other act. *Jackson v. Catlin*, 2 Johns. 248, 259, 8 Am. Dec. 415.

When one in embarrassed circumstances sends a deed to his father by his brother, to be delivered only on the payment of the

consideration named in the deed, such deed in the hands of the brother was an escrow, and did not take effect until actual delivery to the father. *Sparrow v. Smith*, 5 Conn. 113, 116.

Mr. Washburn, in his work on Real Property (5th Ed.) vol. 3, pp. 319, 320, states the law thus: "Whether putting a deed into a third person's hands is a present delivery or an escrow, depends upon the intent of the parties. If the delivery depends upon the performance of a condition, it is an escrow; otherwise it is a present grant, though it be to wait the lapse of time or happening of an event. If it is to be delivered at the grantor's death, it is a present deed, and a quitclaim by the grantee, intermediate, would pass his estate." An eminent lawyer correctly and clearly states the law thus: "Where a grantor executes a deed, and delivers it to a third person, to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed or alter its provisions, it seems settled by the weight of authority that the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title. A delivery of this kind may be considered in effect an escrow, but differs from that in the fact that a delivery in escrow is dependent upon the performance of some event, and not upon the lapse of time." 1 Devl. Deeds, § 280. *Stout v. Rayl*, 45 N. E. 515, 517, 146 Ind. 879.

The term "escrow" implies that the depository is not to hold the deposit at the will of the depositor, but that it is to be delivered to the person entitled to it upon the happening of the event upon which the delivery is conditioned. Where, by the terms of a resolution of a city council, park bonds were to be delivered to a bank in escrow, to be delivered to another on his completion of a contract, the delivery was sufficient, whether the contract was performed or not. *Schmid v. Village of Frankfort*, 91 N. W. 131, 132, 131 Mich. 197.

Where a deed was delivered to a third person, and he was to hold it and deliver it to the vendee as soon as the vendee paid the purchase money, the payment of the purchase money being a condition on which the deed was to be delivered by the depository, there was an escrow. *Cannon v. Handley*, 13 Pac. 315, 318, 72 Cal. 133.

An escrow is the delivery of a deed to a stranger, to be delivered by him to the grantee upon the performance of certain conditions by the grantee. A. executed a deed to B., and placed it in the hands of C., to be by him kept until B. should give a certain bond to A., and then to be delivered by C. to B. C. accepted the trust, but immediately delivered the deed to B., without waiting for the performance of the condition. The deed in the

hands of C. was an escrow, and, the condition not being performed, the title never passed from A. *Coe v. Turner*, 5 Conn. 86, 92.

#### Depositaries.

A deed can be delivered as an escrow only to a third person, and not to the grantee himself. *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 203; *Alexander v. Wilkes*, 70 Tenn. (11 Lea) 221, 225; *Miller v. Fletcher* (Va.) 27 Grat. 403, 410, 21 Am. Rep. 356; *Easton v. Driscoll*, 18 R. I. 318, 320, 27 Atl. 445; *State Bank v. Chetwood*, 8 N. J. Law (3 Halst.) 125; *Clark v. Hyatt*, 55 N. Y. Super. Ct. (23 Jones & S.) 98, 106; *Massman v. Holscher*, 49 Mo. 87, 89; *Ryan v. Cooke*, 50 N. E. 213, 216, 172 Ill. 302.

A deed delivered to the grantee himself, to take effect upon the happening of certain conditions, cannot be called an "escrow." *Jordan v. Pollock*, 14 Ga. 145, 155.

A deed delivered by the grantor to the grantee, under an agreement that the grantee will return it to the grantor on his return from a journey which he was then about to undertake, if he should safely return, was not an escrow. *Braman v. Bingham*, 26 N. Y. 483, 492.

A delivery in escrow can only be made to a stranger. It cannot be made to a party. If made to a party, no matter what may be the form of the words, the delivery is absolute, and the deed takes effect presently as the deed of the grantor, discharged of the conditions on which the delivery was made. *Sargent v. Cooley* (N. D.) 94 N. W. 576, 580; *Arnold v. Patrick* (N. Y.) 6 Paige, 310, 315.

"The term 'escrow' was originally applied to a deed, but was extended first to sealed obligations, then to written contracts in general. And it has been usually held that if the instrument be delivered into the manual possession of the grantee it cannot operate as an escrow, though the parties may have both intended that it should. It will in such case take effect discharged of the condition." *Alexander v. Wilkes*, 79 Tenn. (11 Lea) 221, 225.

That the delivery of a deed should operate as an escrow, it is necessary that it should be made to a stranger, and not to the party, for if one make a deed and deliver it to the party to whom it is made as an escrow upon certain conditions, in such case, let the form of words be whatever it may, the delivery is absolute, and the deed will take effect presently, and the party to whom it is delivered is not bound to perform the condition. *Fairbanks v. Metcalf*, 8 Mass. 230, 238.

A deed, to be delivered in escrow, must be delivered to a stranger, to be by him deliv-

ered upon the happening of some contingency or upon the performance of some condition, and the deed becomes effectual as a delivered instrument only upon such second delivery. It cannot be delivered in escrow to the agent or attorney of the grantor, because the possession of the grantor's agent or attorney is the grantor's possession, and revocable by him; nor to the agent or attorney of the grantee, for then it is equivalent to a delivery to the grantee himself. *Day v. Lacasse*, 27 Atl. 124, 125, 85 Me. 242.

An escrow is an obligatory writing, usually, but not necessarily, in the form of a deed, delivered by the party executing it to a third person, to be held by him until the performance of a specified condition by the obligee, or the happening of a certain contingency, and then to be delivered by the depository to the obligee, when it becomes of full force and effect. A delivery of a bond in escrow must be to a third person, and cannot be to the obligee. *Easton v. Driscoll*, 27 Atl. 445, 446, 18 R. I. 318. *Semble*, it would be difficult to show that a curator's bond, regular in form and signed by a surety, though under a conditional agreement, made at the time with the principal, that the latter was not to deliver the bond until the signature of a certain person had also been obtained, could be deemed an escrow unless delivered as such to a third person, and how, if meant for an escrow when left with the principal, it could be one, being incomplete. *State, to Use of Bothrick, v. Potter*, 63 Mo. 212, 225, 21 Am. Rep. 440.

An escrow is a writing delivered to a third person, to be held by him until some conditions are performed by the person to whom the writing is to be delivered, and is not to take effect until the conditions are performed. One who signs a covenant as surety, upon the condition and agreement between him and his principal that it is not to be binding upon him or delivered to the covenantee unless another person should also sign it as surety, is bound thereby, though the principal to whom he intrusted it delivered it to the covenantee without a compliance with such condition, the delivery to the principal not being an escrow. *Millett v. Parker*, 59 Ky. (2 Metc.) 608, 613.

#### Instruments deliverable in escrow.

"A note, as well as a deed, may be delivered as an escrow, and the law of escrow is substantially the same in both cases. In either case it is necessary that the instrument in the first instance should be delivered to a stranger; that is, to a person not a party to the contract. Neither a note nor a deed can be delivered to the grantee or promisee to be held by him as an escrow." *Massmann v. Holscher*, 49 Mo. 87, 89 (citing 1 Pars. Notes & B. 51, § 7; *Couch v. Meeker*, 2 Conn. 302, 7 Am. Dec. 274; *Bradley v. Bent-*

ley, 8 Vt. 243, 246; *Badcock v. Steadman* [Conn.] 1 Root, 87).

An actual contract of sale on one side and purchase on the other is just as requisite as the execution of the instrument by the grantor to make it an escrow. *Clark v. Campbell*, 65 Pac. 496, 497, 23 Utah, 569, 54 L. R. A. 508, 90 Am. St. Rep. 716.

**Time when instrument takes effect.**

A deed delivered as an escrow does not become a conveyance so long as it remains in that condition, nor until the condition is performed upon which it is to take effect. *Gaston v. City of Portland*, 19 Pac. 127, 130, 16 Or. 255; *Ashford v. Prewitt*, 14 South. 663, 666, 102 Ala. 264, 48 Am. St. Rep. 37; *Day v. Lacasse*, 27 Atl. 124, 125, 85 Me. 242; *Clark v. Gifford* (N. Y.) 10 Wend. 310, 311, 313; *Jackson v. Catlin* (N. Y.) 2 Johns. 248, 259, 8 Am. Dec. 415; *Mudd v. Green*, 12 S. W. 139, 140, 12 Ky. Law Rep. 348.

Generally, an escrow takes effect from the second delivery, the title not being perfected in the grantee until the happening of a condition; but the grantor, when the deed has been placed in the hands of a third person as an escrow, cannot, after the happening of the act on which delivery is conditioned, prevent delivery taking effect by getting possession of the deed. *Appeal of Baum*, 4 Atl. 461, 462, 118 Pa. 58.

Although, generally, an escrow takes its effect from the second delivery, yet there are excepted cases in which it takes its effect and is considered the deed of the maker from the first delivery. The exception is founded on necessity. If a feme sole seal a writing and deliver it as an escrow, to be delivered over on condition, and afterwards marry, and the deed be then delivered on performance of the condition, it is her deed from the first delivery; otherwise her marriage would defeat it. So where a deed is delivered as an escrow, to be delivered over on certain condition, and before the condition is performed the grantor dies or becomes insane, the delivery of the deed, on the performance of the condition, relates to the first delivery, and the deed becomes operative from that time. Therefore, if deeds were delivered by a grantor to be delivered on his death, they must take effect and be considered as his deeds from the first delivery, he being dead at the second delivery. In such case the presumption is violent that he considered the person to whom he delivered the deeds as a trustee for the grantees. *Wheelwright v. Wheelwright*, 2 Mass. 447, 454, 8 Am. Dec. 66.

It is said that there is no legal distinction between a delivery of an instrument as the deed of a party to a third person as a trustee or agent, to be delivered to the gran-

tee upon the happening of some contingency, and the delivery of the instrument as an escrow, to take effect as a deed upon such contingency; but that in either case it is an escrow, and will be inoperative in the hands of the grantee, by whatever means he may get possession of the instrument, until the condition is performed. It is the performance of the condition, and not the second delivery, that gives it validity and existence as a deed. *State Bank v. Evans*, 15 N. J. Law (3 J. S. Green) 155, 158, 28 Am. Dec. 400.

The term "in escrow" is one strictly applicable to deeds, and a direction that such imperfect obligation, executed subject to conditions and restrictions by a maker having no general authority to issue such paper, should be held in escrow, implies that the term was used just as it would be used if the subject-matter of the deposit was a deed. As used, the term implied the state or condition of a deed conditionally held by a third person, to be delivered and to take effect upon a happening of a condition. When a deed is delivered as an escrow, nothing passes by the deed unless the condition has been performed. Thus where bonds in aid of a railroad were to be held in escrow and delivered to the railroad company when it should be entitled to them by the construction of its road through such county, the bonds did not take effect until such construction was completed. *Mercer County v. Provident Life & Trust Co.*, 72 Fed. 623, 635, 19 O. C. A. 44.

A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a future and certain event or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, seems almost entirely nominal, when we consider the rules of decision which have been resorted to for the purpose of effectuating the intentions of the grantor or obligor in some cases of necessity. If delivered as an escrow, and not in name as a deed, it will nevertheless be regarded and construed as a deed from the first delivery, as soon as the event happens, or the condition is performed, upon which the effect had been suspended. *Hatch v. Hatch*, 9 Mass. 307, 310, 6 Am. Dec. 67.

**ESCUTCHEON.**

"A family escutcheon is the insignia, suggested by valorous achievement or other cause, which is adopted by a family and usually engraved on its seal." *Kirksey v. Bates*, 7 Port. 529, 535, 31 Am. Dec. 722.

**ESPECIAL**

"The words 'especial care' have no fixed legal signification." An instruction using



such words without defining them is faulty. *Chicago & N. W. Ry. Co. v. Clark*, 2 Ill. App. (2 Bradw.) 116, 124.

The term "especial privilege," in the acts of Congress declaring that legislative assemblies in the several territories should not, after the passage of these acts, grant private charters or especial privileges, refers to the granting of monopolies, such as ferries, trade-marks, and the exclusive right to manufacture certain articles, and to carry on a business in a particular locality, to the exclusion of others, and does not relate to the granting of a public charter of a city. *City of Elk Point v. Vaughn*, 46 N. W. 577, 578, 1 Dak. 113.

## ESPEDIENT.

An "espedient" is the junction of all the separate papers made in the course of any one proceeding, and which remains in the office at the close of it. (Spanish Law.) *Castrillero v. United States*, 67 U. S. (2 Black) 17, 109, 17 L. Ed. 360.

## ESPLEES.

The "esplees" embrace the products which the land yields, as the hay of the meadows, the herbage of the pasture land, corn of the arable land, rents, services, etc. *Fosgate v. Herkimer Mfg. & Hydraulic Co.* (N. Y.) 9 Barb. 287, 293 (citing 2 Jac. Law Dict. 433).

## ESQUIRE.

The word "esquire" is properly used to designate a justice of the peace. *Call v. Foresman* (Pa.) 5 Watts, 331.

The word "esquire" is a sufficient designation of the occupation of an associate judge, though he was a farmer, under the act requiring the occupation of a possessor of a slave to be registered. If the description of the person was the design of the Legislature, "esquire," the legal title, the name by which he was generally called and known, would be more appropriate than that of "farmer." "Esquire," even in an act of attainder, would be a good addition and description where the attainted person, by his commission, was entitled to the appellation. *Commonwealth v. Vance* (Pa.) 15 Serg. & R. 36, 37.

The term "esquire," in the transcript of the record showing that proceedings were had before and in the county court of a certain county, a certain judge presiding, assisted by Esquires H. & M., was meant to indicate that the persons to whom it was applied were the associate justices. *Christian v. Ashley County*, 24 Ark. 142, 151.

## ESSE.

See "In Esse."

## ESSENCE.

### Of cinnamon.

The court judicially knows the meanings and definitions of the words "essence," and "cinnamon." The latter is a bark, and Webster defines the former to be that which constitutes the particular nature of a being or substance that distinguishes it from all others; formal existence; the predominant qualities or virtues of any drug extracted, refined, or rectified. Take which of these definitions we may of the word "essence," and connect it with the word "cinnamon," and the necessary conclusion is that the "essence of cinnamon" is a preparation or mixture, within a statute prohibiting the sale of any mixtures or preparations which will produce intoxication. *State v. Muncey*, 28 W. Va. 494, 495.

### Of lemon.

Essence of lemon may contain enough alcohol to produce intoxication—more alcohol proportionately than many kinds of wine or beer. It is possible that a man may get drunk on it, but it is not intoxicating liquor. Bay rum, cologne, paregoric, tinctures generally, all contain alcohol, but in no fair or reasonable sense are they intoxicating liquors or mixtures thereof. *Intoxicating Liquor Cases*, 25 Kan. 751, 762, 37 Am. Rep. 284.

## ESSENTIAL.

When examining a body of systematic law in order to determine whether certain characteristics are substantial or merely accidental, language is used according to the subject-matter, and in such a connection the word "essential" does not import a physical, moral, or mathematical necessity, but rather a scientific fitness and congruity, having regard to inveterate usage, historical development, and the nature of legal things. *Flanigan v. Guggenheim Smelting Co.*, 44 Atl. 762, 764, 63 N. J. Law, 647.

### ESSENTIAL OIL.

Nitrobenzole, being a manufacture from benzole and nitric acid, is not an essential oil. *Murphy v. Arnson*, 96 U. S. 131, 132, 24 L. Ed. 773.

## ESSENTIALLY.

"Essentially," as used in the instruction of a court which used the following language: "If the jury believe that they [referring to certain statements made by the plaintiff]

were essentially untrue, they should find for the defendant"—was synonymous with the word "strictly," and was not synonymous with the legal term "materially." *Hoffman v. Supreme Council of American Legion of Honor* (U. S.) 35 Fed. 252, 255.

## ESTABLISH.

See "Clearly Establish"; "Legally Established"; "Permanently Established."

"To establish" is "to make stable and firm, to fix or settle unalterably." *Appeal of Ambler*, 2 Montg. Co. Law Rep'r, 65, 66 (quoting *Webst. Dict.*).

In a statute providing that a city council may "make, ordain, constitute, establish and pass" ordinances, etc., all these verbs mean the same thing, and any one of them would have been sufficient. *Kepner v. Commonwealth*, 40 Pa. (4 Wright) 124, 129.

In Act April 20, 1899 (P. L. 66), declaring it unlawful thereafter to establish or maintain any additional hospital in the built-up portions of cities, provided, however, that nothing therein contained should be so construed as to prevent the maintenance of any hospital then lawfully established and maintained, "established," being coupled with the word "additional," shows clearly that existing hospitals were to be left unaffected by the act. *Commonwealth v. Charity Hospital*, 48 Atl. 906, 907, 199 Pa. 119.

Act April 8, 1899, providing that any foreign corporation that may desire to "transact business in this state or solicit business in this state, or establish a general or special office in this state," shall be required to file a copy of its articles, does not apply to a sale of goods to a resident of Texas at a place of business of the corporation in a foreign state, where it is not stated that the parties contemplated shipping the goods from that state into Texas. *Reed & Barton v. Walker*, 21 S. W. 687, 688, 2 Tex. Civ. App. 92.

A power granted to a corporation to construct a railroad and establish transportation lines upon it, necessarily includes the essential appendages required to complete and maintain such a work and carry on such a business, as the power to erect and maintain suitable depots, carhouses, water tanks, shops for repairing engines, houses for bridge and switch tenders, coal and wood yards, for fuel and for the use of their locomotives, etc.; but there is a limit to this incidental power of the company, which must be fixed where the necessity ends and the mere convenience begins. The necessary appendages of a railroad or transportation company are one thing, and those appendages which may be convenient means for increasing the advantages and profits of the company is an-

other thing. It might be advantageous for the company to purchase lands and erect houses in the right location and of the right kind for all their constant employes, to establish factories for making their own rails, engines, and cars, and even to purchase coal mines and supply themselves with fuel, but these are not among the necessary powers of such a company. *Camden & A. R. & Transp. Co. v. Commissioners of Mansfield Tp.*, 23 N. J. Law (3 Zab.) 510, 514, 57 Am. Dec. 409.

Authority to establish and regulate markets implies, beyond question, the power to purchase or provide the site and erect necessary buildings and stalls, and, when provided by lease, purchase, or other lawful mode, to adopt reasonable and usual rules and regulations in regard to the market and the business transacted there, and having in view the preservation of peace and good order and the health of the community. *City of Jacksonville v. Ledwith*, 28 Fla. 163, 7 South. 885, 888, 9 L. R. A. 69, 23 Am. St. Rep. 558 (citing *Ketchum v. City of Buffalo*, 14 N. Y. 356; *Gale v. Village of Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80).

Code 1873, § 1543, providing a punishment of any one who shall erect or establish, or continue to use, any building, erection, or place for any of the purposes prohibited in the preceding section, which prohibits the sale of intoxicating liquors, does not include a person not interested in the saloon, or in the building in which it is kept, but who merely assists about the saloon at times as a matter of accommodation and without pay. *State v. Herselus*, 53 N. W. 105, 86 Iowa, 214.

A covenant not "to set up or establish," or cause to be set up or established, in the same town, a newspaper or printing press in opposition to the covenantees, is broken when a new press is established at that place by a third party and the covenantor is employed therein as manager, receiving for his compensation a certain portion of the profits. *Anderson v. Faulconer*, 30 Miss. 145.

A statute granting power to a city to establish and construct wharf docks, piers, etc. (Rev. St. Ind. § 3106), does not imply power to condemn for public use an existing private wharf. *City of Madison v. Daley* (U. S.) 58 Fed. 751, 755.

Where a will bequeathed property for the erection and maintenance of a hospital, but provided that if at the end of a certain period such hospital should not be "founded and established" the property should go to testator's legal heirs, it did not mean built and completely equipped ready for immediate occupation, but merely required that the enterprise should be so far promoted as to be reasonably certain of success. *Appeal of Seagrave*, 17 Atl. 412, 416, 125 Pa. 362.

"Established or to be established," as used in Const. art. 4, § 30, providing that the General Assembly may by law give to any inferior courts by it established or to be established jurisdiction of certain criminal matters, in their natural and ordinary meaning reasonably imply that the framers of the Constitution contemplated the continued existence of some inferior court or courts lawfully established by the General Assembly before and legally existing at the time the Constitution was to become operative, as well as the establishment by it of any such courts thereafter. *Forbes v. State* (Del.) 43 Atl. 626, 628, 2 Pennewill, 197.

#### **As allow, ratify, and confirm.**

Within the statute authorizing the bringing of an action against legatees of an estate for a claim within one year from the time when it shall accrue and be established, the word "established" means the allowance in the probate court, or on appeal from it. *Brinkworth v. Hazlett*, 90 N. W. 537, 540, 64 Neb. 592.

The word "established," "as usually understood, means settled, fixed, confirmed," and such is its use in relation to the disqualification of a juror by the fact that there is in some way "established" in his mind a conclusion as to the guilt or innocence of the defendant. *Suit v. State*, 17 S. W. 458, 459, 30 Tex. App. 319.

"Established," as used in a contract for the sale of land, and containing a reference to grades established by a certain surveyor, means settled firmly. In *Smith v. Forrest*, 49 N. H. 230, 237, where the question was as to the establishment of a corner boundary, the court said it meant to settle certainly and fix permanently that which was before uncertain, doubtful, or disputed. In *Succession of Weigel*, 18 La. Ann. 49, the word "establish," as used in the Civil Code, was defined as permanently settled and confirmed. *O'Keefe v. Irvington Real Estate Co.*, 39 Atl. 428, 429, 87 Md. 196.

A written submission to arbitrators, giving them authority to "find and establish" the boundary lines between the adjoining lands of different proprietors, gave the arbitrators authority to ascertain and confirm what was before doubtful—the pre-existing line on the respective sides of which the parties have held title. *Weeks v. Trask*, 16 Atl. 413, 414, 81 Me. 127, 2 L. R. A. 532.

In a proceeding to settle and "establish" a disputed boundary line between two sections, an order appointing a commission of surveyors, and directing them "to make survey of and establish the line in dispute," the order does not authorize the commission to establish for themselves and upon their own judgment a line dividing the lands, without regard to the line of the government sur-

vey, but only to ascertain and re-establish the location of the original corners and boundaries. *Faucher v. Tutewiller*, 76 Ill. 194, 196.

The word "establish," in common language, has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. It may be used as to settle firmly; to fix unalterably; to make a form, and not to fix or settle unalterably or forever; to create, to found, and to regulate; to settle, recognize, or support; to ratify and to confirm. As used in Act 1865, "to establish and regulate domestic relations," it means to recognize, acknowledge, ratify, and confirm. *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317.

#### **As change.**

The right of a city to "establish and regulate markets" therein includes the right to shift such market from place to place when the convenience or necessities of the place demand it. *Wartman v. City of Philadelphia*, 33 Pa. (9 Casey) 202, 210.

Act 1871, c. 226, § 4, authorizing the commissioner of public parks of the city of New York to "establish and fix" the grades of the streets within a specified territory, does not authorize a change of grade, but deals only with streets whose grades had not been established, and where some authority must intervene to fix them for the first time. In *re Mutual Life Ins. Co.*, 89 N. Y. 530, 533.

#### **As construct.**

The word "establish," as used in a statute authorizing the board of sewer commissioners to establish and maintain a sewer system, is not used in the sense of to "construct," and that is not its meaning etymologically. *Village of Brockport v. Green*, 79 N. Y. Supp. 416, 418, 39 Misc. Rep. 231.

#### **As create, institute or form.**

"Establish," as used in Const. 1869, art. 5, § 19, providing that the Legislature shall establish new counties, should be construed to mean the same as the word "create." *State v. Cook*, 14 S. W. 996, 999, 78 Tex. 406.

Where a charter authorized a city to "establish markets," though these words may mean simply to confirm, yet their more common import is permanently to create or found. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 361.

The words "ordain and establish," as used in the Constitution, providing that the judicial power shall be vested in the Supreme Court and such inferior courts as Congress may from time to time ordain and establish, mean instituted; formed; modeled; set

in office; settled firmly. *United States v. Smith*, 4 N. J. Law (1 Southard) 33, 38.

#### As discontinue.

The power to establish post offices, given to the Postmaster General, includes the power to discontinue them. *Ware v. United States*, 71 U. S. (4 Wall.) 617, 632, 18 L. Ed. 389.

#### As prescribe.

The words "establish" and "prescribe" are often used to express the same thing, and Webster classes them as synonymous. Hence a decision under an act using one word is authority in the construction of an act using the other. *Ex parte Lothrop*, 6 Sup. Ct. 984, 987, 118 U. S. 113, 30 L. Ed. 108.

#### As purchase.

To "establish" means to originate, to found, to institute, to create; not to acquire something which has already been brought into existence. As used in *Village Laws*, § 223, relating to propositions to establish a system of waterworks, it contemplates, in part at least, a construction as distinguished from a purchase. *Village of Hempstead v. Seymour*, 69 N. Y. Supp. 462, 463, 34 Misc. Rep. 92.

To "establish," as used in Code 1878, c. 84, § 6, providing that the council of any town may establish in or near such town hospitals, which shall be subject to regulation, not contrary to law, made by such council, means to designate and direct the purchase of a place for a hospital, and to appropriate the money of the state to pay for it, and to pay the money and receive a deed for the property or place purchased. *City of Richmond v. Henrico County Sup'rs*, 2 S. E. 26, 27, 83 Va. 204.

A city charter authorizing the common council to "establish markets" at such places as from time to time may be ordered, established, and erected, necessarily conferred the power to purchase and hold the land on which such market was to be erected. *People v. Lowber* (N. Y.) 28 Barb. 65, 70; *Ketchum v. City of Buffalo*, 21 Barb. 294, 298.

Where a city charter provided that the city council should have power "to establish cemeteries or burial places and provide for the sanctity of the dead," such words meant that the city council might purchase or receive, by way of donation, grounds for public city cemeteries, but did not authorize the council to seize upon existing private burying grounds and make them public, and exclude their former proprietors from management. *Bogert v. City of Indianapolis*, 13 Ind. 134, 136.

#### As reconstruct or reform.

To "establish" is not limited in its meaning to the signification of "to found or set up," but is as often employed to signify the putting or fixing on a firm basis, or putting in a settled or efficient state or condition, an existing legal organization or institution, as it is to founding or setting up such organization or institution. An act entitled "An act to establish a board of revenue" for a certain county does not incorrectly or inaccurately state the purposes of the act by reason of the fact that the act provides for the reconstruction and reformation of a board of revenue already existing in such county. *State v. Rogers*, 19 South. 909, 911, 107 Ala. 444, 32 L. R. A. 520.

#### Conclusiveness of evidence.

The meaning of the word "establish," as applied to the quantum of evidence, is to settle certainly or fix permanently what was before uncertain, doubtful, or disputed. It is a term much more appropriate for criminal than civil cases, but even in criminal cases the facts do not have to be established so as to settle them certainly and leave no ground for dispute, but only beyond a reasonable doubt. An instruction in a criminal case requiring the facts necessary to show defendant's guilt to be "established" by the evidence is erroneous as requiring a too high degree of proof. With relation to such an instruction, the Supreme Court of Wisconsin, in *Eberhardt v. Sanger*, 51 Wis. 79, 8 N. W. 111, said the use of the word "establish" in the charge seems to have been specially unfortunate. The word ordinarily means to settle finally, to fix unalterably, and in this sense the instruction given would be equivalent to saying that the facts recited were not conclusive evidence of fraud. In this sense it was peculiarly inapplicable. It was unnecessary for the plaintiff to furnish conclusive evidence, and yet from the instruction the jury might well infer that it was essential for him to do so. It is not necessary in a civil action that any fact should be "established"—that is, settled certainly, or fixed permanently—which may have been uncertain, doubtful, or disputed before. It is not required that the evidence shall be clear and plain, or that it shall satisfy any reasonable man. *Endowment Rank of Order of K. P. v. Steele*, 63 S. W. 1126, 1128, 107 Tenn. 1.

"Established," as used in Civ. Code, art. 1099, providing that before the effects and property of a decedent can be taken out of the inventory the claimant must have established his claim to them, has a well-known signification, and implies that a claim to property doubtful as between a third person and the succession is permanently settled and confirmed. *Succession of Weigel*, 13 La. Ann. 49, 52.

Act 1875, providing that all railroad companies operating in the state should be held liable for damages to stock by their cars or trains, either by killing or maiming animals, and the amount of damages should be "established" by affidavit of the owner, or some other person acquainted with the stock so killed or maimed, and the damages so established could be sued out and judgment obtained in the same manner as other evidences of debt, should be construed as meaning that the affidavit was conclusive evidence of the damage or of the amount thereof. The plain meaning of the language is that the affidavit should fix, settle unalterably, make stable or firm, the amount of the damages. *Savannah, F. & W. Ry. Co. v. Geiger*, 21 Fla. 669, 697, 58 Am. Rep. 697.

In an instruction stating that facts were to be established by the fair weight of all the evidence, the word "establish" means to settle firmly or to fix unalterably, and hence facts could not be "established" except by a greater weight or preponderance of the evidence. The use of the word "fair" would not be misleading. *McKeon v. Chicago, M. & St. P. Ry. Co.*, 69 N. W. 175, 178, 94 Wis. 477, 35 L. R. A. 252, 59 Am. St. Rep. 910.

In its ordinary import, "established" is a stronger term and means more than the word "prove," and as used in Code Cr. Proc. art. 2027, which declares that the defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence, means conclusively shown to the minds of the jury. *Fury v. State*, 8 Tex. App. 471, 473.

#### **Erection of building authorized.**

The statute authorizing a city to "establish" markets gives the city the right to purchase land and to erect buildings thereon for market purposes. *Ketchum v. City of Buffalo* (N. Y.) 21 Barb. 294, 298.

"Establishment," as used in a will directing the establishment of a dispensary, necessarily includes the procuring of a site and the erection of a suitable building. *Beekman v. People* (N. Y.) 27 Barb. 260, 264.

The use of the word "establishing," in a will bequeathing a legacy to be applied towards establishing a school at A., provided a further sum could be raised in aid thereof if necessary, imported an intended outlay of the sum in building a schoolhouse at the place referred to. *Attorney General v. Hull*, 9 Hare, 647, 648.

#### **Permanency indicated.**

The word "establish" means to make, erect, or found permanently. *MacDonell v. International & G. N. Ry. Co.*, 60 Tex. 590, 595.

To "establish," according to Webster, means to make stable and firm; to fix or settle unalterably. *Appeal of Ambler* (Pa.) 2 Walk. 287, 289.

The word "establish" does not convey the idea of permanency, as used in Act 1885, §§ 5, 8, vesting the power to fix water rates in the board of supervisors, and providing that "when so fixed by such board they shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such board etc.," and that those furnishing water "shall so sell, rent or distribute such waters at rates not exceeding the established rates," etc. As used in the statute it has no such meaning. The power of the board of supervisors is not exhausted by one exercise, nor has its result unalterable fixity. *Osborne v. San Diego Land & Town Co.*, 178 U. S. 22, 38, 20 Sup. Ct. 860, 866, 44 L. Ed. 961.

"Establish," as used in a contract between a landowner and a railroad company contemplating the erection of a town upon the land of the former, and whereby the latter agreed to establish a depot upon his land in consideration of the grant of a right of way, should be construed, in view of the evident intention of the parties that the town should be permanent and that the depot should coexist with the town, as meaning the same as "permanently locate." *Yazoo & M. V. R. Co. v. Baldwin*, 29 South. 763, 78 Miss. 57.

In *Smith v. Forrest*, 49 N. H. 230, Mr. Justice Nesmith, in defining the word "establish," says: "The ordinary meaning of the word is to settle certainly or fix permanently what was before uncertain, doubtful, or disputed;" and such is its meaning as used in a statute authorizing the county surveyor "to permanently establish the corners of a boundary" of land. *Egan v. Finney*, 72 Pac. 133, 135, 42 Or. 599.

The act of the Legislature of Georgia giving to the county courts the power to establish ferries or bridges did not give such courts the right to tie the hands of the public in respect to its future necessities by giving an exclusive franchise. The right to establish one bridge and fix a right of toll does not imply a power to bind the state or its instrumentalities not to establish another in case of necessity. *Wright v. Nagle*, 101 U. S. 701, 706, 25 L. Ed. 921.

#### **Company.**

To "establish" a company for any business means complete and permanent provision for carrying on that business, and putting a company in operation may well include its continued, as well as its first or original, operation; and the word, as used

in the statute to suppress private banking, covers with its prohibition not only the primary steps in establishing the bank, but the whole range of its transactions by which illegitimate currency is imposed on the community. *Davidson v. Lanier*, 71 U. S. (4 Wall.) 447, 455, 18 L. Ed. 377.

#### County.

"Establishing" a county is merely the setting apart of certain territory to be in the future organized as a municipal corporation or quasi corporation for political purposes. *First Nat. Bank v. Beltrami County Com'rs*, 79 N. W. 591, 77 Minn. 43.

#### Evidence.

To "establish evidence," which means to secure its preservation for possible future use in a judicial controversy, is one thing; to render a judgment or decree which ends all controversy is a very different thing. The one implies that the office of the testimony is yet unfulfilled, the other that it has performed its functions and may henceforth be dispensed with. In the one case the title or right remains in statu quo, and liable to any countervailing proofs by the adverse claimant. In the other it is divested of all existing uncertainty, and freed forever from the adverse and defeated claim. No further argument can be needed to show that the subject of rendering final judgments and decrees is not expressed in the title "An act to establish evidence of title to real property and to restore the records of the same and to provide for the recording of deeds." *In re Goode*, 3 Mo. App. 226, 229.

#### Post roads.

Whether we consider the popular use of the word "establish," or the definition of it by the most approved lexicographers, or the admitted import of it in the preamble and in the fourth clause of the eighth section of the federal Constitution, it must be understood to mean, not merely to designate, but to create, erect, build, prepare, fix permanently. Thus, to "establish a character," to "establish one's self in business," to "establish a school," or "manufactory," or "government"—all common and appropriate phrases—is not to assume or adopt some pre-existing character, or business, or school, or manufactory, or government. To "establish," in each of those uses of the phrase, clearly expresses the idea of creating, preparing, founding, or building up. In the same sense, too, it is used and understood in the Bible. Thus it is said: "The Lord by wisdom hath founded the earth; by understanding hath he established [prepared] the heavens." *Proverbs* iii, 19. Just so, also, is it used and understood in the federal Constitution. Thus we find in the preamble these words, "establish justice," "establish

this Constitution," and in the fourth clause of the eighth article power is given to Congress "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." Thus we might present almost endless illustrations of the fact that the popular and philological, sacred and profane, oracular and political, import of "establish," is not to designate, but to found, prepare, make, institute, and confirm. It appears to us, therefore, that "to establish post offices and post roads" means, *ex vi termini*, not only the designation and adoption of an existing house and road for a post office and a post road, but also, more comprehensively, the renting or building of a house, and the construction and the reparation of a road, and the appropriation of money for any of those national purposes, whenever any of them shall be deemed useful. *Dickey v. Maysville, W. P. & L. Turnpike Co.*, 37 Ky. (7 Dana) 113, 125.

#### Will.

"Establishing a will" means the same as "proving a will," and such is its meaning in *Code Civ. Proc.* § 1861, providing that the action to procure a judgment establishing a will may be maintained by any person interested in the establishment thereof. *Clark v. Poor*, 25 N. Y. Supp. 908, 909, 73 Hun, 143.

#### ESTABLISHED BANKING COMPANY.

"Established banking company," as used in *Rev. St.* p. 809 (*St.* 1836, c. 4, § 15), relating to the offense of bringing into the state forged and counterfeit bills issued by or for any bank or banking company established in the state or in any other of the United States, is not identical with the term "incorporated banking company in the state." An "incorporated banking company in the state" necessarily implies a bank organized under a legal charter or authority in the form of a special act or some general law authorizing and giving a corporate character to such association, but the term "established" may imply nothing more than a voluntary association organized by its own independent agreement, and not in pursuance of any statute incorporation. *Commonwealth v. Simonds*, 77 Mass. (11 Gray) 306, 307.

#### ESTABLISHED BY LAW.

See, also, "Law."

"Established by law," as used in *Const.* 1868, art 5, § 19, providing that certain officers shall receive for their services a compensation to be established by law, means declared by legislative enactments. *Dane v. Smith*, 54 Ala. 47, 48.

*Const.* art. 6, § 15, providing that the salary of county judges "shall be establish-

ed by law," means that the power fixing such salaries is in the Legislature. *Healey v. Dudley* (N. Y.) 5 Lans. 115, 120.

#### ESTABLISHED COUNTY.

"An 'established county,' in the constitutional sense, is a territorial subdivision of the state, with certain prescribed boundaries, designated and set apart by legislative authority for the erection and creation of an organized county, with the powers and incidents pertaining to a quasi corporation of that character, whenever in the judgment of the Legislature it shall contain the requisite population for that purpose. The manifest object sought in the establishment of such counties in advance of settlement is to secure to each a territorial area of sufficient size and with suitable boundaries to accommodate, when settled, its entire population, to obtain efficient county government, and to avoid the evils supposed to be incident to their formation out of sparsely settled districts, under the influence of local considerations having reference rather to the interests of some town site, expectant the advantages of a county seat, than the well-being of the whole." *State v. McFadden*, 23 Minn. 40, 42.

The distinction between "organized" counties and "established" counties, recognized under the Constitution in statutes of Minnesota, is that the "establishing" of a county is the setting apart of territory to be in future organized as a political community or quasi corporation for political purposes, while the "organizing" is the vesting the people of such territory with such corporate rights and powers. *State v. Parker*, 25 Minn. 215, 219.

#### ESTABLISHED PLACE OF BUSINESS.

An "established place of business" is not to be construed as meaning "the established or usual place of business, but may mean each of different places in which a company with local establishments transacts business." *Rhodes v. Salem Turnpike & C. Bridge Corp.*, 98 Mass. 95, 97.

#### ESTABLISHED RATE.

In Interstate Commerce Law, § 10, as amended by Act March 2d, 1889, c. 382, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172], providing a penalty for conspiring to obtain transportation for property at less than the regular established rates on the line of transportation, "established" cannot be construed to mean "posted up," if it is known by the people in charge of the railroad as an established rate, as a fixed rate having a uniform character. An "established rate" is one that has become a fixed rate under which the railroad acts, and combining for the purpose of

evading that rate is a violation of the statute. *United States v. Howell* (U. S.) 56 Fed. 21, 24.

#### ESTABLISHED RIGHT.

A statute defining the property rights of husband and wife, and providing that any "right established, accrued or accruing" prior to the time the act went into effect should be governed by the law in force at the time such right was established or accrued, cannot be construed to include the right to dower before the death of the husband. As it can be wholly taken away by statute, it is not "established" or "accrued"; and, as it is not an increasing, enlarging, or augmenting right, it is not an "accruing" right. The fact that the possibility of dower may at times be said to be approaching the time when it will be realized is another thing from saying that the right is increasing or augmenting. The possibility or expectancy may become stronger or greater as the husband's death approaches, but not the right. *Richards v. Bellingham Bay Land Co.* (U. S.) 54 Fed. 209, 213.

In chapter 245 of the Laws of 1880, providing that on the vacation of the charter of any corporation such action should not affect any lawful act done, or right or defense accrued or established, the limitation "lawfully accrued or established" meant an absolute and vested right, and hence did not apply to a motion made after a decree entered affecting the charter of the corporation, for attachment was against the directors for the payment of costs against it. *People v. Cohocton Stone Road Co.* (N. Y.) 25 Hun, 14, 16.

#### ESTABLISHED ROAD OR WAY.

An allegation, in an indictment for obstructing a highway, that a road described is a "common highway," is equivalent to an allegation that it is an "established highway." *Palatka & I. R. Ry. Co. v. State*, 8 South. 158, 161, 23 Fla. 546, 11 Am. St. Rep. 395.

An "established road" includes a street laid out by the commissioners and approved by the court, though not opened, within the meaning of Act Feb. 19, 1849, providing that railroad companies shall so construct their roads across an established road or way as not to impede passage or transportation. *City of Chester v. Baltimore & P. R. Co.*, 21 Atl. 320, 140 Pa. 275.

A private way across a farm, leading from the farm buildings to a ferry, used only by the owner of the farm and his tenants for their convenience, fenced on but one side, and not permanent in its nature or construction, is not an "established" road or way, within the meaning of Act Feb. 19, 1849, §

12, providing that such a way must not be impeded or obstructed by a railroad. Appeal of Ambler (Pa.) 4 Atl. 187, 188.

An answer admitting that a village, with its streets and alleys, was laid out and "established," in effect concedes all that is essential to the legal dedication of such town, including its streets and alleys, for it could not be "established" without a legal dedication. *Stephenson v. Incorporated Village of Leesburgh*, 33 Ohio St. 475, 480.

#### ESTABLISHMENT.

Webster gives, as one of the meanings of the word "institution," "an establishment, especially of a public character, or affecting a community"; and he defines "establishment," in one of its meanings, as "the place in which one is permanently fixed for residence or business; residence, with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures." Hence the word "institution," both in legal and colloquial use, admits of application to physical things, so that the word "institution," as used in Pamph. Laws 1878-79, exempting from taxation institutions of purely public charity, includes such institutions as property, not as persons—the physical things, not the ideal institutions. Lands held in trust to appropriate the annual product to the erection of a poorhouse and the support of its inmates forever are not exempt, but the poorhouse when erected will be exempt, but not detached property from which its support is to be derived. *Trustees Academy of Richmond County v. Bohler*, 7 S. E. 683, 684, 80 Ga. 159.

The word "establishment" "means nothing more, in the popular language of the French of Missouri, than is implied in the popular language of the Anglo-Americans by the word 'settlement.'" *Dent v. Bingham*, 8 Mo. 579, 592.

"Establishment," when used in a conveyance of a newspaper, the same being described as the "Watertown Reunion Establishment, including presses, type, etc.," may be construed by implication to include the good will and the right to use the name of the paper. *Lane v. Smythe*, 19 Atl. 199, 203, 46 N. J. Eq. (1 Dick.) 443 (citing *Boon v. Moss*, 70 N. Y. 465).

#### ESTATE.

See "Absolute Estate"; "Beneficial Estate"; "College Estate"; "Contingent Estate"; "Dominant Estate or Tenement"; "Equitable Estate or Interest"; "Eventual Estate"; "Existing Estate"; "Factory Estate"; "Fast Estate"; "Future Estate"; "Homestead Estate"; "Inde-

feasible Estate in Fee Simple"; "Landed Estate"; "Legal Estate"; "Movable Estate"; "Net Estate"; "Open Estate"; "Particular Estate"; "Residuary Estate"; "Separate Estate"; "Servient Estate or Tenement"; "Settled Estate"; "Trust Estate"; "Vested Estate"; "Whole Estate"; "Worldly Estate."

All estate, see "All."

Any estate, see "Any."

Body of estate, see "Body."

Fee simple estate, see "Fee Simple."

Leasehold estate, see "Leasehold."

Other estate, see "Other."

Personal estate, see "Personal Property."

Real estate, see "Real Property."

"In a popular sense, 'estate' has relation to condition in life, prosperity or adversity, and may include not only property, but also rank, office, income, social position, and even character. In legal parlance, its meaning is more restricted, but it is not always uniform. It was anciently confined to land. 'Estate' signifieth such inheritance, freehold, term for years, tenancy by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements.' Co. Litt. 345a. In *Archer v. Deneale*, Marshall, C. J., says: 'That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. As little is it to be denied that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect.' In *Godfrey v. Humphrey*, Shaw, C. J., says: 'Sometimes the word "estate" is enumerated with others, all descriptive of personal or chattel interests, so as to exclude real estate. But as it is flexible, so it is generally very comprehensive.' Lord Holt says that the word 'estate' is genus generalissimum, and includes all things, real and personal. In *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236. Pollock, C. B., calls it 'nomen generalissimum,' comprehending everything, real and personal, over which the testator had a disposing power." *Campbell v. Campbell*, 37 Wis. 206, 215.

The ancient "creation of estates" consisted in the donation of land to the tenant, to be held of the donor, and reciprocal relations arise between them. From the tenant was due homage and feudal services, and in return the donor was bound to assure the enjoyment of the estate which he undertook to confer. These duties were held to arise not from express obligation, but from the nature of the tenure. They were imposed upon the tenant by his acceptance of the estate, and they might be exacted from the lord, who employed the term "dedi," or other term



of donation by which estates were created. *Young v. Hargrave's Adm'r*, 7 Ohio (7 Ham.) 63, 69, pt. 2.

The word "estate," in general, is applicable to anything of which riches or fortune may consist. Civ. Code La. 1900, art. 448; *Ayers v. Lawrence*, 59 N. Y. 192, 198 (quoting Whart. Law Dict.; Bouv. Law Dict.); *Cooney v. Lincoln*, 37 Atl. 1031, 1032, 20 R. I. 183.

"The word 'estate,' used in a will, in its application to real property may be used to express either the quantity of interest devised, or to designate the thing devised, or both, and the sense in which it is used must be determined from the will itself." *Hart v. White*, 26 Vt. 260, 267.

An "estate and interest in land" is defined by Rev. St. tit. 3, c. 7, § 3, to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. *King v. Kaiser*, 3 Misc. Rep. 523, 524, 23 N. Y. Supp. 21, 22.

In a will in which testator gave to his wife "all the rest and residue of my estate and property, real and personal," the words "estate" and "property" show that he was giving to her his whole interest and ownership in this residue. The word "estate," at common law, even when used in a grant, signified such inheritance, freehold, etc., or the like, as any man hath in lands. *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411.

An "estate" is defined to be that title or interest which a man hath in lands or tenements. Co. Litt. 345. It also signifies the state, condition, or circumstances in which the owner stands in regard to his property, and has relation to the quantity or interest which the tenant has therein, and the time at which that quantity or interest is to be enjoyed, as well as the number and connections of the tenants. In *re Rash's Estate* (Pa.) 2 Pars. Eq. Cas. 160, 162.

Pub. St. c. 50, § 7, providing that the city council of a city or the voters of a town may adopt a system of sewerage for the whole or a part of its territory, and may provide that assessments shall be made on owners of "estates" within such territories by a fixed, uniform rate, etc., would include only those estates which were benefited by the system so adopted, and would not include a cemetery under which a sewer ran, but which is not used for any purpose by the cemetery association. *Proprietors of Mt. Auburn Cemetery v. City of Cambridge*, 22 N. E. 66-68, 150 Mass. 12, 4 L. R. A. 836.

The word "estate" has in law a diversity of meanings, but, as used in a mortgage to denote the subject of lien, should be understood in the sense which shall accomplish and not defeat the obvious purpose to create

a lien; that is, to comprehend property susceptible of being impressed with a lien. *Higgins v. Higgins*, 53 Pac. 1081, 1082, 121 Cal. 487, 66 Am. St. Rep. 57.

"Estate," as used in the building act of 14 Geo. III, c. 78, § 86, declaring that no action shall be maintained against any person in whose house or on whose estate any fire shall accidentally begin, though used in a sense different from that which it bears in the language of the law, includes lands not built on. *Filliter v. Phippard*, 11 Adol. & E. (N. S.) 346, 355.

"Estates," as used in a will devising the share of his son to trustees in trust for his use for life, and from and after his death to the use of such of his children and issue, and "in such shares for such estates" as he shall by last will appoint, means merely that if there were two or more of the class the donee of the power might divide the use between them as he saw fit, but it did not authorize the creation of a spendthrift trust. The words were not intended to authorize the donee to cut down the estate which he took under the will from an estate in fee to an estate on condition and forfeitable for alienation. *Appeal of Pepper*, 13 Atl. 929, 931, 120 Pa. 235, 6 Am. St. Rep. 702.

The term "estate and interest in lands," as used in the title relating to fraudulent conveyances and contracts, shall be construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent, in lands. Rev. St. Wis. 1898, § 2325; *Cobbey's Ann. St. Neb.* 1903, § 5971.

#### **Alimony.**

See "Alimony."

#### **Annuity.**

An annuity charged on an estate, properly a rental charge, is itself an "estate." *Campbell v. Campbell*, 37 Wis. 206, 216 (citing *Bissett*, Est. 88).

#### **Assignor for creditor's interest.**

When a debtor has made an assignment of his property for the benefit of his creditors, and the assignee has accepted the trust and taken possession of the property, the legal title and the whole interest in the property is vested in the assignee, and the interest which the assignor has in the property, founded upon the prospect of a surplus, does not constitute any estate or interest or lien upon the property which he can assert in an action against him to determine an adverse claim to the property, within Gen. St. 1886, c. 75, § 1, providing that an action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein, adverse to him.

for the purpose of determining such adverse claim, estate, or interest. *Donohue v. Ladd*, 17 N. W. 381, 383, 31 Minn. 244.

#### **Benefit funds.**

In a release of all claims against the estate of a deceased person, and consenting that the estate be distributed according to the provisions of the will, the word "estate" should be construed to include the funds which came from two beneficial associations of which deceased was a member. *Daniels v. Pratt*, 10 N. E. 166, 170, 143 Mass. 216.

#### **Community property.**

Code 1881, §§ 1528, 1562, requiring a personal representative to take possession of the decedent's "estate" and to pay the debts of the "estate," applies to community as well as separate property and debts. *Columbia National Bank v. Embree*, 26 Pac. 257, 2 Wash. St. 331.

#### **Contingent remainder.**

A contingent remainder is not within Code 1873, c. 148, § 1, allowing an attachment against estates or debts in certain instances. *Young v. Young*, 17 S. E. 470, 471, 89 Va. 675, 23 L. R. A. 642.

A contingent remainder is an "estate," within Gen. St. 1894, § 1603, providing that minors, insane persons, and others under disability, having an estate in lands sold for taxes, may redeem the same within two years after the termination of their disability. *Minnesota Debenture Co. v. Dean*, 89 N. W. 848, 849, 85 Minn. 473.

#### **Covenant as to use of land.**

"Estate," as used in 1 Rev. St. p. 758, § 10, providing that no estate of a married woman shall pass by a conveyance not acknowledged by her apart from her husband, cannot be construed to include a covenant among adjacent lot owners to reserve an open space in front of their lots and not to build thereon. *Bradley v. Walker*, 14 N. Y. Supp. 315, 59 Super. Ct. 334.

#### **Decedent's estate or assets, and succession.**

Where a will contains certain specific devises by which testator disposes of all his real estate, the words "one-fourth part of my estate," as used in a gift thereof expressed in a subsequent clause, relate only to that portion of testator's personal estate not specifically disposed of. *Allison v. Chaney*, 63 Mo. 279, 283.

Where a testator makes specific devises or bequests of his property, and afterwards inserts a general clause disposing of all his estate, the term "estate" will be construed to mean that portion of the estate remaining after the satisfaction of the specific devises

and bequests. *Blewer v. Brightman* (S. C.) 4 McCord, 60, 61.

A clause in a will devising and bequeathing the balance "of my estate," both real and personal, is to be construed as meaning what still remains of testator's property which he is about to give, and not to any of the parts to be given out of that residue. *Bannister v. Bull*, 16 S. C. 220, 227.

The word "estate," in a will giving the whole residue of the testator's estate to certain persons, taken in its largest signification, means all the property, but, having already disposed of part, it means every part which the testator had not already disposed of. *Barnes v. Patch*, 8 Ves. 604, 607.

As used in Civ. Code, § 1313, providing that no estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or in trust for charitable uses, unless executed at least 30 days before the decease of the testator, and that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving legal heirs, "estate" means distributable assets, being one-third of the residue of the estate after payment of debts, and not the gross estate of testator. In re *Hinckley's Estate*, 58 Cal. 457, 484.

"Estate," as used in a judgment against the estate of a certain person for taxes due the city of New Orleans, is synonymous with "succession." *City of New Orleans v. Stewart's Estate*, 28 La. Ann. 180.

The term "estate," in the statute (Sayles' Civ. St. Tex. art. 1773) providing that the clerk shall issue a citation, briefly stating the contents of a petition, for all persons interested in the estate to appear and answer, etc., means the estate sought to be escheated by such petition, under the provisions of the statute providing that an estate shall be escheated when the person seised of the estate has died without any devise thereof, and leaving no heirs. *Newman v. Crowls* (U. S.) 60 Fed. 220, 227, 8 C. C. A. 577.

"The word 'estate' is used in various senses. It is often used to designate the property composing the assets of a decedent, or the property, real and personal, belonging to an existing individual." *Sellers v. Sellers*, 35 Ala. 235, 241.

The word "estate," when used to signify property which a person leaves to be divided at his death, includes indebtedness as well as assets; so that where a testator gave his wife a specific sum of money, and then devised to her "one-third part the residue and remainder of all the estate," the residuary bequest to the wife was not exempt from the payment of the proportionate share of the debts and expenses. *Stevens v. Underhill*, 86 Atl. 370, 371, 67 N. H. 68.

Where a testator directed his executors, "as soon as they may deem advantageous to my estate after my decease, to sell all my real and personal estate that I may be possessed of at the time of my decease," he evidently meant that kind of property which it was usual to sell according to the custom of the country, and did not intend bonds and notes, mentioned in the will, to be included in such direction, the use of the words "advantageous to my estate" indicating that he had in his mind something beyond and over what he understood to be comprehended by the words "real and personal estate." In *re Hunter's Estate*, 6 Pa. (8 Barr) 98, 107, 108.

As used in a will, after a bequest of the household effects of the testatrix and one-tenth of all she possessed, "estate" includes all the residue of the estate after deducting the charitable legacies, exclusive of certain mining stocks mentioned elsewhere in the will as unproductive and worthless. In *re Sweitzer's Estate*, 21 Atl. 885, 142 Pa. 541.

#### **Dower interest.**

Until the widow's dower has been assigned to her, she has no estate in the land of her deceased husband. *Smith v. Shaw*, 150 Mass. 297, 22 N. E. 924; *State v. Wincroft*, 76 N. C. 38. Neither has the wife of an owner of land an estate therein which would give her a right to redeem from a tax sale, under a statute giving any one having an estate in land such right. *Flynn v. Flynn*, 50 N. E. 650, 651, 171 Mass. 312, 42 L. R. A. 98, 68 Am. St. Rep. 427 (citing *People v. Palmer*, 10 App. Div. 895, 41 N. Y. Supp. 760).

The word "estate" includes dower, but does not include alimony. *Campbell v. Campbell*, 37 Wis. 206, 216 (citing *Bridge-water v. Bolton*, 1 Salk. 236).

#### **Equity distinguished.**

The word "estate" is clearly distinguishable from an equity, for "estate" and "equity" are not synonymous words either in meaning or substance. *Overseers of Tewksbury Tp. v. Overseers of Readington Tp.*, 8 N. J. Law (3 Halst.) 319, 323.

#### **Fee imported.**

The word "estate" has regularly been held broad enough, unless restricted by the context, to pass a fee, so that a will passing an estate or devising an estate will be held to pass a fee. *Harris v. Dyer*, 28 Atl. 971, 972, 18 R. I. 540; *Arnold v. Lincoln*, 8 R. I. 384, 385; *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411; *Bolton v. Bowne*, 18 N. J. Law (3 Har.) 210, 214; *Robinson v. Randolph*, 21 Fla. 629, 639, 58 Am. Rep. 692 (citing *Randall v. Tuchin*, 2 Marsh. 117); *Hammond v. Hammond* (Md.) 8 Gill & J. 436, 440; *Chamberlain v. Owings*, 30 Md. 447; *Kellogg v. Blair*, 47 Mass. (6 Metc.) 322, 325;

*Tracy v. Kilborn*, 57 Mass. (3 Cush.) 557, 558; *Godfrey v. Humphrey*, 35 Mass. (18 Pick.) 537, 539, 29 Am. Dec. 621; *Thomas v. Miller*, 43 N. E. 848, 850, 161 Ill. 60; *Leland v. Adams*, 75 Mass. (9 Gray) 171, 175; *Jackson v. Robins* (N. Y.) 16 Johns. 587, 588; *Busby v. Busby* (Pa.) 1 Dallas, 226, 1 L. Ed. 111; *Harden v. Hays*, 9 Pa. (9 Barr) 151, 155; *Carr v. Jeannerett* (S. C.) 2 McCord, 66, 70; *Josselyn v. Hutchinson*, 21 Me. (8 Shep.) 339, 340; *Fogg v. Clark*, 1 N. H. 163, 166.

A devise of the testator's "whole estate" is genus generalissimum, and was sufficient to include all things, real and personal; the word "estate" being sufficient to pass a freehold as well as a chattel, and implied a fee simple, since that is the general estate which every man is supposed to be seised of. *Bolton v. Bowne*, 18 N. J. Law (3 Har.) 210, 214.

"Estate," as used in a will devising three-fifths of "my estate to my daughter," with a provision that should she die having no issue living at the time of her death, and without a will disposing of such three-fifths, then the amount should go to the testator's grandchildren, means an estate in fee simple, defeasible only by her death without leaving issue living at her decease, or without leaving a will disposing of the estate, under Code, art. 98, § 314, providing that in every will whereby any lands or real property shall be devised to any person, and no words of perpetuity or limitation are used in such devise, the devisee shall take under and by virtue of such devise the entire and absolute estate of the testator in such lands or real property. *Backus v. Presbyterian Ass'n of Baltimore*, 25 Atl. 856, 860, 77 Md. 50.

A will devising all the "estate called 'M.'" in a certain county passes a fee, or whatever other interest the devisor possesses; and the legal effect of the word is not varied, whether preceded by "my" or "the," and followed by "at" or "in," or in the singular or plural. "The word 'estate,' in testamentary cases, is sufficiently descriptive both of the subject and the interest existing in it. The plain, ordinary import of the word would convey the idea of an absolute disposition of every article of property undisposed of by the will." *Lanbert's Lessee v. Paine*, 7 U. S. (3 Cranch) 97, 128, 2 L. Ed. 377.

The record "estate," as used in the introductory clause of a will declaring the testator's intention of settling his temporal estate, followed by a devise of real estate, conveys a fee, for it shows that the testator intended to part with his whole interest. *Howell v. Howell*, 20 N. J. Law (Spencer) 411, 415.

A devise of all the testator's "estate" and property gives the devisees a fee simple. The word "estate" is a word of great exten-

sion, and comprehends every species of property, real and personal, and will carry a fee unless restrained. It describes both the corpus and the extent of interest. *Deering v. Tucker*, 55 Me. 284, 287.

A devise of all of testator's estate, both real and personal, to his wife, for her support and comfort, to vest absolutely in her during her lifetime, should not be construed to pass a fee, though the word "estate," employed in a will, in connection with a devise, ordinarily indicates an intention to impart a fee, and operates on the title rather than the corpus of the property; yet such inference may be controlled and restricted by the other provisions of the will. *McKeown v. Officer*, 6 N. Y. Supp. 201, 202, 58 Hun, 634.

"The word 'estate' signifies such an estate as the tenant has in the land; so that, if a man grants all his estate in a piece of land to A. and his heirs, everything which he possibly can grant will pass thereby." *Coke's Litt.* 345; *Cruise's Dig.* p. 244. It has been long since established by analogy from this principle that in a will the words 'all my estate' pass a fee simple. A devise of all one's real estate, says Lord Holt, comprehends not only the thing itself, but the interest in it. The primary signification of the word 'estate' refers rather to the interest than the subject, and in all cases, both at law and in equity, when a question has arisen, it has been held that the word 'estate' in a will was sufficient to pass a fee." *Jackson v. Merrill* (N. Y.) 6 Johns. 185, 191 5 Am. Dec. 218.

#### Income.

Rev. St. c. 111, § 34, provides that, if alimony awarded a wife shall be insufficient for the support of herself and children, the court may adjudge further alimony out of the husband's estate. Held, that "estate" is equivalent to the "faculties" of the ecclesiastical courts, and includes income of whatever nature, as well as subsisting property. *Campbell v. Campbell*, 37 Wis. 206, 218.

The words "estates of bankrupts," in a bankruptcy act requiring the trustee to collect and reduce to money the property of the estates of which they are trustees, and authorizing a court of bankruptcy to cause the estates of bankrupts to be collected, are used in the broadest sense, and intended to include every species of property, not legally exempt, that can be made available for the benefit of creditors, and would therefore include the surplus income of a trust estate. *In re Baudouine* (U. S.) 96 Fed. 536, 540.

#### In inheritance tax law.

The word "estate," as used in the act providing for a collateral inheritance tax, is defined by section 22 of the act as meaning the property or interest therein of the testa-

tor, and not the property or interest therein passing or transferred to individual legatees, devisees, etc.; so that an estate will be liable for the taxes when it is over the specified amount, regardless of how small the individual shares may be. *In re Taylor's Estate*, 27 N. Y. Supp. 232, 234, 6 Misc. Rep. 277; *In re Hoffman's Estate*, 88 N. E. 311, 312, 143 N. Y. 327; *In re Hall's Estate*, 34 N. Y. Supp. 616, 617, 88 Hun, 68.

"Estate," as used in Act 1846, c. 72, relating to a tax on the legacies, section 4 providing that, when the testator leaves any lineal descendants, the executor or administrator shall account for and pay to the clerk of the court the amount which the estate of his testator or intestate shall be liable to pay by way of tax under the provisions of the act, should not be construed in its ordinary and largest sense, but is to be understood in relation to the subject-matter, which was to throw the tax on collaterals only, and which can be effected only by making each devise, legacy, or distributive share pay its own tax. It refers to legacies and distributive shares only. The word "estate" ordinarily means the whole of the property owned by any one, the realty as well as the personalty. *Hunter v. Husted*, 45 N. C. 141.

The term "estate," in the inheritance tax law of 1885, providing that an estate which may be valued at a less sum than \$500 shall not be subject to the tax, means the estate of the taker, and not of the testator, intestate, or transferor, as the purpose of the exception was to exempt small legacies. *In re Smith* (N. Y.) 5 Dem. Sur. 90, 91.

The term "estate," as used in Laws 1895, c. 483, § 1, which exempts from the tax imposed by that section on gifts, legacies, and collateral inheritances, an estate which may be valued at a less sum than \$500, means the estate given to devisees and legatees under a will, or the estate that descends to the heirs at law under the intestate laws of the state. *McVean v. Sheldon* (N. Y.) 48 Hun, 163, 164.

"The words 'estate' and 'property,' as used in the transfer tax law, mean the property or interest therein of the testator, intestate, grantor, bargainor, or vendor, passing or transferred, . . . and shall include all property or interest therein, whether situated within or without this state." *In re Dun's Estate*, 40 Misc. Rep. 509, 510, 82 N. Y. Supp. 802, 808.

#### Interest synonymous.

See "Interest (In Property)."

#### Judgment.

A judgment is not an estate or interest in land. It only confers a right to levy on the land to the exclusion of other adverse in-

terests subsequent to the judgment. *State v. District Court of Chippewa*, 88 N. W. 755, 757, 85 Minn. 283.

A judgment is not an estate or interest in lands. Hence the provisions of the Revised Statutes as to trusts are not applicable, and a judgment confessed by a debtor to secure existing and future indorsements for his accommodation is valid. *Lansing v. Woodworth* (N. Y.) 1 Sand. Ch. 43, 45.

#### Kind and quantum of interest.

An "estate in lands" is the interest which the owner has therein. *Van Rensselaer v. Poucher* (N. Y.) 5 Denio, 35, 40; *In re Rash's Estate* (Pa.) 2 Pars. Eq. Cas. 160, 162; *Crawl v. Harrington*, 49 N. W. 1118, 1119, 33 Neb. 107 (citing 2 Bl. Comm. 103).

An "estate in land" is the interest which the tenant has therein. *Beall's Lessee v. Holmes*, 6 Md. 208 (citing 2 Bl. Comm. 103); *Appeal of Commonwealth*, 17 Atl. 1094, 1096, 127 Pa. 435; *Mulford v. Le Franc*, 26 Cal. 88, 103; *Clift v. White*, 12 N. Y. (2 Kern.) 527; *James v. Morey* (N. Y.) 2 Cow. 246, 300, 14 Am. Dec. 475; *Jackson v. Merrill* (N. Y.) 6 Johns. 185, 191, 5 Am. Dec. 213; *James v. Morey* (N. Y.) 2 Cow. 256, 300, 14 Am. Dec. 475; *Minnesota Debenture Co. v. Dean*, 89 N. W. 848, 849, 85 Minn. 473; *New Orleans, J. & G. N. R. Co. v. Hemphill*, 35 Miss. 1, 22.

An "estate in land" is defined to be "the degree, quantity, nature, or extent of interest which a person has therein." *Robertson v. Vancleave*, 29 N. E. 781, 129 Ind. 217, 15 L. R. A. 68; *Bates v. Sparrell*, 10 Mass. 323, 324; *Trustees of Jefferson College v. Dickson* (Miss.) Freem. Ch. 474, 485. "It is called in Latin 'status,' which signifies the condition or circumstances in which the owner stands in regard to his property." *Friedman v. Macy*, 17 Cal. 226, 231 (quoting 1 Greenl. Cruise, Real Prop. 44); *Bradford v. Mogk*, 8 N. Y. Supp. 709, 710, 55 Hun, 482. "But the word 'estate,' when used in a statute or instrument, other than a deed, and calling for such meaning, is to be deemed as passing the land itself." *Friedman v. Goodwin* (U. S.) 9 Fed. Cas. 818, 819; *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411.

"Estate," as defined by Coke (Co. Litt. § 650), signifies "such inheritance, freehold, term of years, tenancy by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements." *Ball v. Chadwick*, 46 Ill. 28, 31.

"The word 'estate' may mean an absolute or qualified fee in the land itself, or only an easement upon it." *Elliot v. Carter*, 29 Mass. (12 Pick.) 436, 440.

An "estate" is the quantity of interest which a person has from absolute ownership down to naked possession. It is the interest

which any one has in lands or in any other subject of property. So that, in a provision of the Code which authorizes administration to be vested in the clerk of the superior court in cases where the estate is unrepresented and not likely to be represented, the word "estate" indicates some property or interest, and hence does not authorize the administration when the decedent left no estate at all. *Lowery v. Powell*, 34 S. E. 296, 297, 109 Ga. 192.

The term "estate," when used in a will, will be construed to refer to testator's title, and not to the corpus of his property, unless the word is controlled or restricted by other portions of the instrument. *Bradford v. Mogk*, 8 N. Y. Supp. 709, 710, 55 Hun, 482; *Terry v. Wiggins*, 47 N. Y. 512, 515.

Within Comp. St. c. 82, § 22, the term "estate in interests in lands" is construed to embrace every estate and interest, freehold and chattel, legal and equitable, present and future, vested and contingent. *Bloomfield State Bank v. Miller*, 75 N. W. 569, 571, 55 Neb. 243, 44 L. R. A. 387, 70 Am. St. Rep. 381.

"Estate," as used in *Conspirators' Act*, April 29, 1779, requiring the information thereunder to describe the estate claimed and the title set up thereto by the commonwealth, means the kind and quantum of interest therein. This interest may be a freehold or of an inferior degree. A freehold may be of inheritance or for life. If of inheritance, it may be pure or base, absolute or conditional, in fee simple or fee tail. If fee tail, it may be general or special. If for life, it may be for that of a tenant or of another person, with or without impeachment of waste, absolute or conditional. If the estate be less than freehold, the term may be of greater or less duration, and with duties to the superior more or less burdensome. In short, an "estate" in real property is susceptible of every possible variation in which man can be related to the soil. The words "hold and possess" are not descriptive of an estate in lands, for they apply equally to many kinds of estates. *Cutts v. Commonwealth*, 2 Mass. 284, 289.

"By 'estate' of any one," says Preston, "is to be understood his situation and the circumstances of his tenancy in regard to the property in which he has the interest in question." 1 Prest. Est. 20. *Burrill*, in his *Law Dictionary*, gives this definition, and adds: "'Estate' is constantly used in conveyances in connection with the words 'right, title and interest,' and is in a great degree synonymous with all of them." 1 Burr. Law Dict. 434. As used in the *Water Lot act* of March, 1851, providing that the property known as the "Government Reservation should be exempt from its operation, except that any estate held by virtue of any lease or leases

executed and affirmed by any officer of the United States on behalf of the same, or granted and confirmed to the lessee thereof, etc., the word estate means the right, title, and interest of the lessee. *Friedman v. Macy*, 17 Cal. 226, 231.

"Estate," as used in a covenant in a lease providing that in default of payment of rent the lessor may enter in the said premises and repossess and enjoy as of his first and former estate, was used and had reference to the nature of the defendant's interest in the property, and should not be limited in its meaning to the extent of improvements on the soil. Thus, if the lessor had a fee-simple estate, the land reverted to him again in fee. If he had a term, he was in again as part of his term. The word had no relation to the question whether the estate might be more or less valuable when repossessed, or might bring to him more or less buildings; and thus a building erected thereon by the lessee belonged to the landlord, without any obligation on his part to pay the tenant for the same. *Kutter v. Smith*, 69 U. S. (2 Wall.) 491, 500, 17 L. Ed. 830.

#### Legal and equitable interest.

"Estate," as used in St. 1860, c. 69, § 12, which provides that a person may acquire legal settlement by residing in a place for ten years and paying a tax on "his poll or estate" for five years within that period, does not mean a fee, or even a freehold, but means any legal interest for which a person is taxed, excluding such estate as the person may hold in trust, either as the guardian, administrator, or otherwise. *Sudbury v. Inhabitants of Stow*, 13 Mass. 461, 462.

The word "estate" is defined in *Anderson's Dictionary of Law*, as the quality of interest which a person has in land, from absolute ownership down to naked possession; that it does not import a fee or even a freehold, but any legal interest in land. It imports merely the relation that a party has to the land, not the quantity of interest. After the decease of a wife, and before assignment of the husband's dower interest, such interest is not such an estate as is properly the subject of the lien of a judgment against the husband, or subject to levy upon execution, but it is such an interest as may be subjected to the payment of such judgment by proceedings in equity. *MacLaren v. Stone*, 9 O. C. D. 794, 795, 18 Ohio Cir. Ct. R. 854.

The words "estate or interest," as used in Rev. Codes, § 5904, providing that actions to quiet title may be maintained by a plaintiff who has an estate or interest in real property, include both legal and equitable estates and interests. *Dalrymple v. Security Loan & Trust Co.*, 83 N. W. 245, 248, 9 N. D. 306.

#### Liens.

See, also, "Vendor's Lien."

Gen. St. 1866, c. 75, § 2, relating to the bringing of actions to determine adverse claims to real property, and providing that, if the defendant in such action disclaims in his answer any interest or estate in the property, the plaintiff cannot recover costs, is construed as including liens. *Donohue v. Ladd*, 17 N. W. 381, 383, 31 Minn. 244.

A judgment lien is not an estate or interest of the land. It is held that it only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment. *Burwell v. Tullis*, 12 Minn. 572, 583 (Gil. 486, 497).

#### Mortgagee's interest.

Rev. St. § 2203, providing that conveyances of land, and of any "estate or interest therein," may be made by D., includes interest of a mortgagee in the mortgaged premises, and hence a quitclaim deed by the mortgagee will operate as a discharge of the mortgage. *Mason v. Beach*, 13 N. W. 884, 886, 55 Wis. 607.

The term "estate in land" does not include the right of a mortgagee in mortgaged premises. Such an interest will not make the mortgagee a freeholder. If he enters and holds the property, he is obliged to account to the mortgagor, as the owner, for the rents and profits. If the money due on his bond is paid to him, his connection with the land is dissolved, for there is no necessity for a reconveyance, and at his death the mortgage interest passes to his representative, as personalty. In these and in all other particulars the land seems to be a mere pledge in equity for the payment of the debt. It is true, he may maintain ejectment and enter on the possession; but this right springs into existence in a controversy between him and the mortgagor, rather than the owner. Such rights, so devoid of all the incidents of property, can scarcely be called an estate in lands. *Marshall's Ex'rs v. Hadley*, 25 Atl. 325, 326, 50 N. J. Eq. (5 Dick.) 547 (citing *Wade v. Miller*, 82 N. J. Law [3 Vroom] 296, 303).

#### Ownership or possession and choses in action.

"Estate," as used in a will devising testator's estate, cannot be construed to include property which in equity did not belong to the testator. *Croftswaigh v. Hutchinson*, 5 Ky. (2 Bibb) 407, 410, 5 Am. Dec. 619.

"Estate and effects," as used in Rev. St. 1889, c. 73, § 107, which authorizes the receiver of an insurance company to take charge of the estate and effects of the company, and to collect the debts due and property belonging to it, means the estate and ef-

facts owned by the company, or its assets, and hence no authority is conferred upon the receiver to sue stockholders for the unpaid subscriptions to stock which had been surrendered to the corporation. *Republic Life Ins. Co. v. Swigert*, 25 N. E. 680, 682, 687, 135 Ill. 150, 12 L. R. A. 328.

General words in a deed, as "my estate," or "my property," or "all the property I possess," do not pass, or purport to pass, anything which was not held by the grantor as his own property. They do not apply to the property of others in the occupancy of the grantor. *Jones v. Sasser*, 18 N. C. 452, 463.

A devise of testator's real and personal estate does not apply to land of which he is in possession without color of title. *Austin v. Rutland R. Co.*, 45 Vt. 215, 236.

The word "estate," as used in Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), authorizing courts of bankruptcy to cause the estates of bankrupts to be collected and distributed, is to be construed as covering all property in the possession of the debtor at the time proceedings in bankruptcy are commenced, to which the trustee may fairly make color of claim. *In re Union Trust Co.*, 122 Fed. 937, 940 (citing *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183).

The word "estate" is derived from "status," and, in its most general sense, means position or standing in respect to the concerns of this world. In this sense it includes choses in action. However, it is used in a more restricted sense. Thus we say that "the estate is divested"; and so, in equity, where the trust is by agreement of the parties, we say "the cestui que trust has the estate." And hence the word "estate," as used in Rev. St. c. 43, § 2, providing that estates, real and personal, of any tenant, shall not go to the surviving tenant, but shall descend to the heirs of the tenant, includes a joint chose in action for a tort. *Bond v. Hilton*, 51 N. C. 180, 182.

The word "estate" includes chose in action. *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403; *Vaughan v. Town of Murfreesborough*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

While in some states as narrow a definition as possible has been given to the words "property" or "estate," and a distinction has been sought to be drawn between things in possession and things or choses in action—between property and a claim to property—as used in the statutes of Rhode Island it is given an extremely broad sense, and includes choses in action as well as property in possession. *Cooney v. Lincoln*, 37 Atl. 1031, 1032, 20 R. I. 183.

#### Personal estate only.

A will giving testator's wife all his real estate during her life, and providing that an appraisalment only of his estate shall be made, and directing that his estate shall not be sold to pay debts for which he was a surety until property treated in trust should be sold, when his estate should be charged with any deficiency, cannot be construed to include realty, but applies only to personalty, though the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts if used with other words which indicate an intention to charge them. *Archer v. De-neale*, 26 U. S. (1 Pet.) 585, 588, 7 L. Ed. 272.

The word "estate," as used in a residuary legacy bequeathing all of testator's residuary estate, ordinarily means personal property only; but, where the term "real and personal estate" is used, all the residuary property of every description will pass. *Blagge v. Miles* (U. S.) 3 Fed. Cas. 559, 569.

A will bequeathing "the rest and residue and remainder of my estate, consisting in ready money, jewels, leases, judgments, mortgages, etc., or in any other thing whatsoever," should be construed as applicable to personal estate only. *Timewell v. Perkins*, 2 Atk. 102 (cited in *Sites v. Eldredge*, 18 Atl. 214, 216, 45 N. J. Eq. [18 Stew.] 632, 648, 14 Am. St. Rep. 769).

The word "estate" may mean either real or personal property, and it may be descriptive of the locality or quality or amount of the property only, or of the quantity of time or interest therein, or both; and, when it is used in a will as descriptive of the subject or property devised, it will be considered as descriptive also of the interest in the subject devised, unless manifestly used in a different sense. Thus the term "residue of my estate" will be restrained and qualified to mean personal estate only, in the absence of circumstances calculated to show that such was the testator's intention. *Sinickson v. Drew*, 14 N. J. Law (2 J. S. Green) 68, 73.

A will, following a devise of all of testator's real estate which he had at the date of the will, bequeathing all the rest, residue, and remainder of his estate, does not include real estate afterwards acquired by the testator, but is limited to personalty, though the word "estate" ordinarily is sufficient to include all property, real and personal. *Havens v. Havens* (N. Y.) 1 Sandf. Ch. 324, 334.

Where a testator directs the trustee at the expiration of his term to sell such residue of his "estate and effects," or such "effects as shall be upon the said farm," the use of the word "effects" in the second instance shows that by the words "the residue of his estate and effects" he meant only

such as constituted personal property. *Murrell v. Hurrell*, 5 Barn. & Ald. 18.

Rev. Codes, c. 119, § 11, providing for the disposing of a person's estate by a nuncupative will, cannot be construed to include land, though the word, in its general sense, is broad enough to include land. *Smithdeal v. Smith*, 64 N. C. 52, 53.

Code 1892, § 2180, providing that the clerk of the chancery court, when appointed guardian of a minor who has property, shall be allowed not more than 10 per cent. "on the amount of the estate," if finally settled by him, or not more than 5 per cent. if not so settled, applies to the personal estate and the income of the realty, and not to the corpus of the real estate. *Harkleroad v. Maxwell*, 25 South. 878, 874, 77 Miss. 117.

A will attested by only two witnesses, after several bequests of pecuniary legacies, proceeded: "I give and bequeath the balance of my estate including a double case gold watch, my clothing, books," etc., "to be equally divided as follows," etc. "The legacies above mentioned to be paid out in one year." Held, that the will did not operate to dispose of real estate, the words in question being so associated and connected with gifts of personalty that the rule of ejusdem generis applied, and limited their application to estates of the same kind. *Bartlett v. Munroe*, 38 Mass. (21 Pick.) 98, 100.

#### **Persons and personal faculties, status or rank.**

A policy of life insurance reciting that it was for the benefit of the estate of the insured, in its strict legal signification, embraces neither the administrator, the heir, nor the creditor of the assured, and means the effects, personal and real, left by the decedent, when given a signification with reference to a period subsequent to his death, and that is the date when the benefit was to accrue; but such literal signification would be absurd in this case, for the word "benefit" must be interpreted with reference to persons, not things. *Pace v. Pace*, 19 Fla. 438, 452.

In an insurance policy procured by a mortgagee on property mortgaged to him, the policy purported to insure the "estate of R." It was held that the word "estate" must have been intended to describe such person as had upon R.'s death succeeded to his title, and would not waive a condition in the policy that the sole ownership of the property must be in the insured, or the policy would be void, and would not include one to whom the property had been conveyed in trust to pay debt. *Weed v. London & Lancashire Fire Ins. Co.*, 22 N. H. 229, 231, 116 N. Y. 106.

Where a fire insurance policy was made payable to the "estate of R.," the words "es-

tate of R." did not have a definite legal signification, meaning R.'s administratrix, but rather came within the rule that where the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if the designation used is applicable to several persons, or if the description is imperfect or ambiguous, extrinsic evidence may be resorted to, to ascertain the meaning of the contract. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 461.

The word "estate," in an assessment for a public improvement, assessing the cost to the estate of a certain person, should be construed in its common meaning, to indicate not only the property, but the takers of it; and, when it is said that an estate is charged with the payment of any claim, it is well understood that those who are to take with the incumbrance are to pay it in due proportion among them. Manifestly this language was adopted not only to designate the property, but also that the former owner was dead, and that there were successors in title whom it was more convenient to designate in mass, without separately naming them. *Moale v. City of Baltimore*, 61 Md. 224, 238.

A deed to an executor which set apart, distributed, and conveyed "a lot of land to the estate of Daniel W. Hart," he being dead, does not pass the legal title to the premises to the sole devisee of such Hart, and a purchaser of the interest of such devisee acquires no legal title. *Simmons v. Sprat*, 20 Fla. 495, 505.

A statute making the confirmed habit of drunkenness on the part of the husband of not less than one year's duration, accompanied with a wasting of his "estate," a ground for divorce, should be construed to include his mental and physical faculties. *Shuck v. Shuck*, 70 Ky. (7 Bush) 306, 307.

The word "estate," as used in the rule that an indictment should state the estate of the defendant, means the defendant's rank in life. *State v. Bishop*, 15 Me. (3 Shep.) 122, 124.

#### **Possibility or contingency.**

"A possibility or contingency is not an 'estate.'" *Richards v. Bellingham Bay Land Co.*, 54 Fed. 209, 211, 4 C. C. A. 290.

#### **Proceeds of real estate.**

In a will as follows: "I give and bequeath unto my dear wife K. all my estate, real and personal, and wheresoever found at the time of my death, giving her full power and authority to sell the whole or any part of my said real estate and execute a deed and deeds therefor, and in case any of my said 'estate' be 'left' after the death of my wife I order it to be divided," etc.—"estate"



includes as much of the proceeds of the real estate which the wife sold during her life as remains undisposed of at her death. Hence the subsequent devisees would be entitled to this fund. *Appeal of Brockley (Pa.)* 4 Atl. 210, 211.

#### Property compared and distinguished.

The word "estate" has a broader signification than the word "property." *Pipplin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403; *Vaughan v. Town of Murfreesborough*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

The word "property," used in a will, has as broad a meaning as "estate of succession," and is identical with those words. *Succession of Marks*, 35 La. Ann. 1054.

"Property" is defined to mean estate, and "estate" to mean property, and it is otherwise said that property is the right a man can have to anything, real or personal. The word "property" comprehends the meaning of both words, and hence it is held that where an officer made a return under the statute that he could find no corporate property wherein to satisfy the execution, using the words of the statute, "corporate property or estate," it was held to be sufficient. *Stanley v. Stanley*, 26 Me. (13 Shep.) 191, 199.

#### Property conveyed in trust.

A fire insurance policy which insures the "estate" of O. includes and sufficiently describes property, left by O., which before his death he had conveyed to a trustee for the benefit of his creditors. A failure to mention the trust in the policy does not avoid it under a condition therein that it shall be void if the exact interest of the assured in the property, whether as owner, trustee, or mortgagee, or otherwise, be not truly stated therein. "Estate," as used in an insurance policy as above, is an indeterminate word, the precise meaning of which is to be ascertained from circumstances under which it is used. It may be used to represent the interest of administrators in personal estate, or the interest of a widow and heirs in real estate, or the interest of all these in both personal and real estate, and the scope to be given to it will depend largely on the persons who procure the policy and the purposes for which it was procured. *Weed v. Hamburg-Bremen Fire Ins. Co.*, 31 N. E. 231, 232, 133 N. Y. 394.

#### Property in excess of debts.

"Estate" means that which a man is worth in property—that is, the value of his property over and above his liabilities—and the amount of a deceased person's estate is what he is worth after payment of his debts. *Smith v. Terry*, 12 Atl. 204, 205, 43 N. J. Eq. (16 Stew.) 659.

#### Property, real and personal.

"The word 'estate,' unqualified or restricted, is always construed to embrace every description of property, real, personal, and mixed." *Pulliam v. Pulliam* (U. S.) 10 Fed. 25, 40; *Weatherhead's Lessee v. Baskerville*, 52 U. S. (11 How.) 329, 358, 13 L. Ed. 717; *Archer v. Deneale*, 26 U. S. (1 Pet.) 585, 589, 7 L. Ed. 272; *Allen v. White*, 97 Mass. 504, 507; *Hooper v. Hooper*, 63 Mass. (9 Cush.) 122, 129; *Bates v. Sparrell*, 10 Mass. 323, 324; *Andrews v. Brumfield*, 32 Miss. 107, 108; *Hartson v. Elden*, 26 Atl. 561, 562, 50 N. J. Eq. (5 Dick.) 522; *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411; *Whittaker v. Whittaker*, 40 N. J. Eq. (13 Stew.) 33, 34; *Stewart v. Stewart*, 47 Atl. 633, 637, 61 N. J. Eq. 25; *Cook v. Lansing*, 3 Atl. 132, 133, 40 N. J. Eq. (13 Stew.) 369; *Willard's Ex'r v. Willard* (N. J.) 21 Atl. 463, 464; *Fosdick v. Town of Hempstead*, 8 N. Y. Supp. 772, 774, 55 Hun, 611; *Lamb v. Lamb*, 14 N. Y. Supp. 206, 210, 60 Hun, 577; *Jackson v. Delancey* (N. Y.) 11 Johns. 365, 374; *Turbett v. Turbett* (Pa.) 8 Yeates, 187, 2 Am. Dec. 369; *Appeal of Lewis*, 108 Pa. 133, 137; *Gourley v. Thompson*, 34 Tenn. (2 Sneed) 387, 393; *Cole v. Proctor* (Tenn.) 54 S. W. 674, 676; *Campbell v. Campbell*, 37 Wis. 206, 216; *Hunter v. Husted*, 45 N. C. 141; *Barnea v. Patch*, 8 Ves. 604, 608.

The word "estate," as used in a will, includes both real and personal property. *Johnson v. Johnson*, 32 Minn. 513, 515, 21 N. W. 725; *Fosdick v. Town of Hempstead*, 8 N. Y. Supp. 772, 774, 55 Hun, 611; *Laing v. Barbour*, 119 Mass. 523; *Price v. Price*, 52 N. J. Eq. (7 Dick.) 326, 329, 29 Atl. 679; *Carter v. Gray*, 43 Atl. 711, 58 N. J. Eq. 411.

"Estate," as used in an administrator's bond, conditioned that the administrators should make an inventory of all the goods, chattels, credits, and estate of the deceased, comprehends real as well as personal property. *Edwards v. White*, 12 Conn. 28, 35.

"Estate," as used in a provision in a will that testator's wife should have her lawful right of dower out of his estate, should be construed as including both real and personal property. *Adamson v. Ayres*, 5 N. J. Eq. (1 Halst. Ch.) 349, 352.

"Estate," as used in a clause of a will in which testator disposes of his whole estate, giving certain personal property to his wife, and providing that her acceptance thereof shall exclude her from any further demands on testator's estate, cannot be construed to mean personal estate, but means all of his estate, both real and personal. *Norris v. Clark*, 10 N. J. Eq. (2 Stockt.) 51, 54.

The word "estate" has a broad signification, and would, of course, be sufficient to pass personality. A clause of a will, void as

devising real estate to aliens, does not make void for repugnancy a subsequent clause converting it into personalty, and providing for payment thereof to the same person. *Greenwood v. Greenwood*, 53 N. E. 101, 102, 178 Ill. 387.

As used in a release executed by an heir, purporting to release and relinquish "all and every claim and demand which I have against the estate" of his deceased ancestor, "estate" includes both real and personal estate. *Thornton v. Mulquinne*, 12 Iowa, 549, 556, 79 Am. Dec. 548.

Where the word "estate" is used in a release of inheritance of a certain person, stating that "I have no claim after the death of my parents in my father's or mother's estate," the word "estate," being used without limitation, is sufficiently comprehensive to embrace property of every description. *Stollenburg v. Diercks*, 90 N. W. 525, 526, 117 Iowa, 25.

The word "estate," as used in a will, means real or personal property according to the sense in which it is used, and that sense must often be ascertained by the connection in which the word is placed, or the subject-matter to which it has reference. *Sinnickson v. Snitcher*, 14 N. J. Law (3 J. S. Green) 53, 63.

The term "estate" embraces all property, in whatever form it may have existed, without specifically mentioning the classes and subdivisions of which it was composed, and whether it be real or personal property. And in a will the terms "all my" estate and "my whole" estate are both descriptive of the word "estate," and equally broad and comprehensive in their import. *Equitable Guarantee & Trust Co. v. Rogers*, 44 Atl. 789, 792, 7 Del. Ch. 398.

"Estate," as used in a statute requiring notice of the sale of real estate by an executor or administrator to be given to persons interested in the estate, "does not mean the real estate to be sold, but the entire estate of the deceased to be administered upon, real, personal, and mixed." *Shields v. Ashley's Adm'r*, 16 Mo. 471, 472.

As used in Comp. Laws 1879, c. 37, § 1, providing that letters testamentary or letters of administration shall be granted on the estate of a deceased person in the county in which the deceased resided at the time of his death, and that when any person dies intestate in any other state or country, leaving any estate to be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered, and that the administration which shall be first lawfully granted in the last-mentioned case shall extend to all the estate of the de-

ceased within the state, etc., "estate" means the goods, chattels, real estate, rights, and credits of a deceased person, or, in other words, the assets of the deceased. *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420, 422.

Code 1880, § 1981, providing that an executor or administrator must give bond in such penalty as will be equal to the full value of the "estate" at least, relates to the rights, powers, and duties of an executor or administrator with the will annexed, and may mean such estate, either real or personal, or both, as may be by the will the charge of such executor or administrator. *Ellis v. Witty*, 63 Miss. 117, 120.

The word "estate," as used in the clause of a will as follows: "And touching all such worldly or temporal estate as it has pleased God to bless or endue me with in this life, I give and dispose of in the following manner," etc.—*prima facie* imports and includes, in its legal sense and meaning, all the legal right and title which the testator then had in law in and to the land devised. It *ex vi termini* imports an evident intention on the part of the testator to devise all his right and title in the land to the devisee named. It is not used as descriptive of the corpus and locality of the land merely, but included with that the legal idea and conception of all the right and title to and ownership of the testator in the premises. *Hitch v. Patten* (Del.) 16 Atl. 558, 566, 8 Houst. 334, 2 L. R. A. 724.

"Estate," as used in a will disposing of "all the remainder of the rents, profits, and residue of my 'estate' after the payment of my debts," should be construed as carrying everything, both real and personal, there being no particular expression to tie the word down. The word "estate" is susceptible of different meanings, according to the connection in which it is used and the subject-matter to which it is applied. It may mean real or personal estate, or it may be descriptive of the locality or quantity of land only, or of the quantity of time or interest therein, or of both, and, when it is descriptive of the subject of property devised, it will be considered as descriptive also of the interest in the subject, unless manifestly used in a different sense. *Sinnickson v. Drew*, 14 N. J. Law (2 J. S. Green) 68, 72.

"Estate," as used in a will in which the testator bequeathed his goods, chattels, stock in trade, and estate, of what nature and kind soever, was not limited to personal property by the rule that the general word "estate," being followed by the words "goods, chattels, stock in trade," must be confined to property *ejusdem generis*. Hence the effect of the word "estate" is not restrained merely by such collocations, and any presumption which might arise from

such general word being used in a restricted sense is repudiated by the words "of what nature and kind soever" following. *O'Toole v. Browne*, 8 Bl. & Bl. 572, 585.

"Estate," as used in *Gantt*, Dig. § 7, providing that on the death of a person leaving minor children and no widow, and an estate less in value than a certain sum, his entire estate shall pass and vest in his minor children, should be construed in its popular sense, as meaning the mass of property left by the decedent. There are no grounds for drawing a distinction between real and personal property in the act, and, if there were any, the term "estate" must be considered as more aptly referring to real property. *Harrison v. Lamar*, 83 Ark. 824, 827.

The word "estate" was originally used to designate the interest which one had in land, later to indicate the land itself, technically the corpus. It was afterwards extended to all property, real and personal. Citing *Burr. L. D. "Estate."* In wills the import of the term depends in a great degree on its association with other expressions. Of course, the same is true when it is used in statutes. In a very common sense "estate" signifies the entire condition in respect to the property of an individual, as in speaking of a bankrupt decedent, or insolvent estate, or of administering upon an estate. Here, not only the property, but indebtedness, is part of the idea. The estate does not consist of the assets only. If it did, such expressions as "insolvent estates" would be misnomers. Citing *Burr. L. D. "Estate."* As used in Civ. Code, § 1313, which prohibits devises or bequests to charitable or beneficent societies or corporations which shall collectively exceed one-third of the estate of a testator leaving legal heirs, etc., "estate" means the property, both real and personal, which remains after paying the debts of the deceased and charges of administration. In *re Hinckley's Estate*, 58 Cal. 457, 516.

The word "estate," in Code 1873, c. 112, § 20, providing that when any estate, real or personal, is given by deed or will to any person subject to a limitation contingent, etc., such estate may be ordered sold under certain conditions, is used in its most extensive sense, and means the property or thing given by the deed or will, and not merely the interest therein. *Troth v. Robertson*, 78 Va. 46, 50.

The word "estate," as used in St. 1798, § 10, subsec. 12, providing that in certain instances the court may allow the guardian to exceed the income of the estate of his ward and make use of the principal thereof for the maintenance and education of the orphan, is to be construed in its natural and legal meaning, as including the whole of the ward's property in the guardian's hands.

*Thaw v. Falls*, 10 Sup. Ct. 1087, 1042, 136 U. S. 519, 34 L. Ed. 531.

As used in Act Cong. March 2, 1799, § 65, providing that in all cases of insolvency, or where any "estate" in the hands of executors, administrators, or assignees shall be insufficient to pay all the debts due from the deceased, the debts due the United States on any bond or bonds for the payment of duties shall be first satisfied, and any executor, administrator, or assignee, or other person who shall pay any debt due from the person or "estate" for whom or for which they are acting previous to the debt or debts due to the United States shall be personally liable therefor, "estate" may embrace both real and personal property. "If it be real estate which passes to an assignee, the priority attaches; and if, by the laws of any particular state, executors or administrators are vested with a control over the realty, as well as over the personalty, for the purpose of sale and payment of debts, I see no way of avoiding a priority which the United States will be entitled to, even out of real estate which may thus be sold. But until sale is actually made and the proceeds are placed in the hands of executors or administrators, it is idle to talk of the priority in question; and in no event and under no circumstances, according to my judgment, can the right of priority attach whilst the real estate or its proceeds belong to or remain vested in the heirs at law." *United States v. Crookshank* (N. Y.) 1 Edw. Ch. 233, 239.

The term "estate," as used in section 52 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 559 [U. S. Comp. St. 1901, p. 3441]), designating the amount the clerks shall receive for their services in each estate, has no restricted technical meaning, but means the ownings, real and personal property, choses in action—whatever may belong to the person as defined in the statute. In *re Barden* (U. S.) 101 Fed. 553, 555.

As used in Rev. St. c. 43, § 3, providing that all estates, real or personal, held in joint tenancy, on the death of one shall not descend or go to the survivor, but shall descend or be vested in the heirs, executors, administrators, etc., of the party dying, the word "estates" is broad enough to include bonds and judgments, as well as land and other property. *Ellison v. Andrews*, 34 N. C. 188, 193.

In Gen. St. § 68, providing that whenever any person or corporation shall thereafter make an assignment of his or its estate for the benefit of creditors, etc., the word "estate" means all the debtor's property, both real and personal, not exempt from execution, and thus indicates that the statute was designed to cover general assignments. *Campbell v. Colorado Coal & Iron Co.*, 10 Pac. 248, 250, 9 Colo. 60; *Id.*, 7

Pac. 291, 293; *May v. Tenny*, 13 Sup. Ct. 491, 494, 148 U. S. 60, 37 L. Ed. 868.

The words "estate" and "property," as used in Laws 1892, c. 899, relating to taxable transfers of property, are made by section 22 of such act to include all property or interest therein, whether situated within or without the state, over which the state has any jurisdiction for the purpose of taxation. Hence transfers of United States bonds are exempted from the operation of the act, as they are not "property" within the jurisdiction of the state for the purpose of taxation. In *re Sherman's Estate*, 46 N. E. 1032, 1033, 158 N. Y. 1.

The word "estate," in Code 1871, § 758, making a person incompetent as a witness to establish his own claim against the "estate of a deceased person" which originated during the lifetime of such deceased, should be construed in its broad and popular sense, to signify all the property of every kind which one leaves at his death. *Jacks v. Bridewell*, 51 Miss. 881, 887; *Rothschild v. Hatch*, 54 Miss. 554, 561.

The words "estate" and "property," as used in Rev. St. U. S. § 510, concerning bankruptcy, and providing that no discharge in bankruptcy shall be granted if the bankrupt has concealed any part of his estate or effects, or any books or writings relating thereto, or has been guilty of any fraud or negligence in the care, custody, or delivery to the assignees of the property belonging to him at the time of the presentation of his petition and inventory, mean all manner of property of which the bankrupt is possessed, and include lands, so as to bring cutting of timber from lands belonging to the estate, for the purpose of defrauding his creditors, within the statute. In *re Carriers* (U. S.) 47 Fed. 438, 444.

Where, previous to a marriage, a contract was executed in which the intended husband agreed that if he died first he would order \$1,000 to be put at interest for the use of the woman while she remained his widow; and, further, that she should have a right to the household furniture, and that the woman agreed that she would desire no more of her husband's estate than had been mentioned, the word "estate" included not only real, but personal, property. *Shoch v. Shoch's Ex'rs*, 19 Pa. (7 Har.) 252, 255.

In *City of Boston v. Inhabitants of Dedham*, 45 Mass. (4 Metc.) 178, the court says: "The leading and most prominent objection taken by the defendants is that the term 'estate,' as used in the statute defining the gaining of a settlement, means exclusively real estate, and that a valuation and assessment on personal property do not bring the case within the statute. This, in our opinion, is too restricted a definition of the term

'estate.' The term is of very broad and extensive application, and clearly comprehends personal as well as real estate." In *Archer v. Deneale*, 28 U. S. (1 Pet.) 588, 7 L. Ed. 272, Chief Justice Marshall said that the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; and, where a will provides that certain legacies should be paid out of his "estate," it means the whole estate of the testator, real and personal. *Taylor v. Dodd* (N. Y.) 2 Thomp. & C. 88, 92.

Where legacies are directed to be paid out of the "estate" of a testator, the real estate is charged with the legacies. *Cox v. Corkendall*, 18 N. J. Eq. (2 Beasl.) 138, 139.

The old definition of the word "estate" generally confined it to land or realty. Thus, according to Lord Coke, state or estate signifies such inheritance, freehold, term for years, etc., "as any man hath in lands or tenements." Co. Litt. 845. Cowell defines it to be "that title or interest which a man hath in lands or tenements." But according to the modern doctrine, the term "estate" is of much more extensive import and application, and clearly comprehending things personal as well as real estate. Countess of *Bridgewater v. Duke of Bolton*, 1 Salk. 237. In general, whenever legal enactments are intended to apply exclusively to one or the other of these different species of property, the statutes use the proper qualifying words "personal" or "real" estate, as the case may require. *Read v. Town of Jamaica*, 40 Vt. 629, 635.

#### **Property shown by inventory.**

St. 1838, c. 322, providing that, when the amount of the estate of a deceased person shall be absorbed or used up in the payment of certain expenses and of the allowance to the widow, it shall not be necessary to represent such estate insolvent, and if the estate be thus settled the administrator shall be wholly discharged from all claim, etc., has "reference to the estate represented by the inventory." It does not include "all the property rights and credits of the intestate. If it were not so, a faithful administrator, by the omission to include any property or credit in the inventory because he had no knowledge of its existence, would, by settlement of the estate, as provided in the act, be subject to a suit when first knowledge of such omission might be presented to him at the trial." *Longfellow v. Patric*, 25 Me. (12 Shep.) 18, 20.

#### **Real estate only.**

While in its popular sense the word "estate" includes both real and personal property, in a strictly technical sense it applies

to realty only; and so where a scire facias on a judgment, issued under an act which referred solely to real estate, required defendants to show cause why judgment should not be levied out of the "estates" instead of out of the "real estate," and where the verdict was for the amount of the judgment "to be levied out of the lands and tenements," subject to the payment of the judgment, the variance was immaterial. *Messmore v. Williamson*, 41 Atl. 1110, 1111, 189 Pa. 73, 69 Am. St. Rep. 791.

"Estate," is defined to be the interest which any one has in lands or in any other subject of property (Black's Law Dict.), but as used in a provision of a will as follows: "With regard to my Tuscararo 'estate,' if my brother T. will take it at 1,000 pounds, one-half cash, or upon interest from the day of acceptance, and the other half to carry interest three years after that date. In case my brother T. refuses the offer, my executors will then proceed to the sale of that 'estate' by private or public sale as they may judge best, as well as my stock, farming utensils, store goods," etc.—it means real estate. *Turbett v. Turbett* (Pa.) 3 Yeates, 187, 192, 2 Am. Dec. 369.

The word "estate," in Code, § 2403, directing dower to be assigned so as to give the widow one-third in value of the whole estate, is synonymous with "land" as used in section 2398, giving the widow dower in one-third of all the lands of which her husband was the owner at his death. *Puryear v. Puryear*, 64 Tenn. (5 Baxt.) 640, 644.

"Estate," as used in Laws 1886, c. 257, providing that, where the trust is or shall be expressed in the instrument creating the trust, every sale or act of the trustee in contravention of the trust is void; provided, however, that the Supreme Court shall have power to authorize any such trustee to mortgage or sell any such real estate whenever it shall appear to the satisfaction of the court that it is for the best interest of said estate to so do, and that it is necessary and for the benefit of the estate to raise by mortgage thereon, or by a sale thereof, funds for the preserving or improving such estate—means real estate. In *re Roe*, 6 N. Y. Supp. 464, 465, 53 Hun, 433.

"Estate or interest in land," as used in 2 Rev. St. pp. 134, 135, §§ 6, 8, enacting that no estate or interest in land, other than leases for a term not exceeding one year, shall be assigned unless by act or operation of law, or by deed or other conveyance in writing, is employed comprehensively, and means every species and title to real property known to the law. *Agate v. Gignoux* (N. Y.) 1 Rob. 278, 284.

#### **Remainder.**

"Estate," as used in Gen. St. 1894, § 1603, providing that minors, insane persons,

and others under disability, having an estate in or lien on land sold for taxes, may redeem the same within two years after such disability shall cease, should be construed to include remainders, either vested or contingent. *Minnesota Debenture Co. v. Dean*, 89 N. W. 848, 849, 85 Minn. 473.

#### **Reversion.**

A reversion may pass under the term "estate," if not restrained or qualified. *Hooper v. Hooper*, 63 Mass. (9 Cush.) 122, 129.

#### **Right of re-entry.**

The phrase "estate or interest in real property descendible to heirs," in 2 Rev. St. p. 57, § 2, making such estate devisable, does not include the right of the grantor to re-enter for breach of the condition subsequent. *Uppington v. Corrigan*, 45 N. E. 359, 360, 151 N. Y. 143, 37 L. R. A. 794.

#### **Seat in Stock Exchange.**

Laws 1896, c. 908, art. 10 (the transfer tax law), provides that the words "estate" and "property," as used in the statute, shall include all property and interest therein, whether situated within or without the state, and hence a seat in the New York Stock Exchange is within the statute. In *re Hellman's Estate*, 66 N. E. 809, 810, 174 N. Y. 254, 95 Am. St. Rep. 582.

#### **Shares in corporation.**

A statute providing that all gifts of any "estate or interest in lands," save as by the said act is directed, should be void, cannot be construed to include shares in incorporated companies holding land for the purposes of their business, such as canal, waterworks, and gas companies. *Edwards v. Hall*, 35 Eng. Law & Eq. 433, 440.

#### **Trade or business.**

"Estate," as used in an answer by a wife, in an action against her, that the notes sued on are not a charge on her separate estate, cannot be construed to mean her separate trade or business, though the word "estate" in its full sense may perhaps include trade or business. *Gillespie v. Smith*, 30 N. W. 526, 527, 20 Neb. 455.

#### **ESTATE AT SUFFERANCE.**

See "Tenant at Sufferance."

#### **ESTATE AT WILL.**

See "Tenant at Will."

#### **ESTATE BY THE CURTESY.**

See "Curtesy."

**ESTATE BY ENTIRETY.**

See "Entirety (Estate by)."

**ESTATE DESCENDED.**

The term "estate descended" is applicable only to real estate. *Williams v. Stonestreet* (Va.) 3 Rand. 559.

**ESTATE FOR LIFE.**

See "Life Estate."

**ESTATE FOR YEARS.**

"Estates for years" embrace such as are for a single year, or for a period still less, if definite and ascertained, as a term for a fixed number of weeks or months, as well as for any definite number of years, however great. *Brown's Adm'rs v. Bragg*, 22 Ind. 122, 125 (quoting Washb. Real Prop. p. 291).

An "estate for years" is one that is created by a contract, technically called a "lease," whereby one man, called the "lessor," lets another, called the "lessee," the possession of lands or tenements for a term of time fixed and agreed upon by the parties. *Bailey v. Bond* (U. S.) 77 Fed. 406, 409, 23 C. C. A. 206.

An "estate for years" is a contract for the possession of lands or tenements for some determinate period, and this period may be less than a year, as a certain number of months or even weeks. A tenant for years is never seised of the lands leased. He acquires a right of entry upon the land, and when he enters he is possessed, not of the land, but of a term of years, while the seisin of the freehold remains in the lessor, and the lessee's possession is the possession of him who has the freehold. A lease for a term of years is not a freehold, but a chattel.—*Hutcheson v. Hodnett*, 42 S. E. 422, 424, 115 Ga. 990.

An estate for years differs, when applied to personalty, from a contract of hiring, in this, that the latter is a bailment, conveying no interest in the property of the bailee, but a mere right to use; when applied to realty, it differs from the relation of landlord and tenant in this, that in the latter the tenant has no estate, but a mere right of use, very similar to the right of a hire of personalty. Civ. Code Ga. 1895, § 3110.

An "estate for years" is one limited in its duration to a period fixed, or which may be made fixed and certain. If it be in lands, it passes as realty. It may be for any number of years, so that the limitation be within the rule against perpetuities. Civ. Code Ga. 1895, § 3109.

An "estate for years" is only personal property; a chattel real. *Jeffers v. Easton, Eldridge & Co.*, 45 Pac. 680, 681, 113 Cal. 345.

"Estates for years" have always been classified as chattel interests, and properly fall under any definition of personal property. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 3, 18 Misc. Rep. 327.

"Estates for years are denominated 'estates in lands.' \* \* \* They are still chattels real, \* \* \* and are not classed as real estate in the chapter on 'Title to Property by Descent.' A judgment binds and is a charge upon them, yet they go to the personal representatives as assets, and vest in the executors as part of the testator's personal estate." *State Trust Co. v. Casino Co.*, 39 N. Y. Supp. 258, 262, 8 App. Div. 381, 387 (quoting *Despard v. Churchill*, 53 N. Y. 119).

**ESTATE IN EXPECTANCY.**

See "Expectant Estate."

**ESTATE IN FEE.**

See "Fee."

**ESTATE IN POSSESSION.**

An "estate in possession" is where the owner has an immediate right to the possession of the land. *Gen. St. Minn.* 1894, § 4369; *Comp. Laws Mich.* 1897, § 8790; *Sage v. Wheeler* (N. Y.) 37 N. Y. Supp. 1107, 1108.

An "estate in possession" means merely an estate in present enjoyment, and, whether occupied by tenants or entirely unoccupied, is equally within section 6268 of the statute authorizing a partition of estates in possession. *Eberts v. Fisher*, 7 N. W. 211, 212, 44 Mich. 551.

The statute providing for partition of lands held by joint tenants or tenants in common gives the right to a person who has an estate in possession in the lands of which partition is sought, but not to one who has only an estate therein in remainder or reversion. The term "estate in possession" does not require actual possession, but is doubtless used here in the same sense as defined in the same statute, namely: "An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to the possession is postponed to a future period." Now, though the owner of a merely "expectant estate," as defined by the statute, would not be entitled to maintain a bill for partition, yet we think it clear that the immediate right of possession, in defining "estates in possession," does not mean the absolute right of possession as

against all possible rights or powers given for special purposes, and which have not been, but may or may not be, exerted or required for the accomplishment of such special purposes. The owner may be said to have an estate in possession unless there be some intervening estate in the land, the owner of which has a present paramount right of possession as against him. *Campau v. Campau*, 19 Mich. 116, 122, 123.

#### ESTATE IN REMAINDER.

See "Remainder (Estate in)."

#### ESTATE IN REVERSION.

See "Reversion."

#### ESTATE IN TRUST.

See "Trust Estate."

#### ESTATE OF DOWER.

See "Dower."

#### ESTATE OF HOMESTEAD.

The estate of a surviving husband or wife in the homestead, which is called in the books an "estate of homestead," is an estate for life, with no limitation upon the manner of its enjoyment, but the homestead premises are transferred to the survivor by operation of law, and may thereafter continue to be occupied as a homestead or not, as the interest and convenience of such survivor may require. *Holbrook v. Wightman*, 17 N. W. 280, 31 Minn. 168.

#### ESTATE OF INHERITANCE.

An "estate of inheritance" is an estate which may descend to heirs. It includes all freehold estates, except estates for life. *Crawl v. Harrington*, 49 N. W. 1118, 1119, 33 Neb. 107; *Casteel v. Potter*, 75 S. W. 597, 598, 176 Mo. 76.

An estate "acquired by inheritance" is one that has descended to the heir or been cast upon the possessor by the simple operation of law. In *re Donahue's Estate*, 36 Cal. 329, 332.

A statute providing that the widow shall be endowed of the third part of all the lands whereof the husband was seised of an "estate of inheritance" at any time during the marriage does not require that the husband must have had a strict legal title. Where the husband went into possession under a valid purchase and held continuous possession for over 11 years, he was seised of an estate of inheritance to which the right of dower attached. *Kirby v. Vantrece*, 26 Ark. 368, 370.

An "estate of inheritance or freehold," as used in St. 1821, c. 94, § 2, and Rev. St. c. 45, § 1, providing that a citizen having an estate of inheritance or freehold in any town, and living on the same three years successively, shall gain a settlement in such town, does not apply to one living on an estate which he has in remainder as tenant of the owner of the preceding estate of freehold, the statute referring to such an estate as the party has a right to occupy, and not to an estate in expectancy where there is a preceding estate of freehold in another. *Inhabitants of Ipswich v. Inhabitants of Topsfield*, 46 Mass. (5 Metc.) 350, 351.

An "estate of inheritance" is a species of freehold estate in land, otherwise called a "fee," where the tenant is not only entitled to enjoy the land for his own life, but where, after his death, it is cast by the law on the persons who successively represent him in perpetuum in right of blood, according to a certain established order of descent. *Brown v. Freed*, 43 Ind. 253, 256 (citing *Burrill's Law Dict.*).

By statute in New York, estates of inheritance are denominated "estates of freehold," and it is further provided that the terms "real estate" and "land" shall be co-extensive with "lands, tenements, and hereditaments." *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453.

#### Donation claim.

Where the one who entered a donation land claim, before completing the four years' residence necessary to give him title, quitclaimed his interest in the land and delivered the possession to L., who also, before title was acquired, quitclaimed the land to a third person, L., although he had an equitable interest in the land, was not seised of an estate of inheritance, and his widow was not entitled to dower in such land under St. 1855, p. 405, providing "that a widow shall be dowered of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage." Every estate of inheritance is fee simple or fee tail. 4 Com. Dig. "Estates," A, 1; 1 Bouv. Law Dict. "Inheritance," 679. The highest estate in lands known to the American law is a fee simple. A fee simple is a pure inheritance or absolute ownership, clear of any qualification or condition, or a time in the land without end, and, upon the death of the proprietor, is a right of succession to all his heirs. *Farnum v. Loomis*, 2 Or. 30, 32 (citing 1 Hilliard, R. R. pp. 35-38).

#### Estate by entirety.

An "estate of inheritance" is a species of freehold estate in land, otherwise called a "fee," where the tenant is not only entitled to enjoy the land for his own life, but

where, after his death, it is cast by the law upon the persons who successively represent him in perpetuum in right of blood, according to a certain established order of descent. An estate held by entirety cannot be an estate of inheritance. *Roulston v. Hall*, 50 S. W. 690, 692, 66 Ark. 305, 44 Am. St. Rep. 97.

#### **Estates in joint tenancy.**

"Estate of inheritance," as used in Revision, p. 320, § 78, providing that a wife shall have dower in all the real estate of which her husband was seised during the coverture and to which she shall not have relinquished her right of dower, means an estate of inheritance in severalty or in common. Estates in joint tenancy are not included. *Babbitt v. Day*, 5 Atl. 275, 276, 41 N. J. Eq. (14 Stew.) 392.

#### **Mining claim.**

See "Mining Claim."

#### **Vested remainder.**

When a conveyance of a particular estate is made to support a remainder, the tenant for the particular estate takes it, and if the remainderman is in being he takes the fee. In such a case the remainder is not contingent as to its becoming a vested remainder, because the title vests in the remainderman on the delivery of the deed. The title thus vested becomes an estate of inheritance, and, in case the remainderman dies before the previous estate is expended, the title passes to his heirs, unless the deed directs otherwise. *Bunting v. Speck*, 21 Pac. 288, 290, 41 Kan. 424, 3 L. R. A. 690 (citing *Smith v. West*, 103 Ill. 332).

### **ESTATE ON CONDITION.**

See "Condition."

### **ESTATE TAIL.**

The definition of an "estate tail" generally accepted is that given in 1 Cruise, 78, viz.: "An 'estate tail' may be described to be an estate of inheritance, deriving its existence from the statute de donis conditionalibus, which is descendible to some particular heirs of the person to whom it is granted, and not to the heir generally." In *re Bacon's Estate*, 52 Atl. 135, 137, 202 Pa. 535; *Jordan v. Roach*, 32 Miss. 481, 603. Upon the extinction of such issue the estate determines. *Holden v. Wells*, 31 Atl. 265, 266, 18 R. I. 802; *Richardson v. Richardson*, 16 Atl. 250, 252, 80 Me. 585.

Where one devises land to a man and his heirs male, this, by construction of law, is an "estate tail." *Crane v. Fogg*, 3 N. J. Law (2 Penning.) 819, 823.

An "estate tail," at common law, was a continual fee, limited to particular heirs, as the heirs of a man's body, and by virtue of the Statute of Westminster was converted into what was termed a "fee tail," which then vested in the donee an estate which continued in him and his issue, as long as any remained, to the remotest generation, and leaving in the donor the ultimate fee-simple expectant upon the final failure of issue at any, however remote, period it might happen. This estate passed from the first donee to the issue of his body under the same rules that regulated the descent of fee-simple estates, giving to the male and to the eldest preference over all the rest. The effect of this statute was to restrain alienation and preserve the title in the same family, and was favored by the policy of the country where it originated. *Wardell v. Allaire*, 20 N. J. Law (Spencer) 625.

A devise to one and the heir of his body is an "estate tail"; so is a devise to one and his lawfully begotten heir. *Ewan v. Cox*, 9 N. J. Law (4 Halst.) 10, 13.

An "estate tail" is created where lands are conveyed to a person and the heirs of his body, or to some particular heirs, to the exclusion of the heirs generally. But the specified heirs must be lineal heirs, as an estate tail can only be created by a gift to the donee and the heirs of his body begotten (1 Thom. Co. Litt. Tit. "Fee Tail," §§ 14, 15; 2 Prest. Est. 355), and it goes down to the heirs of the body of the donee in perpetual succession. Its character is never changed by the descent through any number of generations. Its particular characteristics are the measure of the estate by the continuance of issue, and its quality to determine only on the failure of issue. 2 Prest. Est. 392. When the line of descent is broken by the failure of the issue of the donee, it reverts to the grantor by operation of law. What was a conditional fee at the common law has, since the Statute of Westminster 2, 13 Edw. I, been denominated an "estate tail." This statute, commonly called the "Statute De Donis Conditionalibus," took away the power of alienation on the birth of issue, which existed in reference to conditional fees. These, at common law, were construed to be fees on condition that the grantee had the heirs prescribed. If the grantee died without issue the land reverted to the grantor, but if he had the prescribed issue, the condition was held to be performed, and the estate became absolute so far as to enable the grantee, by alienation, to bar not only his own issue, but the possibility of a reverter. Under this statute the courts of justice considered that the estate was divided into a particular estate in the donee, and a reversion in the donor. Where the donee had a fee simple before, under this construction of the statute he has what was



called an "estate tail," and, where the donor had before but a bare possibility, he had a "reversion expectant" upon the failure of the estate tail. *Jordan v. Roach*, 32 Miss. 481, 603.

An "estate tail," created by an implication or construction, is a case where a testator's meaning is not declared in express terms, but is fairly and clearly enough to be inferred from what he does say. *Richardson v. Richardson*, 16 Atl. 250, 252, 80 Me. 585.

"Estates in fee tail" are of two kinds: Estates tail general, as where the grant was to one and the heirs of his body generally, so that his issue in general, by each and all marriages, are capable of taking per formam doni; and estates tail special, where the gift or grant was restricted to certain heirs or class of heirs of the donee's body. *Lehndorf v. Cope*, 122 Ill. 317, 325, 13 N. E. 505, 509 (citing 2 Bl. Comm. 118).

An "estate tail" may be defined to be a fee conditional at common law, limited to certain heirs, to the exclusion of heirs general. *McLeod v. Dell*, 9 Fla. 427, 441; *Wardele v. Allaire*, 20 N. J. Law (Spencer) 625.

An "estate tail" is where lands and tenements are given to one and the heirs of his body begotten, and may be either general or special. *Butler v. Heustis*, 68 Ill. 594, 599, 18 Am. Rep. 589.

An "estate tail" is one limited to a person and the heirs of his body. The limitation may be to all such heirs, or to certain specified heirs coming within that description, to the exclusion of others. In one case the entail is general, and in the other special. *McArthur v. Allen* (U. S.) 15 Fed. Cas. 1210, 1212.

The specified heirs must be lineal heirs, as an estate tail can only be created by a gift to the donee and the heirs of his body begotten. Its character is never changed by the descent through any number of generations. Its peculiar characteristics are the measure of the estate by the continuance of issue, and its quality to determine only on the failure of issue. *Jordan v. Roach*, 32 Miss. 481, 603.

At common law a devise to a devisee and the heirs of his body created an estate tail general, leaving in the heirs at law of the devisor the reversion in case of an entire failure of issue; but under the provisions of the statute in relation to conveyances, section 6, such devise would vest in the devisee only a life estate, with remainder in fee to the heirs of his body, leaving the reversion, in case of an entire failure of issue, in the heirs at law of the devisor. *Turner v. Hause*, 65 N. E. 445, 446, 199 Ill.

464 (citing *Lehndorf v. Cope*, 122 Ill. 317, 13 N. E. 505).

"Estates tail are estates of inheritance, which, instead of descending to heirs generally, go to heirs of the donor's body, which means his lawful issue—his children—and through them to his grandchildren in a direct line, so long as his posterity endures, in regular order and course of descent, and upon the extinction of such issue the estate determines." Washb. Real Prop. (5th Ed.) p. 104, § 22. A deed "to S. A. D. and her heirs by J. D., their heirs and assigns forever," made after the death of J. D. by one to whom he had conveyed the land in trust for himself and family, does not vest a fee tail in S. A. D. which would be converted into a life estate in S. A. D. by Rev. St. 1889, § 8836, but a fee simple in her and said children. *Fanning v. Doan*, 80 S. W. 1032, 1033, 128 Mo. 323, 329.

## ESTIMATE.

See "Monthly Estimates."

"The word 'estimate,' when properly and correctly used in oral communications or written instruments, is selected to express the mind or judgment of the speaker or writer on the particular subject under consideration. It implies a computation or calculation as to estimating the loss or gain of an enterprise." *People v. Clark* (N. Y.) 37 Hun, 201, 203 (quoting *Webst. Dict.*).

Where a conveyance of land describes the same by metes and bounds, and states that it contains a certain quantity, "estimated," the purchaser takes all within the prescribed bounds, although more than the estimated quantity, and there is no abatement, should the quantity fall short. *Ketchum v. Stout*, 20 Ohio, 453, 463.

A contract providing that payments are to be made on monthly estimates means that the proportionate payments of his compensation are to be made on monthly estimates of each month's progressive work—that is, the estimated cost of each month's work—and hence the contract is sufficiently definite to determine the time of payment.—*Davis v. New York Steam Co.*, 54 N. Y. Supp. 78, 79, 33 App. Div. 401.

The word "estimates," as used in Laws 1870, c. 39, § 9, requiring the superintendent of a hospital to furnish the board of building commissioners monthly estimates of materials put in the building, did not mean correct and accurate statements; the word "estimates" precluding accuracy. Judge Redfield, speaking of contracts of construction, says that monthly estimates are understood to be mere approximations." *Shipman v. State*, 43 Wis. 381, 389 (citing 1 Redf. Rya. 436).

**As assess or determine.**

The word "estimate," when used in a verdict stating that the jury estimate the damage at so much, means to fix the amount of the damages, or the value of the thing to be ascertained. It is equivalent to the word "assess." *Roddy v. McGetrick*, 49 Ala. 159, 162.

"To estimate" means to judge and form an opinion of the value from imperfect data; to fix the worth of roughly or in a general way. Thus it was held that the use of the word "estimated," in the verdict of the jury fixing the amount of value of property stolen, does not comply with the statute requiring the jury to determine the amount. *McCormick v. State*, 61 N. W. 99, 100, 42 Neb. 866.

**As compute.**

"Estimated," as used in a contract by which one party was to furnish the use of his patents for manufacturing a paint, and the other parties were to be sole manufacturers thereof—they to furnish the capital necessary for the business, and to have a third of the net profits—the cost of manufacture to be estimated by the wholesale price of the materials and packages used, and amount of labor bestowed on its manufacture, should be construed in the sense of "computed." *Tully v. Felton*, 86 Atl. 285, 286, 177 Pa. 344.

**Measurement imported.**

In a contract for the construction of a railroad, and that the railroad engineer should between the 1st and 10th of each month estimate the quantity of work done, for which the contractor should then receive three-fourths of the amount to be paid for such work, "estimate" imports an accurate measurement and final estimate for each month, and not such a one as is merely approximate or conjectural. *Herrick v. Belknap's Estate*, 27 Vt. (1 Williams) 678, 688.

Where a contract for the sale of standing timber was to be paid for at the rate of \$10 per thousand feet, the lumber to be estimated on or near the 15th of each month, the word "estimate" meant the same as "measure." *Galloway v. Week*, 12 N. W. 10, 11, 54 Wis. 604.

Where a contract for the purchase of logs provided that a certain sum should be paid for each and every thousand feet of merchantable boards which said logs may be estimated to make, and no mode is prescribed in the written contract by which this estimate is to be made, and there is a scale in common use in that locality by which the amount of lumber in logs is there estimated, the estimate should be made by such scale. *Heald v. Cooper*, 8 Me. (8 Greenl.) 32, 34, 35.

**As opinion.**

"Estimate of value," as used in Civ. Code, § 1263, relating to an estimate of value of a homestead, means something existing in the mind of a person, of which certainty cannot assuredly be predicated, for nothing is more uncertain or more variable than an estimate of value. *Ham v. Santa Rosa Bank*, 62 Cal. 125, 136, 45 Am. Rep. 654.

The term "estimate of value," as used in the insurance law, in speaking of an estimate of value of the insured property made by the owner thereof, means an opinion of value. An erroneous estimate of value in such cases is not sufficient to invalidate the policy unless the overvaluation is intentional and fraudulent. *Wheaton v. North British & M. Ins. Co.*, 18 Pac. 758, 761, 76 Cal. 415, 9 Am. St. Rep. 216.

The ordinary meaning of "estimate" is to calculate roughly, or to form an opinion as to the amount from imperfect data. In this sense, the term "estimated capacity of a car" means substantially the supposed or probable capacity of the car. *Louisville, H. & St. L. Ry. Co. v. Chandler's Adm'r* (Ky.) 72 S. W. 805.

**Of damages.**

Pol. Code, § 2686, providing that the report of viewers of land condemned for the purpose of a road shall contain the "estimate of the damage to the owner," means the lump sum which, in the judgment of the viewers, was the proper amount to be paid to the owner, without specifying and distinguishing between the items of damage. *Monterey County v. Cushing*, 23 Pac. 700, 703, 83 Cal. 507.

**ESTIMATED CAPACITY.**

The "estimated capacity of an irrigation canal" means the ability of a canal to supply water, based on its physical capacity, and the probability of obtaining water from the stream supplying it under normal conditions during the season of irrigation. *Blakely v. Ft. Lyon Canal Co.*, 73 Pac. 249, 250, 81 Colo. 224.

A complaint alleged that the estimated carrying capacity of defendant's canal was 500 water rights of 1.44 cubic feet each per second, and that defendant had sold certain of such rights to plaintiffs under written contracts which provided that, when the company had sold water rights equal to the estimated capacity of its canal, stock should be delivered to each purchaser, that the company should not be liable for deficiency in the supply of water from natural causes, and that if, from causes beyond its control, the supply should be unequal to the estimated capacity of the canal, or if the supply should be insufficient to furnish the stipulated amount, defendant might prorate the water

among the holders; that 366½ of such rights had been sold; that, by reason of prior appropriations of water of the stream supplying defendant's canal, the supply of water was insufficient to furnish each holder 1.44 cubic feet per second; that for two or more years defendant had repeatedly refused to dispose of additional water rights, and admitted that it could not do so without violating its duty to present owners; but that defendant was now about to sell a large number of additional rights. Held, that "estimated capacity" meant and referred to the supply of water, and not to the carrying capacity of the canal, and, it being alleged that the water rights sold exceeded such supply, it was error to sustain a demurrer to the complaint. *Wyatt v. Larimer & Weld Irrigation Co.*, 83 Pac. 144, 149, 18 Colo. 298, 36 Am. St. Rep. 280.

### ESTIMATED CASH VALUE.

Where an insurance policy speaks of the property as of the estimated cash value of \$1,950, and the words "estimated cash value" appear in subsequent parts of the policy, they will be construed to refer to the estimated cash value at the time the insurance was effected. *Elliott v. Lycoming County Mutual Ins. Co.*, 66 Pa. (16 P. F. Smith) 22, 26, 5 Am. Rep. 323.

### ESTIMATED COST.

"Estimated cost," as used in a contract to pay a certain per cent. of the estimated cost of a building for the preparation of architectural plans therefor, means the reasonable cost of the building, estimated in accordance with the plans and specifications referred to, and not necessarily the amount of the actual estimate made by a builder, nor an estimate agreed upon by the parties, nor yet an estimate or bid accepted by the defendant. *Lambert v. Sanford*, 12 Atl. 519, 520, 55 Conn. 437.

### ESTIMATED DAMAGES.

The expression "estimated damages," as used in a contract providing that on a breach thereof a party should recover a certain sum as estimated damages, is equivalent to the term "liquidated damages." *Gallo v. McAndrews* (U. S.) 29 Fed. 715.

### ESTIMATION.

See "By Estimation."

## ESTOPPEL

See "Corporation by Estoppel."

The name "estoppel" was given, says Coke, because a man's own act stoppeth up his mouth to allege or plead the truth. *Martin v. Maine Cent. R. Co.*, 21 Atl. 740, 741, 83

Me. 100; *Behr v. Connecticut Mut. Life Ins. Co.* (U. S.) 4 Fed. 357, 363; *Welland Canal Co. v. Hathaway* (N. Y.) 8 Wend. 480, 24 Am. Dec. 51; *Frost v. Saratoga Mut. Ins. Co.* (N. Y.) 5 Denio, 154, 157, 49 Am. Dec. 234; *Davis v. O'Ferrall* (Iowa) 4 G. Greene, 358, 363; *Armfield v. Moore*, 44 N. C. 157, 161; *Snider v. Newell*, 44 S. E. 354, 355, 132 N. C. 614; *Gibson v. Gibson*, 15 Mass. 106, 110, 8 Am. Dec. 94; *Hudson v. Inhabitants of Winslow Tp.*, 35 N. J. Law (6 Vroom) 437, 441.

Lord Coke is not to be understood as meaning that the party is precluded from alleging the truth, as truth, but because what he now assumes to be true is something inconsistent with his former position. *Haynes v. Stevens*, 11 N. H. 28, 31.

Estoppel is said to be when a man is concluded by his own act to say the truth—a rather startling definition, as if the truth was the enemy which the law of estoppel was invented to exclude, while its real object is to repress fraud, and to render men truthful in their dealings with each other. A better definition has been given by some old authorities: "An estoppel is where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth." It is an admission, or something which the law treats as equivalent to an admission, of an extremely high and conclusive character—so high and conclusive that the party whom it affects is not permitted to aver against it, or to offer evidence against it, or to offer evidence to controvert it. *Demarest v. Hopper*, 22 N. J. Law (2 Zab.) 599, 619.

An estoppel is where a man has done some act which estops or precludes him from averring anything to the contrary. *Grant v. Savannah, G. & N. A. R. Co.*, 51 Ga. 348, 355 (3 Bl. Comm. 308); *Davis v. O'Ferrall* (Iowa) 4 G. Greene, 358, 363; *Reid's Adm'r v. Bengé* (Ky.) 66 S. W. 997, 998, 57 L. R. A. 253.

Estoppel may arise either by matter of record, by deed, or by matter in pais. *Grant v. Savannah, G. & N. A. Co.*, 51 Ga. 348, 355; *Davis v. Collier*, 13 Ga. 485, 491; *Chesser v. De Prater*, 20 Fla. 691, 696; *Sparrow v. Kingman*, 1 N. Y. (1 Comst.) 242-256; *Lyle v. Richards* (Pa.) 9 Serg. & R. 322, 371.

An estoppel may be defined, in a general sense, to be a preclusion of a person to assert a fact which has been admitted or determined under circumstances of solemnity, such as by matter of record or by deed, or which he has by an act in pais induced another to believe and act upon to his prejudice. *Williams v. Supreme Council American Legion of Honor*, 80 N. Y. Supp. 713, 717, 80 App. Div. 402; *Veeder v. Mudgett*, 95 N. Y. 295, 310; *Lyon v. Town of Tonawanda* (U. S.) 98 Fed. 361, 370.

An estoppel is founded on a preclusion in law which prevents a man from alleging or

denying a fact in consequence of his own previous act, allegation, or denial. *Stuyvesant v. Grissler* (N. Y.) 12 Abb. Prac. (N. S.) 6, 18.

The very meaning of estoppel is when an admission is intended to lead and does lead the man with whom the party is dealing into a line of conduct which must be prejudicial to his interest unless the party estopped be cut off from the power of retraction. *Turner v. Edwards* (U. S.) 24 Fed. Cas. 350, 351.

An estoppel is, in substance, an admission made by a party in relation to a subject-matter; and, after admitting the fact, he cannot controvert it, but is bound by the admission. *Haynes v. Stevens*, 11 N. H. 28, 31.

An estoppel is an admission or determination under circumstances of such solemnity that the law will not allow the fact so admitted or established to be afterwards drawn in question between the same parties or their privies. *Sly v. Hunt*, 159 Mass. 151, 153, 34 N. E. 187, 188, 21 L. R. A. 680, 38 Am St. Rep. 403.

An estoppel exists where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position. The word "willfully," as used in this connection, is not to be taken in the limited sense of the term "maliciously" or of the term "fraudulently," nor does it of necessity imply an active desire to produce a particular impression or to induce a particular line of conduct. Whatever the motive may be, if one so acts or speaks that the natural consequence of his words or conduct will be to influence another to change his condition, he is legally chargeable with an intent—a willful design—to induce the other to believe him. *Preston v. Mann*, 25 Conn. 118, 128.

Estoppel, in connection with the law of evidence, arises when a man has done some act which the policy of the law will not permit him to gainsay or deny. If it be a recital of facts in a deed, there is implied a solemn engagement that the facts are true as they are recited. The doctrine of estoppel has, however, been guarded with great strictness, not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already solemnly recited, but because the estoppel may exclude the truth; hence estoppels must be certain to every intent, for no one should be denied setting up the truth, unless it is in plain contradiction of his former allegations and acts. Evidence is excluded and witnesses rendered incompetent by the doctrine of estoppel as applied to evidence and witnesses, but this is often a different thing from the

estoppel which precludes a man from making a certain claim. In such cases his evidence and facts showing his right may be excluded, not because he is estopped from giving such evidence under any circumstances, but because such facts are irrelevant. There is nothing to which they apply, for he is estopped from making the claim. The estoppel, however, relates to the making of the claim, and not the giving of the testimony; but in such a case, if the testimony be relevant to the claim of another, it may be given to support such a claim. *South v. Deaton* (Ky.) 68 S. W. 187, 189.

There is no such thing as estoppel against truth in a court of equity. It is but a term of law. Where there is an untrue presumption of law, the chancellor will give relief. According to the English common law, a man shall always be estopped by his own deed, and not be permitted to aver or prove anything in contradiction to that which he has once so solemnly and deliberately avowed. A host of authorities might be cited to this point, but yet, notwithstanding all these authorities, it cannot be denied that the settled law among us is different; and, in *scire facias* on a mortgage given for the price of land, the mortgagor may give in evidence that part of the mortgaged property had been evicted by a title paramount to that of the vendor. *Steinhauer v. Witman* (Pa.) 1 Serg. & R. 438, 442, 444.

An estoppel is the conclusive ascertainment of a fact by the parties so that it no longer can be controverted between them. It is not solely the result of the act of the parties themselves, but may be by the adjudication of a court appointed to try the facts. *Wilkins v. Suttles*, 114 N. C. 550, 556, 19 S. E. 606 (citing *Woodhouse v. Williams*, 14 N. C. 508).

The distinguishing feature of an estoppel is that under no circumstances can it be averred against. It is not susceptible of explanation, and often speaks against the truth, and for this reason has been regarded as odious. *Behr v. Connecticut Mut. Life Ins. Co.* (U. S.) 4 Fed. 357, 363.

An estoppel is always something personal. The party is estopped from recovering his claim or proving his defense by some act in law or in deed which precludes him from going beyond it. It always arises from the act of the party estopped. *Gavin v. Graydon*, 41 Ind. 559, 566.

Estoppel had its origin in the determination to prevent fraud resulting in injustice. *Thomas v. Romano*, 38 South. 969, 970, 82 Miss. 256 (citing *Kelly v. Wagner*, 61 Miss. 299, 302; *Staton v. Bryant*, 55 Miss. 261, 269.)

Estoppel between private parties, whether acting in person or by agent, involves

more or less the idea of fraud. The notion of an estoppel, as derived from the force and effect of a judgment or other judicial act, is technical, and involves the idea that, what one does by the hand and operation of the law, the law will not lend its hand to undo or render void. *Ward v. Cohen*, 3 S. C. (3 Rich.) 838, 845. It is the foundation of the doctrine of estoppel that the party estopped has designedly so acted or spoken as to induce others to change their position injuriously to themselves. In other words, the doctrine of estoppel is founded on the fraud of the party who is held to be estopped. *Reid's Adm'r v. Benge*, 66 S. W. 997, 998, 112 Ky. 810.

### ESTOPPEL BY CONTRACT.

The phrase "estoppel by contract" embraces all cases in which there is an actual or a virtual undertaking to treat a fact as settled—as, for example, a contract based on one's having a certain title to property will estop the parties in the performance of the contract from claiming a different title. *Bricker v. Stroud*, 56 Mo. App. 183, 188.

### ESTOPPEL BY DEED.

Whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. This is the effect where a man by his deed grants, bargains, and sells real estate, and covenants therein for the quiet possession of the grantee against the party of the first part, his heirs and those claiming through him, although there be no covenant of seisin, or express statement that the grantor was seised. The estoppel works upon the estate, and binds an after-acquired title as between the parties and privies. This doctrine of estoppel is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one; and, although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious and not to be favored, still it should be remembered that it debars it only in the case where its utterance would convict the party of a previous falsehood, and would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine,

therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when, in conscience and honesty, he should not be allowed to speak. *Taggart v. Risley*, 4 Or. 235, 242. The estoppel works upon the estate, and binds a future-acquired title, as between parties and privies. *Van Rensselaer v. Kearney*, 52 U. S. (11 How.) 297, 325, 13 L. Ed. 703.

The principle that a party is concluded by the admissions of his own deed is the admitted rule of law, and such admissions cannot be put in dispute either by the pleadings or the evidence. The principle is applicable, however, only in the instance of a deed, where the act of the party is admitted. A party cannot at the same time admit the deed, and also traverse the truth of its contents. *Hudson v. Inhabitants of Winslow Tp.*, 35 N. J. Law (6 Vroom) 437, 441.

Estoppel by deed avails only in favor of the parties and privies, and judgment creditors are not privies, either in blood, in law, or in estate; not in blood, where no relationship is alleged; not in law, for the legal relation between debtor and creditor is one of antagonism, rather than of confidence or of mutual dependence; nor are they by estate, for they have none in the debtor's land. What proves that they have no interest in the land is that a judgment against one of the judgment creditors would not even be a lien on the land of his debtor. *Appeal of Water*, 35 Pa. (11 Casey) 523, 526, 78 Am. Dec. 354.

Estoppel by warranty is based on the fundamental principle of giving effect to the manifest intention of the grantor, appearing in the deed, as to the lands or estates to be conveyed, and of preventing the grantor's derogating from or destroying his own grant by any subsequent act. *Condit v. Bigelow*, 54 Atl. 160, 164, 64 N. J. Eq. 504 (citing *Staffordville Gravel Co. v. Newell*, 53 N. J. Law [24 Vroom] 412, 19 Atl. 209).

### ESTOPPEL BY ELECTION.

Estoppel by election is an estoppel predicated on a voluntary and intelligent action or choice of one of several things which is inconsistent with another. Thus *Bigelow*, *Estoppel*, 508, says: "Whenever the rights of other parties have intervened by reason of a man's conduct or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches was based on a knowledge of the facts, he will be deemed to have made an effectual election, and will not be permitted to disturb the state of things, whatever may have been his rights at first. Estoppel by election is a part of the general subject of estoppel in pais, which is also defined by *Bigelow* (*Bigelow*, *Estoppel*, 345) as "an indisputable ad-

mission, arising from circumstances, that the party claiming the benefit of it has, while acting in good faith, been induced by the voluntary and intelligent action of the party against whom it is alleged to change his position." *Yates v. Hurd*, 8 Pac. 575, 579, 8 Colo. 343.

### ESTOPPEL BY JUDGMENT.

See "Res Adjudicata."

"Estoppel by judgment" means the same as "res adjudicata." *State v. Torinus*, 9 N. W. 725, 726, 28 Minn. 175.

### ESTOPPEL BY LACHES.

Estoppel by laches consists of a neglect to do something which one should do, or to seek to enforce a right, at a proper time. *Hunt v. Reilly*, 50 Atl. 833, 23 R. I. 471.

### ESTOPPEL BY RECORD.

An estoppel by the record occurs when, in an action, it appears by the record of a competent tribunal that the same subject-matter has been litigated between the same parties, or those in privity with them, and judgment rendered thereon. When the identity of the subject-matter of the two actions does not clearly appear from the record, resort may be had to parol evidence to establish such identity. A judgment of non-suit entered against the plaintiff in a former action because the evidence failed to show that the defendant made the contract on which the action was brought does not determine any question affecting the merits of the action, and has never been regarded as a bar to a subsequent action for the same cause. *Reynolds v. Garner* (N. Y.) 66 Barb. 310, 313.

It is not the recovery, but the matter alleged by the party upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action for trespass is only a bar to the future recovery of damages for the same injury, but the estoppel precludes the parties from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in an estate or law, has been, on such issue joined, solemnly found against them. *Wood v. Jackson* (N. Y.) 8 Wend. 9, 22 Am. Dec. 603.

A declaration to one person or in one case is not an estoppel as to another person, or in another suit with a different party. Accordingly, where one, at a time when his wife was claiming alimony, averred that he did not own a farm on which he lived, and that it belonged to another, such declaration could not be taken advantage of by such other in a subsequent action, especially where

there was evidence going to show that the allegation was made at the suggestion of the person afterwards seeking to take advantage of it. *Miles v. Miles* (Pa.) 3 Watts & S. 135, 137.

Any confession or admission made in pleading in a court of record, whether it be expressed, or implied from pleading over without a traverse, will forever preclude the party from afterwards contesting the same fact in any subsequent suit with his adversary. Where one in a pleading bases his right to possession of land on the ground that a lease to him has not yet expired, and his adversary accepts this as an assurance that his possession will not become hostile to the latter title, he is estopped by matter of record. *Sullivan v. Colby* (U. S.) 71 Fed. 480, 484, 18 C. C. A. 193.

### ESTOPPEL BY VERDICT.

Where some controlling fact or question material to the determination of both causes has been adjudicated in a former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit, irrespective of the question whether the cause of action is the same in both suits or not. This is sometimes denominated an "estoppel by verdict." *Board of Directors of Chicago Theological Seminary v. People*, 59 N. E. 977, 979, 189 Ill. 439; *Wright v. Griffee*, 35 N. E. 782, 783, 147 Ill. 496, 37 Am. St. Rep. 228.

Estoppel by verdict extends only to the facts in issue and determined, and does not estop the parties from disputed doctrines of law applied to the facts in the first case. *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 424, 63 N. W. 1088.

### ESTOPPEL IN PAIS.

The term "estoppel in pais" is used to designate estoppel not of record or under seal. *Ragsdale v. Gohlke*, 36 Tex. 286, 288.

At the common law, estoppels are founded on deeds and records of court, but estoppels in equity are estoppels in pais. The doctrine of this kind of estoppels was at first administered as a branch of equity jurisprudence, but is now incorporated into the law. The rule with regard to common-law estoppels is a precise and technical one, though supposed to be founded in principles of truth and justice, such as the statement of material facts in specialties, or as found by verdicts or judgments upon trials in courts of record. The common-law rule is obviously too narrow and inadequate for the attainment of equity in the multiplied transactions of modern times, and hence the equitable es-

toppel of the present day. *West Winsted Sav. Bank & Bldg. Ass'n v. Ford*, 27 Conn. 282, 290, 71 Am. Dec. 68.

Estoppels in pais seem, in their common-law origin, to have arisen only in the case of those solemn and peculiar acts to which the law gave the power of creating a right or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Mere acts, statements, or admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by the law, were not considered as estoppels, and had no other weight than that of evidence, more or less strong, but which might be explained or rebutted. But equitable estoppels in pais generally, if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other. *Davis v. Davis*, 26 Cal. 23, 38, 85 Am. Dec. 157.

"Equitable estoppel is the effect of the voluntary conduct of a party, whereby he is absolutely precluded, both at law and in equity, from asserting rights which might have perhaps otherwise existed, either of property, of contract, or of remedy, as against another person who has in good faith relied upon such conduct, and has been led thereby to change his condition for the worse, and who, on his part, acquires some corresponding right, either of property, of contract, or of remedy." *Louisville Banking Co. v. Asher* (Ky.) 65 S. W. 831 (quoting 2 Pom. Eq. Jur. § 804); *The Alberto* (U. S.) 24 Fed. 379, 382; *Richardson v. Olivier* (U. S.) 105 Fed. 277, 282, 44 C. C. A. 468, 53 L. R. A. 113; *The Ottumwa Belle* (U. S.) 78 Fed. 643, 647; *First Nat. Bank v. Dean*, 17 N. Y. Supp. 375, 377, 60 N. Y. Super. Ct. 299; *Nell v. Dayton*, 45 N. W. 229, 230, 43 Minn. 242; *Griffith v. Rife*, 12 S. W. 168, 172, 72 Tex. 185; *Whiteselle v. Texas Loan Agency* (Tex.) 27 S. W. 309, 315; *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 50 S. W. 508, 509, 66 Ark. 287; *Nash v. Baker*, 58 N. W. 706, 707, 40 Neb. 294; *Ricketts v. Scothorn*, 77 N. W. 365, 369, 57 Neb. 51, 42 L. R. A. 794, 78 Am. St. Rep. 491.

To constitute an estoppel, the following elements are essential: (1) There must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth con-

cerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or, at least, with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse. *First Nat. Bank v. Dean*, 17 N. Y. Supp. 375, 377, 60 N. Y. Super. Ct. 299 (citing Pom. Eq. Jur.); *Grange v. Palmer*, 10 N. Y. Supp. 201, 204, 56 Hun. 481; *Roberts v. Trammell*, 40 N. E. 162, 15 Ind. App. 445; *First Nat. Bank v. Williams*, 26 N. E. 75, 77, 126 Ind. 423; *Appeal of Crans* (Pa.) 9 Atl. 282, 287; *Brigham Young Trust Co. v. Wagener*, 40 Pac. 764, 765, 12 Utah. 1; *Blodgett v. Perry*, 10 S. W. 891, 892, 97 Mo. 263, 10 Am. St. Rep. 307; *Gentry v. Gentry*, 26 S. W. 1060, 1095, 122 Mo. 202; *Taylor v. Zepp*, 14 Mo. 482, 488, 55 Am. Dec. 113; *Acton v. Dooley*, 74 Mo. 63, 67; *De Berry v. Wheeler*, 30 S. W. 338, 339, 128 Mo. 84, 49 Am. St. Rep. 538; *Hall v. Warren* (Ariz.) 48 Pac. 214, 216; *Smith v. Brown* (Ariz.) 42 Pac. 949, 950; *Hampton v. Alford* (Tex.) 14 S. W. 1072, 1073; *Long v. Cude* (Tex.) 26 S. W. 1000; *Nichols-Steuart v. Crosby*, 29 S. W. 380, 381, 87 Tex. 443; *Security Mortgage & Trust Co. v. Caruthers*, 32 S. W. 837, 843, 11 Tex. Civ. App. 430; *Chesapeake & O. R. Co. v. Walker*, 40 S. E. 633, 641, 100 Va. 69 (quoting 4 Am. & Eng. Dec. 268); *Stevens v. Dennett*, 51 N. H. 324, 333; *Troy v. Rogers*, 20 South. 999, 1003, 113 Ala. 131; *Griffith v. Wright*, 6 Colo. 248, 249.

To constitute an estoppel in pais, there must be first an admission inconsistent with the evidence which he has to give, or the title or claim which he proposes to set up; second, an action by the other party upon such admission; third, an injury to him by allowing the admission to be disproved. *Chouteau v. Goddin*, 39 Mo. 229, 250, 90 Am. Dec. 462; *Newman v. Hook*, 37 Mo. 207, 213, 90 Am. Dec. 378.

An equitable estoppel in pais requires, as to the person against whom the estoppel is claimed, opportunity to speak, duty to speak, failure to speak, and reliance in good faith upon such failure. *Priewe v. Wisconsin State Land & Improvement Co.*, 79 N. W. 780, 782, 103 Wis. 537, 74 Am. St. Rep. 904.

"Estoppel" is defined to be the preclusion of a person from ascertaining a fact by previous conduct inconsistent therewith on his own part or on the part of those under whom he claims. *Stevens on Pleading* de-

ines "estoppel" to be a preclusion in law which prevents a man alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor; and it has been repeatedly decided that the principle of estoppel is applicable to all cases where one by word, act, or conduct willfully caused another to believe in the existence of a certain state of things, and thereby induced him to act on this belief injuriously to himself or to alter his own previous condition to his injury. The law of estoppel may be briefly laid down as follows: (1) Words and admissions, or conduct, acts, and acquiescence, or all combined, causing another to believe in the existence of a certain state of things, (2) in which the person so speaking, admitting, acting, and acquiescing does so willfully, culpably, or negligently, (3) by which such other person is or may be induced to act so as to change his own previous position injuriously. *Coogler v. Rogers*, 7 South. 391, 394, 25 Fla. 853.

An "estoppel in pais" consists necessarily of three elements—First, an admission inconsistent with the evidence offered to be given or the claim offered to be set up; second, that the other party has acted on the admission; and, third, that he will be injured by allowing the truth of the admission to be disproved. *Cremis v. Byrnes* (N. Y.) 4 E. D. Smith, 756, 758.

"Equitable estoppels" are estoppels which prevent a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Hallowell Nat. Bank v. Marston*, 27 Atl. 529, 531, 85 Me. 488; *Stone v. Bank of Commerce*, 19 Sup. Ct. 747, 758, 174 U. S. 412, 43 L. Ed. 1028; *McGregor v. Equitable Gas Co.*, 21 Atl. 13, 14, 139 Pa. 230; *McCreary v. McCorkle* (Tenn.) 54 S. W. 53, 57; *International Bank of St. Louis v. German Bank*, 8 Mo. App. 362, 371.

"Estoppel in pais presupposes an error or a fault, and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another." *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 645, 19 L. Ed. 1008.

Estoppel presupposes error upon one side and fault or fraud on the other, or some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. The primary ground of that doctrine is that it would be a fraud to assert what one's previous conduct had denied, when upon the faith of that denial others have acted. In *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 157, the court says equitable estoppels in pais are applied to

prevent injury which would ensue to one who from the acts and conduct of another, were he permitted to gainsay the truth of such acts or conduct. *Cornell University v. Parkinson*, 53 Pac. 133, 140, 59 Kan. 365.

"Equitable estoppel," says Justice Carpenter, in *Richman v. Baldwin*, 21 N. J. Law (1 Zab.) 395, 403, "rests upon the principle that when any one has done an act or made a statement which would be a fraud on his part to controvert or impair, and such act or statement has so influenced any one that it has been acted upon, the party making it will be estopped and cut off from the power of retraction. It must appear that he has done some act or made some admission inconsistent with his claim, that the other party has acted on such conduct, and that such party will be injured by allowing such conduct or admission to be withdrawn." *Martin v. Righter*, 10 N. J. Eq. (2 Stockt.) 510, 526.

In *Paxson v. Brown*, 10 C. C. A. 185, 143, 61 Fed. 874, it was declared that no principle is more salutary, none rests on more solid foundation, than that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is to be conclusively estopped to interpose such denial. This principle is salutary, because it represses fraud and falsehood. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believes him. *Union Pac. Ry. Co. v. United States* (U. S.) 67 Fed. 975, 979, 15 C. C. A. 123.

The doctrine of waiver by estoppel is that a party cannot occupy inconsistent grounds or positions; that one who relies upon the forfeiture of a contract cannot at the same time treat the contract as an existing valid one, nor call upon the other party to do anything required by it. *Cannon v. Home Ins. Co.*, 53 Wis. 593, 11 N. W. 11. But the doctrine of estoppel cannot be successfully invoked to create a liability not contracted for, or one which would be outside or in violation of the powers of the company. *Kidder v. Knights Templars' & Masons' Life Indemnity Co.*, 69 N. W. 364, 367, 94 Wis. 538.

Equitable estoppels are in a great degree designed to prevent circuity of action by preventing injuries by which redress would have to be sought by suit and cannot arise unless the evidence discloses some default or fraud for which compensation might be



awarded by equity or law. *Barden v. Overmeyer*, 34 N. E. 439, 440, 134 Ind. 660.

"A man is said to be estopped when he has done some act which the law will not permit him to deny." *Davis v. O'Ferrall* (Iowa) 4 G. Greene, 358, 363.

Estoppels in pais depend upon facts which are rarely in any two causes precisely the same. The principle upon which they are applied is clear and well defined. A party who, by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled. That would be a fraud. *Hanly v. Watterson*, 39 W. Va. 214, 224, 19 S. E. 536, 540 (citing *Jowers v. Phelps*, 33 Ark. 465, 468).

"Estoppel in pais" may be defined to be a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged. *Pope v. J. K. Armsby Co.*, 111 Cal. 159, 164, 43 Pac. 589, 590 (citing *Bigelow*, Estop. [4th Ed.] 445); *Boles v. Bennington*, 136 Mo. 522, 530, 38 S. W. 306.

"To raise an admission from the rank of evidence to that of estoppel, it must not only be inconsistent with the evidence proposed to be given in a subsequent controversy, but must also have so influenced the conduct of the other party that loss or injury will result from allowing the evidence to be introduced. But an estoppel, being in its nature defensive, will not be used to effectuate a gain, and will not be enforced further than is requisite to protect from injury." *Adler v. Pin*, 80 Ala. 351, 354.

The doctrine of estoppel in pais has no application where everything is equally known to both parties, or the party sought to be estopped was ignorant of the facts out of which his rights sprung, or where the other party was not influenced by the acts pleaded as an estoppel. *Ross v. Banta*, 39 N. E. 732, 734, 140 Ind. 120 (citing *Fletcher v. Holmes*, 25 Ind. 458; *McGirr v. Sell*, 60 Ind. 249; *Long v. Anderson*, 62 Ind. 537; *Lash v. Rendell*, 72 Ind. 475; *Hosford v. Johnson*, 74 Ind. 479).

An equitable estoppel is said to be where one knowingly, though he does it passively by looking on, suffers another to purchase land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his

conscience is bound by this equitable estoppel. *Cochran v. Harrow*, 22 Ill. 345, 349.

Equitable estoppel may be said, in general terms, to be described as such conduct by a party that it would be fraudulent, or a fraud upon the rights of another, for him afterwards to repudiate and set up terms inconsistent with it. *Norfolk & W. R. Co. v. Perdue*, 21 S. E. 755, 759, 40 W. Va. 442; *The Ottumwa Belle* (U. S.) 78 Fed. 643, 649.

The doctrine of estoppel is applied to prevent statements of intended abandonment of existing rights from operating as a fraud upon a party who has been led to rely on them and thereby change his conduct or alter his condition. *Stayton v. Graham*, 21 Atl. 2, 4, 139 Pa. 1.

A clear case of admission by the defendant, intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which was prejudicial to his interests, unless the defendant be cut off from the power of retraction, is the very definition of an "estoppel in pais." *Ross v. Banta*, 39 N. E. 732, 734, 140 Ind. 120; *Fletcher v. Holmes*, 25 Ind. 458, 459; *Dezell v. Odell* (N. Y.) 3 Hill, 215, 222, 38 Am. Dec. 628; *Blodgett v. Perry*, 10 S. W. 891, 892, 97 Mo. 263, 10 Am. St. Rep. 307.

In order that estoppel may apply, it must appear—first, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved. Story says: "The doctrine [of equitable estoppel] proceeds upon the ground of constructive fraud, or of gross negligence, which, in effect, implies fraud." And, to the effect that fraud is an essential element of estoppel, see *Commonwealth v. Moltz*, 10 Pa. (10 Barr) 527, 531, 51 Am. Dec. 499; *Crest v. Jack* (Pa.) 3 Watts, 238, 27 Am. Dec. 353; *Copeland v. Copeland*, 28 Me. (15 Shep.) 525, 539; *Whitaker v. Williams*, 20 Conn. 98, 104; *Delaplaine v. Hitchcock* (N. Y.) 6 Hill, 14, 16; *Brewer v. Boston & W. R. R. Corp.*, 5 Metc. 478, 479, 39 Am. Dec. 694. Under these principles statements, by one having a grant to a certain amount of land for which he himself had made a survey, that he did not claim any other land than that covered by his survey, were not binding on him, when it afterwards appeared that his survey was not legal or binding, and that the land to which he was really

entitled was other and different land. *Boggs v. Merced Min. Co.*, 14 Cal. 279, 366, 367.

#### As available in law.

While originally a creature of equity, equitable estoppel is now thoroughly incorporated into law, and is as available in a legal action as in an equitable one. *Dimond v. Mannheim*, 63 N. W. 495, 497, 61 Minn. 178.

Equitable estoppel arises upon facts which render their application in protection of rights equitable and just, and courts of equity recognize them in cases of equitable cognizance; but they are available at law, as well as in equity. Thus, where a city has stood by, and by long acquiescence has given an implied license to a riparian property owner to construct and maintain wharves in front of his land to navigable water in a river, over shore and submerged lands below high tide water mark to which the city held the legal title, and has for years regulated and taxed the structures of such owner, it is equitably estopped from asserting any claim to such lands which would dispossess the license or destroy its property right therein. *Sullivan Timber Co. v. City of Mobile* (U. S.) 110 Fed. 186, 197.

"Estoppels in pais" are called equitable estoppels, not because their recognition is peculiar to equitable tribunals, but because they arise upon facts which render their application in the protection of rights equitable and just. Courts of equity recognize them in cases of equitable cognizance; but the courts of law just as readily and freely, and it is never necessary to go into equity for the mere purpose of obtaining the benefit of an equitable estoppel. *Barnard v. German-American Seminary*, 49 Mich. 444, 445, 13 N. W. 811.

While the doctrine of equitable estoppel originated in courts of equity, it has been applied in cases arising in courts of law. Consequently, where the owner of land permitted its sale by a trustee, and appeared and objected to the manner of distributing the fund created thereby, and permitted the purchaser without objection to enter upon the land and expend a large sum upon its improvement, he cannot be permitted long afterwards to object to the purchaser's title, on the ground that the sale was invalid because of a deficiency in the decree under which the sale was made. *Kirk v. Hamilton*, 102 U. S. 68, 77, 26 L. Ed. 79.

#### Certainty.

"Every estoppel," says Lord Coke, "because it concludeth a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference." *Van Bibber v. Beirne*, 6 W. Va. 168, 178;

*Calkins v. Copley*, 29 Minn. 471, 472, 13 N. W. 904 (citing *Right v. Bucknell*, 2 Barn. & Adol. 278); *Lot v. Thomas*, 2 N. J. Law (1 Penning.) 407e, 411, 2 Am. Dec. 354.

Estoppels must be certain; that is, the fact agreed on or found must be some particular fact, and not a generality or matter of inference. *Armfield v. Moore*, 44 N. C. 157.

#### Intent.

To create an estoppel it is not necessary that the conduct be done with a fraudulent intent. *Shelby v. Bowden* (S. D.) 94 N. W. 416, 420 (citing *Dimond v. Mannheim*, 63 N. W. 495, 61 Minn. 178).

It is not essential to an estoppel in pais that there should have been an intention to deceive. *Crawford v. Lockwood* (N. Y.) 9 How. Prac. 547, 548.

Negligent silence may work an estoppel as effectually as an express representation. So, too, acts or conduct, though nothing is said, if they are calculated to mislead, and do in fact mislead, will work an estoppel, notwithstanding there was no intention to do so. *Tobias v. Morris*, 28 South. 517, 522, 126 Ala. 535.

The doctrine of estoppel in pais is simply the declaration of an equitable principle, to prevent injustice and to protect those who have relied upon the acts or admissions of others made with the expectancy that such reliance would be placed upon them. The authorities are a unit that, where a person has induced another to act in a particular manner, he will not be permitted to evade the effect of his admission, where injury would result to one who has parted with value on the strength of such admission. Intentional fraud is not the essence of the doctrine of equitable estoppel. *Hazard v. Wilson*, 50 N. Y. Supp. 280, 283, 22 Misc. Rep. 397.

In *McAfferty v. Conover's Lessee*, 7 Ohio St. 105, 70 Am. Dec. 57, it is said estoppels in pais are not allowed to operate, except where in good conscience and honest dealing the party ought not to be permitted to gain-say his admission; and in general the act or declaration of the party must be willful, with knowledge of the facts upon which any right he may have must depend, or whether his intention to deceive the other party. In *Beardsley v. Foot*, 14 Ohio St. 416, 84 Am. Dec. 405, it is said: "We think an estoppel may arise from admissions and declarations made without any fraudulent purpose. The circumstances may be such that good conscience and honest dealing may require a party to bear the consequences of his own negligent mistake, instead of throwing the resulting losses upon another whom he has

mislead." *Ensel v. Levy*, 19 N. E. 597, 599, 46 Ohio St. 255.

Estoppel by misconduct arises when one by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and to act accordingly. *Townsend v. Johnson*, 34 Minn. 414, 415, 26 N. W. 395 (citing *Pence v. Arbuckle*, 22 Minn. 417).

Estoppel does not always rest on the intention of the party to be affected by it, but is dependent rather upon the reasonable or legitimate effect of his statement or conduct in the particular matter upon the course of other persons. He will not be allowed to assert his lien to the prejudice of persons whom he has induced to believe that his debt has been satisfied or that he will claim no lien, and who in that belief have purchased that property on which the lien rests, or invested in bonds covered by mortgage thereon. Silence is sometimes as significant as a positive assertion, and when of such import is equally conclusive in favor of the person influenced thereby. *Bristol-Goodson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co.*, 42 S. W. 19, 21, 99 Tenn. 371.

For the application of the doctrine of equitable estoppel there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. In this class of cases the doctrine proceeds upon the ground of constructive fraud or of gross negligence, which in effect implies fraud. *Brant v. Virginia Coal & Iron Co.*, 98 U. S. 323, 23 L. Ed. 927.

#### **Knowledge by party claiming benefit.**

To work an estoppel in pais there must be conduct, acts, language, or silence amounting to a representation or a concealment of material facts, and the truth concerning these facts must be unknown to the party claiming the benefit of the estoppel. The estoppel does not apply where everything is equally well known to both parties. *Estis v. Jackson*, 16 S. E. 7, 8, 111 N. C. 145, 32 Am. St. Rep. 784.

An estoppel in pais arises when one who is ignorant of the material facts which condition a subject is intentionally or recklessly induced by the false representations or action of another to change his relation to it, so that he will be injured if he who made the false representations is permitted to prove the truth. But where a person who had knowledge of the actual value of his own stocks was not misled or induced to make a contract for sale of them by any misrepresentations of the defendant on that subject,

and defendant made no representations as to the value of plaintiff's stocks, and he and his associates fixed their own estimates of these values, there was none of the essential elements of an estoppel in pais. *Rockefeller v. Merritt* (U. S.) 76 Fed. 909, 916, 22 C. A. 608, 35 L. R. A. 633.

The distinction between the cases where acts or declarations of encouragement are necessary to create an estoppel and those where mere silence or acquiescence will be sufficient is one of principle, and each case as it arises must be assigned to one or the other class according to its circumstances, the chief of which is knowledge or ignorance of the party's own rights and the other's action; encouragement being necessary when the party is ignorant, and unnecessary when he has knowledge, because such knowledge creates a duty to speak. *Logan v. Gardner* (Pa.) 26 Wkly. Notes Cas. 497, 500, 20 Atl. 625, 627.

An estoppel in pais arises when by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence one person induces another to believe certain facts to exist, and such other, having the legal right to do so, relies and acts thereon to such an extent as to be misled to his prejudice. But this rule has no application when all the facts are within the knowledge of both parties. *Sanborn v. Van Duyn*, 96 N. W. 41, 44, 90 Minn. 215.

Mere silence, or some act done where the means of knowledge are equally open to both parties, does not estop the party doing the act or remaining silent. Consequently the fact that one was attorney for a plaintiff in an attachment proceeding, when in fact the plaintiff was already the owner of the property attached, does not estop such person from claiming the land under such plaintiff's prior title as against one purchasing at the attachment sale, where it does not appear that the purchaser at the attachment sale was misled by any action of the attorney, or that he was in ignorance of the true state of the title, or that the former deed to the plaintiff was not of record, or that any act of the attachment plaintiff induced him to buy the land, which otherwise he would not have bought. *Blodgett v. Perry*, 10 S. W. 891, 892, 97 Mo. 263, 10 Am. St. Rep. 807.

Estoppel can have no application where everything in relation to the transaction is equally known to both parties, and a receipt for money paid, the amount of which was known both by the payor and the payee, will not work an estoppel. *Lash v. Rendell*, 72 Ind. 475, 480.

#### **Knowledge by party to be estopped.**

In order to constitute an equitable estoppel by silence or acquiescence, it must be

made to appear that the fact upon which it is sought to make the estoppel operate was known to the party against whom the estoppel is urged. *Nash v. Baker*, 58 N. W. 706, 707, 40 Neb. 294.

A representation or concealment, to operate as an estoppel, must be made with knowledge of the facts by the party to be estopped, unless his ignorance is the result of negligence. For an estoppel to arise from silence, the silence must amount to bad faith. *Pettyjohn v. National Exch. Bank (Va.)* 43 S. E. 203, 206.

To create an estoppel it is not necessary that the facts must be actually known to the party estopped. It is enough if the circumstances are such that a knowledge of the truth is necessarily imputed. *Dimond v. Manheim*, 63 N. W. 495, 61 Minn. 178; *Shelby v. Bowden (S. D.)* 94 N. W. 416, 420.

If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other through that belief does an act which he would not have otherwise done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation, and this will constitute an estoppel in pais. *Mayer v. Ramsey*, 46 Tex. 371, 375. If by his representations or silence when he ought to have spoken a person has induced a third party to act upon the belief that another is the owner of the property, he will not be heard to say that he was not aware of his claim, and ordinary prudence will have required him to know of it. *Stewart v. Crosby (Tex.)* 26 S. W. 138, 140.

In order that estoppel may apply to a title of property, it must appear that the party making the admission by his declaration or conduct was apprised of the true state of his own title. *Boggs v. Merced Mining Co.*, 14 Cal. 279.

Where a surety for the completion of a building furnishes material for its completion after he knows of a change in the contract, he is not estopped, in an action to recover for such material, from pleading the alteration as a defense to a counterclaim of the owner against him as surety, where the alterations were made without his knowledge. *Miller-Jones Furniture Co. v. Ft. Smith Ice & Cold Storage Co.*, 50 S. W. 508, 509, 66 Ark. 287.

#### Legal estoppel distinguished.

Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning, as including both his words spoken, or the written words or positive acts, and silence or negative omission to do anything. It is essen-

tially and widely different from the legal estoppels in pais of Lord Coke. Legal estoppels exclude evidence of the truth and the equity of the particular case to support a strict rule of law on ground of public policy. Equitable estoppels are admitted on exactly opposite grounds, of promoting the equity and justice of the individual case by preventing a party from asserting his right under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Martin v. Maine Cent. R. Co.*, 21 Atl. 740, 741, 83 Me. 100.

Technical estoppels, which conclude the party from showing the truth, are for the most part by deed or matter of record, but equitable estoppels are less solemn acts and admissions, having the force of concluding the party. *Dezell v. Odell (N. Y.)* 3 Hill, 215, 219, 38 Am. Dec. 628.

A technical estoppel can only be by deed or matter of record, but an estoppel in pais may be given in evidence to the court and jury, and may operate as effectually as a technical estoppel under the direction of the court. There are many acts which have been adjudged to be estoppels in pais, such as livery, entry, acceptance of rent, etc. In many, and probably most, instances, whether the act or admission shall operate by way of estoppel or not must depend on the circumstances of the case. As a general rule a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. *Welland Canal Co. v. Hathaway (N. Y.)* 8 Wend. 480, 483, 24 Am. Dec. 51.

"When a party, either by his declaration or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission, if the consequence would be the hurt and injury to such third person, or to some one claiming under him. Such declarations and admissions are regarded as equitable estoppels, or estoppels in pais. They conclude as evidence and not as technical estoppels at common law. The estoppel is applied in these cases, not on the ground of unlawful misrepresentation or fraud in making the admission or declaration, but on the ground that it will be a fraud to show that it is untrue to the prejudice of one who has acted upon the faith of the statement." *Kingsley v. Vernon*, 6 N. Y. Super. Ct. (4 Sandf.) 361, 364.

#### Mutuality.

Estoppels must be mutual; that is, if one side is bound, the other must be. *Armfield v. Moore*, 44 N. C. 157, 163.

Mutuality is an essential ingredient of every estoppel. *City of Unionville v. Martin*, 88 S. W. 605, 608, 95 Mo. App. 28.

Estoppel must be mutual and reciprocal, and is founded on the idea that the acts of the party estopped must result in injury to the other party, and, generally, that it would be a fraud if the right asserted be maintained. As between a citizen who has performed service as a public officer for a compensation fixed by law, and a state or county which has received the benefit of the services, no question of estoppel as to compensation can arise by the acceptance of a less sum. *Gallagher v. City of Lincoln*, 88 N. W. 505, 506, 63 Neb. 339.

#### **Prejudice to person claiming benefit.**

An estoppel in pais may be defined to be a right arising from acts, admissions, or conduct which may have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged. *Johnson-Brinkman Commission Co. v. Missouri Pac. Ry. Co.*, 28 S. W. 870, 873, 126 Mo. 344, 28 S. W. 807, 26 L. R. A. 840, 47 Am. St. Rep. 675; *Boles v. Bennington*, 38 S. W. 306, 308, 136 Mo. 522 (citing *Bigelow, Estop.* [4th Ed.] 445; *McGuffey v. O'Reilly*, 88 Mo. 418); *Dolbeer v. Livingston*, 35 Pac. 328, 330, 100 Cal. 617; *Ricketts v. Scothorn*, 77 N. W. 365, 367, 57 Neb. 51, 42 L. R. A. 794, 73 Am. St. Rep. 493.

An estoppel in pais, or equitable estoppel, is an admission intended to influence the conduct of the one with whom he is dealing, and actually leading him into a line of conduct which might be prejudicial to his interest, unless the party be cut off from the power of retraction. *Dakin v. Anderson*, 18 Ind. 52, 54; *Church v. Florence Iron Works*, 45 N. J. Law (16 Vroom) 129, 133; *Leland v. Isenbeck*, 1 Idaho, 469, 472.

As a general rule the doctrine of estoppel is not applicable, except in cases where the person against whom it is invoked has by his representations and conduct misled another to his injury, so that it would be a fraud to allow the true state of facts to be proved. *Taylor v. Cussen*, 90 Va. 40, 17 S. E. 721; *Pettyjohn v. National Exch. Bank (Va.)* 43 S. E. 203, 206.

The doctrine of equitable estoppel is founded upon equity and good conscience, and the party claiming the estoppel must have done something, paid something, or in some way changed his position for the worse, so that he will not be left or cannot be put back in his former condition in case the other party is allowed to assert his original rights. *Neill v. Dayton*, 45 N. W. 229, 230, 43 Minn. 242.

Estoppels in pais are founded on law, honor, and conscience, when confined to their

legitimate purposes of preventing one man from being injured by the wrongful act of another; but, when no injury results from the misrepresentation, its discussion belongs to the forum of morals, and not to judicial tribunals. *Appeal of Viting*, 17 Pa. (5 Harris) 216. No principle is better settled than that a party is not estopped by his silence, unless it has misled another. *Philadelphia, W. & B. R. Co. v. Dubois*, 79 U. S. (12 Wall.) 47, 64, 20 L. Ed. 265; *Anderson v. Walker (Tex.)* 49 S. W. 937, 947.

An estoppel in pais is very well defined by *Nelson, J.*, in *Welland Canal Co. v. Hathaway*, 8 Wend. 479, 483. He says: "As a general rule a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the contract of another, and did so influence it, and when such denial will operate to the injury of the latter." *Payne v. Burnham*, 62 N. Y. 69, 73.

An estoppel arises where one party has been induced by another to rely on the existence of a state of facts, and thereby to do or omit some act which will inure to the prejudice of the former if the latter is permitted to prove the nonexistence of the facts. *Whalen v. Sherrin (U. S.)* 29 Fed. Cas. 850, 852.

Estoppels in pais are created by the law for the purpose of doing justice. Whether an estoppel exists in specific cases is often a question of great difficulty. The rules of law in regard to them seem to be well established. The general rule is that a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, when such denial will operate to the injury of another. *Piper v. Gilmore*, 49 Me. 149, 153.

An admission or statement by one individual, intending to influence the conduct of another with whom he is dealing, and actually leading him in a line of conduct which must be prejudicial to his interests, unless the party making the admission or statement be cut off from the power of retraction, creates an estoppel. In such case it would be against good conscience and a fraud to deny the truth of the admission or statement thus made and acted upon, and this is the point on which the question of estoppel turns. *Dezell v. Odell (N. Y.)* 3 Hill, 215, 219, 38 Am. Dec. 628 (cited in *Hobart v. Verrault*, 77 N. Y. Supp. 483, 486, 74 App. Div. 444).

An estoppel in pais arises from some "act or admission, or neglect to act, on the part of the party estopped, upon which the other party has acted or relied, and in consequence thereof, and through the fault of the party estopped, has placed himself in some respect in a worse position than he otherwise would

have been." *Bowman v. Cudworth*, 31 Cal. 148, 152.

If there has been no alteration in the position of one, and no harm done by the acts of another, such acts do not constitute an estoppel, whatever weight may attach to them as evidence. Injury to others, whose conduct has been influenced by the acts or admissions, is a necessary element, without which an estoppel will not arise. To constitute an estoppel by conduct, it must have been with the intention that others should act on it, or it must have been calculated to induce a reasonable man to believe it was so intended, and others must have been induced to act upon it, so that injury will result from such action thus induced; otherwise, no estoppel arises. *Davis v. Bowmar*, 55 Miss. 671, 751.

Estoppel in pais arises where one person is induced by the assertion of another to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner was allowed to contradict and disprove what he had before affirmed. The estoppel is allowed to prevent fraud and injustice, and exists whenever a party cannot in good conscience gainsay his own acts or assertions. *Frost v. Saratoga Mut. Ins. Co.* (N. Y.) 5 Denio, 154, 157, 49 Am. Dec. 234.

"An estoppel in pais arises when one by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and such other rightfully acts on the belief so induced in such manner that, if the former be permitted to deny the existence of such facts, it would prejudice the latter." *Pence v. Arbuckle*, 22 Minn. 417 (cited in *Hawkins v. Methodist Episcopal Church of Cottage Grove*, 23 Minn. 256, 258).

The basis of an estoppel is action of one party leading to another's injury. *Hix v. Edison Electric Light Co.*, 41 N. Y. Supp. 680, 686, 10 App. Div. 75.

An estoppel can only be maintained on the ground that by the fault of one party another has been induced innocently and ignorantly to change his position for the worse. *Shaw v. Spencer*, 100 Mass. 382, 395, 97 Am. Dec. 107, 1 Am. Rep. 115.

An indispensable requisite of an estoppel in pais is that the conduct or representation was intended to, and did in fact, influence the other party to his injury. It is not sufficient that a person is made to believe that an estoppel will be made in the future. *Payne v. Burnham*, 62 N. Y. 69, 73.

It is well established that, whenever an act is done or a statement made by a party which cannot be contravened without fraud on his part and injury to others, whose con-

duct has been induced by the act or admission, the character of an estoppel will be attached to what would otherwise be mere matter of evidence, and it will become binding upon a jury, even in opposition to proof of a contrary nature; but, to constitute an equitable estoppel, the act or admission must be shown to have had a direct or immediate influence upon the conduct of the party claiming its benefit. No such estoppel can arise without proof of wrong on one side, and injury suffered or apprehended on the other, nor unless the injury be so clearly connected with the wrong that it might and ought to have been foreseen by the guilty party. In order, therefore, to raise an express or implied admission of one party from the rank of evidence to the dignity of an estoppel, it must not only be shown that its retraction will be injurious to the other party, but that the injury results from the course of action induced by the admission. *Scoby v. Sweatt*, 28 Tex. 713, 730, 731.

An estoppel in pais does not operate in favor of everybody. It operates only in favor of the person who has been misled to his injury, and he only can set it up. *Hubbard v. Mutual Reserve Fund Life Ass'n* (U. S.) 80 Fed. 681, 686 (citing *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868).

Where it does not appear that by reason of an act done plaintiff has done any act, or omitted to do any, that has in any way operated to his prejudice, such act cannot operate as an estoppel in pais. *Crandall v. Moston*, 50 N. Y. Supp. 145, 147, 24 App. Div. 547.

The function of an estoppel in pais is to preclude a party from maintaining by evidence that which he has before denied, or disproving that which he has before admitted, when the other party has acted on the faith of the admission or denial in such a manner that he will be injured, unless the same is held conclusive. *Crawford v. Lockwood* (N. Y.) 9 How. Prac. 547, 548.

Where there is a dispute by parties as to the boundary line, the purchase by one of them of land bounded by the line as claimed by the other does not constitute estoppel; it not appearing that such purchase and holding induced the other party to change his position for the worse. *Griffith v. Rife*, 12 S. W. 168, 172, 72 Tex. 185.

An estoppel arises only when the act done is such as that to afterwards question the decree would be to perpetrate a fraud. The acceptance of the benefits under a decree, which, without such decree, the party would be entitled to, does not work an estoppel. *Bliss v. Seaman*, 46 N. E. 279, 281, 165 Ill. 422.

#### **Ratification distinguished.**

Acts and conduct amounting to an estoppel in pais may in some instances amount

also to ratification; but, on the other hand, ratification may be complete without any of the elements of an estoppel. A ratification can be made only in the manner that would have been necessary to confer original authority for the act ratified, or where an oral authorization would suffice by accepting or retaining the benefit of the act with notice thereof. Civ. Code, § 2310. Ratification is thus a question of legal cognizance, while estoppel in pais addresses itself to equity. "Ratification," in our Code, is a legal term, with a well-defined and specific meaning, and to use it interchangeably with "estoppel," or with the verbs "to adopt," or "to confirm," must result and has resulted in unfortunate confusion. *Blood v. La Serena Land & Water Co.*, 45 Pac. 252, 253, 113 Cal. 221, 41 Pac. 1017.

#### **Reliance on acts or representations.**

To create an estoppel in pais the party in whose favor the estoppel operates must have altered his position in reliance upon the words and conduct of the parties estopped. *Day & Frees Lumber Co. v. Bixby* (Neb.) 93 N. W. 688, 690; *Perrin v. Perrin*, 62 Tex. 477, 480; *Hainer v. Iowa Legion of Honor*, 43 N. W. 185, 187, 78 Iowa, 245; *Western Land Ass'n v. Banks*, 83 N. W. 192, 193, 80 Minn. 317.

An estoppel in pais exists only when third persons have acted in the faith of such admissions and changed their conditions in consequence. *Cain v. Busby*, 30 Ga. 714, 722 (citing *Jones v. Morgan*, 13 Ga. 526).

Where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces such other to act on that belief, so as to alter his previous position, the former is concluded from averring to the latter a different state of things as existing at the same time. *Love v. Barber*, 17 Tex. 312, 318 (citing *Pickard v. Sears*, 6 Adol. & E. 469); *Williams v. Chandler*, 25 Tex. 4, 11; *Appeal of Waters*, 35 Pa. (11 Casey) 523, 526, 78 Am. Dec. 854.

It is one of the fundamental principles of estoppel in pais that it can only be invoked by a person who has relied upon the statements or declarations made to him, and, relying on them, has changed his condition with reference to the subject-matter of the statements or declarations upon which the estoppel is based. *Walls v. Ritter*, 54 N. E. 565, 566, 180 Ill. 616 (citing *Robbins v. Moore*, 129 Ill. 30, 21 N. E. 934; *Flower v. Elwood*, 66 Ill. 438; *Hill v. Blackwelder*, 113 Ill. 283; *Noble v. Chrisman*, 88 Ill. 186; *Powell v. Rogers*, 105 Ill. 318).

The general rule is that an estoppel in pais arises where a man by his words or conduct willfully or by negligence causes another to believe in the existence of a certain state of things, and induces him to act

on that belief, so as to alter his own previous position. *Sullivan v. Conway*, 1 South. 647, 648, 81 Ala. 153, 60 Am. Rep. 142; *Vansandt v. Wier*, 19 South. 424, 426, 109 Ala. 104, 32 L. R. A. 201; *Norton v. Kearney*, 10 Wis. 443, 453.

A party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, whenever such denial will operate to the injury of the latter. *Wallis v. Truesdale*, 23 Mass. (6 Pick.) 457. But it must always appear that the party claiming the estoppel was influenced by the declarations to so act that a denial of the truth of the statement will operate to his injury. *Prater v. Frazier*, 11 Ark. (6 Eng.) 249, 264.

Where a father, as administrator on his wife's estate, recognized certain land as community property, though he would have been estopped as against any one claiming under an administration sale made by him from denying the title which he thereby admitted in his wife, only such persons as acted on the faith of his admission, or against whom the subsequent assertion of the truth of the case would operate as a fraud, can rely on the estoppel. *Watson v. Hewitt*, 45 Tex. 472, 475.

"The rule is well settled that when a person by his words or conduct willfully causes another to believe in the existence of a certain state or condition of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the law a different state of things as existing at the same time; but to constitute an estoppel the act or statement must be shown to have had a direct or immediate influence upon the conduct of the party claiming its benefit, for only such persons as have acted on the faith of admissions, or against whom the subsequent assertion of the truth of the case would operate as a fraud, can insist on the estoppel." *Echols v. McKie*, 60 Tex. 41, 42.

An estoppel is worked, not because the loss to the party injured is a succeeding event to the act or omission of the party to be estopped, in dealing with the subject-matter of the transaction, but because the act or omission of the party to be estopped was the moving cause which led the party injured to do the act resulting in the loss. There must have been a relation of cause and effect, by which the injury and consequent loss to the injured party were the result of the previous misconduct of the party to be estopped. The party setting up an estoppel must show that he relied on and was misled by the conduct imputed to the party to be estopped. *Mott v. German Hospital*, 37 Atl. 757, 762, 55 N. J. Eq. 722 (citing *Magie v. Reynolds*, 51 N. J. Eq. [6 Dick.] 113, 26 Atl. 150).

Where a building had been erected over an alley to which others had an easement, it was contended that the knowledge of the fact that the building was being constructed against the alley operated as an estoppel to claim the easement in the alley; but it was held that, to have shown an estoppel, it was essential for defendants to have proven that they were induced to erect the building by the conduct or language of those who were their co-tenants in the easement of the alley. *Welsh v. Taylor*, 31 N. E. 896, 898, 134 N. Y. 450, 18 L. R. A. 535.

#### Representations.

The conduct creating an estoppel must be something which amounts either to a representation or a concealment of the existence of facts. The facts represented or concealed must in general be either existing or past, or at least represented to be so. A statement concerning future facts would either be a mere expression of opinion or would constitute a contract. A conditional promise or representation in regard to something in the future cannot constitute an estoppel. *Lucas v. Johnson (Tex.)* 64 S. W. 823, 825.

Estoppels in pais depend upon facts, which are rarely in any two cases precisely the same. The principle upon which they are applied is clear and well-defined. A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances where he should do so, either designedly, or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right, to the detriment of the person so misled. That would be a fraud. But it is difficult to define special acts or conduct which in all cases would amount to an estoppel. Generally it is said that if the owner of property, with a full knowledge of the facts, stands by and permits it to be sold to an innocent purchaser without asserting his claim, he will be estopped. Although this will not embrace all species of estoppel in pais, which may be as diverse as is the nature of human transactions, it is, so far as it goes, about as safe and correct a rule as can be formulated. The leading idea is that a person shall not do or omit to do anything regarding his rights which, if taken advantage of by him, would work a fraud upon another; but in this, as in all other cases involving fraud, the exact limits and boundaries of fraudulent conduct are left undefined, to be applied by the chancellor to the facts before him. *Jowers v. Phelps*, 33 Ark. 465, 468.

Statements, in order to preclude the party by whom made from asserting or claiming to the contrary, must be material

and such as would naturally lead a prudent man to act upon them. *Boles v. Bennington*, 136 Mo. 522, 530, 38 S. W. 306.

To create an estoppel the conduct of the party need not consist of affirmative acts or words, but may consist of silence or negative omission to act when it was his duty to speak. *Dimond v. Manheim*, 63 N. W. 495, 61 Minn. 178; *Shelby v. Bowden (S. D.)* 94 N. W. 416, 420.

An estoppel must arise from some act of the party against whom the estoppel is claimed. *Thayer v. Bacon*, 86 Mass. (3 Allen) 163, 165, 80 Am. Dec. 59.

Estoppel arises where a party negligently and culpably stands by and allows another to contract on the faith of an understanding which he can contradict. *Harris v. American Building & Loan Ass'n*, 25 South. 200, 202, 122 Ala. 545.

The fact that the representation is made to a third person, and by him truthfully represented to another, who is induced upon that information to purchase, does not prevent the estoppel. *Ruckelschaus v. Oehme's Adm'r*, 22 Atl. 184, 188, 48 N. J. Eq. (3 Dick.) 436.

An estoppel may be created either by the acts of the party himself or by the acts of his agent within the scope of his authority. *Bristol-Goodson Electric Light & Power Co. v. Bristol Gas, Electric Light & Power Co.*, 42 S. W. 19, 21, 99 Tenn. 371.

A wife is not estopped from asserting the title to the possession of her personal property, mortgaged by her husband without her consent to secure his debt, because she did not seek out the mortgagee and inform him of her title. *Roberts v. Trammel*, 40 N. E. 162, 15 Ind. App. 445.

In an action to recover land, which had been sold while plaintiff was a minor, by one owning one-half and claiming to own the entire land, plaintiff standing by at the sale, the court charged that if he, for 10 years after arriving at full age, failed to assert his right to the land, and was present at the sale and knowing what was being done, and also that the sale was intended to embrace his half of the land, and he failed to make known his claim to it, he was thereby estopped from its recovery. These facts, standing alone, do not operate as an estoppel. All this might occur, and he not be acquainted with the fact of his having a title or interest in the land; and, even if he knew that he had an interest, the true rule seems to be that the mere presence of the owner, if he has concealed no fact of which he was informed, and which the purchaser could not have learned by the use of reasonable diligence, will not create an estoppel, unless the purchaser can show that he had reason



to suppose, from the presence of the owner, that he sanctioned and acquiesced in the sale. *Page v. Arnim*, 29 Tex. 53, 70, 71.

#### Waiver distinguished.

See, also, "Waiver."

Waiver belongs to the family of estoppel, and often they are convertible terms. *Maloney v. Northwestern Masonic Aid Ass'n*, 40 N. Y. Supp. 918, 921, 8 App. Div. 575.

In strictness the term "waiver" is used to designate the acts or consequences of the acts on one side only, while the term "estoppel in pais" is applicable where the conduct of one side has induced the other to take such a position that he will be injured if the first be permitted to repudiate his act; but in the law of insurance the terms are ordinarily used indiscriminately. *McCormick v. Orient Ins. Co.*, 24 Pac. 1003, 1004, 86 Cal. 280.

Though in strictness the term "waiver" is used to designate the act or the consequences of the act of one party only, while the term "estoppel in pais" is applicable where the conduct of one party has induced another to take such a position that he will be injured if the first be permitted to repudiate his act, the rule is that in quo warranto proceedings instituted by the state to determine the validity of corporations the doctrine of waiver operating by way of estoppel in pais may be appealed to and applied as a defense. *State v. School District No. 108*, 88 N. W. 751, 753, 85 Minn. 230.

"Estoppel in pais," as the term is usually employed and applied, includes the fact that the party claiming the estoppel relied on and acted on the acts or declarations, so that he would be prejudiced if the other party is not held to them. A court, in holding that the subscriber of stock to a corporation is estopped from contending that the full capital stock of the corporation has not been subscribed, does not use it in this sense, but rather in the sense of waiver. *Masonic Temple Ass'n v. Channell*, 45 N. W. 716, 717, 43 Minn. 353.

Where it appears that an insurance company refused to pay a claim for loss on other grounds than that of insufficient proofs, they are deemed to have waived a failure to furnish sufficient proof; but such waiver is not avoided by a provision in the policy providing that no waiver of the policy shall be effectual unless indorsed thereon, since such facts constitute an estoppel in pais, though called a waiver.—*Roberts v. Northwestern Nat. Ins. Co.*, 62 N. W. 1048, 1050, 90 Wis. 210.

In considering whether there has been a waiver or estoppel, the difference between waiver and estoppel is that in the former the result is voluntary, while in the latter the

conduct of the party may have been voluntary. Though with intention not to lose any existing rights, yet, if such conduct mislead, then estoppel arises. One is the voluntary surrendering of a right. *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240. The other is the inhibition to assert it from the mischief that has followed. *Libby v. Haley*, 39 Atl. 1004, 1006, 91 Me. 331 (citing *Shaw v. Spencer*, 100 Mass. 395, 97 Am. Dec. 107, 1 Am. Rep. 115).

In an action on an insurance policy, brought after the time limited by the terms of the policy, plaintiff excused the delay, alleging negotiations with defendant's agents to settle the loss without litigation, and their request not to bring suit and promising to pay without; and the defendant set up the provision of the policy that no officer or agent should have power to waive any provision therein contained. Discussing this the court said: "As this clause in its terms applies only to matters constituting a waiver, it is clear that it can have no application to facts creating an estoppel; for, though the terms 'estoppel' and 'waiver' may sometimes loosely be used interchangeably, there is a clear distinction between them. A waiver arises by the intentional relinquishment of a right by a person or party, or by his neglect to insist upon his right at the proper time, and does not imply any conduct or dealing with another by which that other is induced to act or forbear to act to his disadvantage, while an estoppel necessarily presupposes some such conduct or dealing with another. The matters set up by the plaintiff are matters operating by way of estoppel, and not as a waiver. *Metcalf v. Phenix Ins. Co.*, 43 Atl. 541, 542, 21 R. I. 307.

Waiver depends on what one intended to do himself; estoppel rather on what he caused his adversary to do. There may be a valid waiver of rights of a certain kind—that is, formal, as distinguished from substantial, rights—without consideration, showing that waiver differs from contract. But, where rights are involved, we apprehend that a waiver must be supported by a consideration, to be valid. *Fairbanks, Morse & Co. v. Baskett*, 71 S. W. 1113, 1116, 98 Mo. App. 53.

## ESTOVERS.

See "Common of Estovers."

"Estovers" is the wood necessary for fuel, fences, agricultural erections, and other necessary improvements and repairs, which a tenant for life is entitled to take from the land. Under the right of estover the tenant cannot destroy or dispose of the timber, nor do any other permanent injury to the estate; for that would subject him to the action and

penalties of waste. The tenant must cut only such wood and timber as he may need for immediate use, and not in anticipation, and he must cut only such timber as is fit for the use for which he is allowed to take it, and as a general principle whatever wood or timber he is allowed to cut he must use upon the premises and not elsewhere.—*Zimmerman v. Schreeve*, 59 Md. 357, 363.

Estovers are necessities, such as housebote, firebote, plowbote, or hedgebote. *Lawrence v. Hunter* (Pa.) 9 Watts, 64 78 (citing 2 Bl. Comm. 35).

Estovers does not include soil and wood taken from the leased premises for the manufacture of bricks which are intended for sale. *Livingston v. Reynolds* (N. Y.) 2 Hill, 157, 159.

## ESTRAY.

See, also, "Stray."

An estray is "an animal of which the owner is unknown." *Lyman v. Gipson*, 35 Mass. (18 Pick.) 422, 423.

"An estray is a beast wandering or without an owner; one wandering at large, or lost, or whose owner is unknown." *Walters v. Glatz*, 29 Iowa, 437, 439.

Estrays are defined to be animals found wandering, and no man knoweth the owner of them. *People v. Kaatz* (N. Y.) 3 Parker, Cr. R. 129, 138.

An estray is a valuable domestic animal which has strayed from its owner. *Owens v. State*, 38 Tex. 555, 557.

"To constitute an estray the owner of the animal must be unknown and it must be found wandering. Burrill in his Dictionary gives this definition from Fleta: 'Pecus vagans, quod nullus petit, sequitur, vel advocat; a wandering beast, which no one seeks, follows, or claims.' He likewise gives that by Spelman: 'A beast which, escaped from its keeper, wanders over the fields; its owner being unknown.'" *Roberts v. Barnes*, 27 Wis. 422, 425.

The general definition of the term "estrays," under the English law, is that of an animal whose owner is unknown. Yet the qualification of the owner being unknown is not attached by all the authors who attempt the definition. Burrill in his Dictionary describes an estray as anything out of its place, especially an animal that has escaped from its owner and wanders or strays about; a wandering animal. And he gives the definition of Spelman as "a wandering beast, which no one seeks, claims, or follows." Crabb, in his *Law of Real Property*, defines an estray, or animal vagans, to be "Any beast found wandering within some lordship." *State v. Apel*, 14 Tex. 428, 430.

An estray is a beast wandering or without an owner, one wandering at large or lost, or whose owner is unknown; and it is immaterial how the animal escaped from the owner, whether by his voluntary act, by the act of a trespasser on his premises, or by a thief. Webster defines an estray as "any valuable animal, not wild, found wandering from its owner." Kent defines it as "cattle whose owner is unknown," and Blackstone as "any beast, not wild, found in any lordship and not owned by any man." *Kinney v. Roe*, 30 N. W. 776, 777, 70 Iowa, 509.

An animal is not an estray where the person distraining it knew who had charge of it, and where it was kept, but did not know which of two persons owned it. *Lyons v. Van Gorder*, 77 Iowa, 600, 42 N. W. 500.

"Estrays," as used in the act relating thereto, includes only those animals known to the taker up as an estray for the period of at least three months in the case of sheep or swine, and six months in the case of all other estrays, next prior to the time of the taking up, and excludes any animal the owner of which shall have recorded in the office of the clerk of the city in which the same is found the brand that is upon such animal. Rev. St. Okl. 1903, § 76.

An estray, as used in the title relating to animals, is any animal of the neat cattle kind being driven from this territory or any county thereof, for shipment, sale, or slaughter, not branded with the duly recorded brand of the person, company, or corporation driving such animal or causing the same to be driven, or not accompanied by a duly executed and acknowledged bill of sale or transfer in writing from the owner of the recorded brand on such animal, or not accompanied by a duly executed authority in writing, duly acknowledged by the owner of the recorded brand on such animal, authorizing the driving and handling of such animal by the person or persons found driving the same. Comp. Laws N. M. 1897, § 120.

All horses, asses, mules, and neat cattle of the age of one year or upwards found running at large, and upon which there is no brand, except sucking animals running with their mothers, and all such animals that are branded, the owner of which cannot after a reasonable search be found, and which have been running at large on any range within the state for two years or more, and all hogs found running at large upon the premises of any person other than their owner, are hereby declared to be estrays and forfeited to the state. Rev. St. Utah 1898, § 13.

### Animal tied in road.

A stolen horse, left by a thief tied to a post in a public road, is not an estray, within the meaning of the New Jersey statute.

*Hall v. Gildersleeve*, 36 N. J. Law (7 Vroom) 235, 287.

Plaintiffs, when on a country road, left their horses by the roadside and went into a restaurant, and defendant impounded the horses, claiming that they were tied to his fence and had pulled a rail off. Held, that the horses were not estrays. *Alok v. Gerke*, 6 Hawaii, 569, 570.

#### **Cattle in charge of herder.**

Cattle driven along a road in charge of a herder, and which in passing casually eat of the grass growing on the roadside, are not estray, within the meaning of Act March 18, 1874, declaring that the roadmasters shall deal with all animals found pasturing upon the public highway as provided in an act concerning animals found estray, etc. *Thompson v. Corpstein*, 52 Cal. 653, 654; *Beeson v. Tice*, 45 N. E. 612, 614, 17 Ind. App. 78.

The fact that a herder in charge of cattle being driven along a road accidentally falls asleep while attending such cattle does not cause the cattle to be estray, within the meaning of Act March 18, 1874, declaring that the roadmasters shall deal with all animals found pasturing upon the public highway as provided in an act concerning animals found estray, etc. *Thompson v. Corpstein*, 52 Cal. 653, 654.

#### **Cattle on range.**

"An estray is defined by Burrill's Law Dictionary to be an animal that has escaped from its owner and wanders or strays about. This author says 'it is usually defined as a wandering animal whose owner is unknown.' According to this definition an animal running on a range where it was raised, or where it was permitted to run by its owner, could not be considered estray, because in so doing it could not have been considered as having escaped or wandered away from its owner." *Shepherd v. Hawley*, 4 Or. 206, 208.

An animal turned upon a range and permitted to run at large is not an estray, because its owner is ignorant of its present whereabouts; but if at the general roundup he is unable to find it, or if it has in the meantime gone beyond the section of country in which it was expected to run, has strayed away from his other stock, and is wandering about in a distant locality, and becomes lost to him, it is an estray. *Stewart v. Hunter*, 16 Pac. 876, 878, 16 Or. 62, 8 Am. St. Rep. 267.

#### **Cattle temporarily straying.**

"Estray," as used in Gen. Laws 1877, § 2565, providing that no person shall take up an estray animal, except in the county where he resides and is a householder, nor unless

the same be found in the vicinity of his residence, means a lost animal, one roaming around the country apparently without an owner, and does not mean one merely temporarily straying a short distance from the residence of the owner. Blackstone says "estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner thereof, in which case the law gives them to the king, as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein." Chancellor Kent defines estrays as "cattle whose owner is unknown." *Weber v. Hartman*, 1 Pac. 230, 7 Colo. 13, 49 Am. Rep. 339.

### **ESTREAT.**

The term "estreat" signifies extracted from the records of the criminal court to serve as a foundation against the accused and his surety for a scire facias; and Act April 2, 1832, allowing district courts to take certain proceedings with regard to bail bonds and recognizances, operates similarly to what is known under the common law as estreat. *Louisiana Soc. for Prevention of Cruelty to Children v. Cage*, 14 South. 422, 45 La. Ann. 1894 (citing *State v. Dunbar*, 10 La. 102).

### **ET AL.**

The Latin abbreviation "et al." means "and another," or "and others," and a mere reference in a bill of exceptions to an unnamed party or parties by the use of the term "and others," or "et al.," amounts to nothing, and those parties not named therein are not parties on the appeal. *Mutual Building Loan & Investment Co. v. Dickinson*, 37 S. E. 713, 714, 112 Ga. 469.

The words "et al." are not sufficient, following the names of parties to a petition in error, to designate any persons not expressly named therein, although such persons were parties before the inferior tribunal. *Brabham v. Custer County (Neb.)* 92 N. W. 989, 990.

The descriptive term "et al.," in an exception to a decree of probate of a will, is not sufficiently definite to identify those persons who would be the particular beneficiaries of a judgment of reversal. *Swift v. Thomas*, 28 S. E. 618, 620, 101 Ga. 89.

The addition of the phrase "et al." after the names of the defendants whose interest is appraised, there being other defendants in the cause, though none claiming title to the property, will not vitiate the appraisement. *Pierce v. Reed (Neb.)* 93 N. W. 154, 155.

The abbreviation "et al.," when occurring in a bill of exchange after the names

of the parties therein designated, will not be held to include any of the persons who figured as parties in the trial court. *Orr v. Webb*, 88 S. E. 98, 99, 112 Ga. 806.

An entry of a clerk of the court, reciting that in the case of *M. against B. et al.* the jury was sworn to try the issue on January 31, 1850, cannot be accepted as indicating that the jury were sworn as against both of the defendants, and cannot be treated as a part of the record and as showing anything inconsistent with it; the presumption being that the court directed the jury to be properly sworn. *Breidenthal v. McKenna*, 14 Pa. 160, 161.

A summons against one of the parties named as defendant in the complaint, followed by the words "et al." is not sufficient to designate the names of such other parties. "They indicate at most that there are still other parties who are not named." *Lyman v. Milton*, 44 Cal. 630, 633.

A bond on an appeal from a judgment in favor of two or more parties, being made payable to one of the parties "et al.," will be construed to refer to all of the other parties. *Bacchus v. Moreau*, 4 La. Ann. 313, 314.

The words "et al., or order," in a note payable to a named payee et al., mean "and others." *Gordon v. Anderson*, 49 N. W. 86, 87, 83 Iowa, 224, 12 L. R. A. 483, 32 Am. St. Rep. 302.

## ET CETERA—ETC.

The character "etc." has been said by Webster to be equivalent to the phrase "others of the like kind; and the rest; and so on." It is equivalent to "et cetera" and the character "&c." *Lathers v. Keogh* (N. Y.) 39 Hun, 576, 579; *Garvin v. State*, 81 Tenn. (13 Lea) 162, 164; *Louisville & N. R. Co. v. Berry's Adm'r*, 96 Ky. 604, 610, 29 S. W. 449.

The character "etc." is used as an abbreviation of "et cetera," and et cetera means "other things." *Gray v. Central R. Co. of New Jersey* (N. Y.) 11 Hun, 70, 75.

"Etc.," as used in an appropriation for objects described thus: "Fugitives from justice, rewards for escaped convicts, sheriff's fees for conveying convicts to penitentiary, etc., \$1,800"—meant "and others," or "and so forth." *State v. Wallichs*, 11 N. W. 860, 861, 12 Neb. 407.

A recognizance "for the defendant's appearance, etc., at my office," means defendant's appearance and not departing without leave; for there is nothing else to which the "etc." can reasonably be applied. To understand it so is not to attribute to it more virtue than has been done in many other

cases. Lord Coke's authority may be vouched in support of the meaning ascribed to it. *Commonwealth v. Ross* (Pa.) 6 Serg. & R. 427, 428.

"Etc.," as used in an instruction defining malice as "actual ill will, hatred, etc.," is not an erroneous addition to the instruction, in view of the well-understood meaning of malice. *Louisville Press Co. v. Tennely*, 49 S. W. 15, 16, 105 Ky. 365.

The character "etc.," found in a contract for the sale of coal in a sentence, "Ship to be named, original cost, etc., to be paid on receipt of bills of lading, etc.," did not render the contract incomplete as a contract of sale, nor justify the conclusion that it was not intended as a memorial of all the terms of the contract. The abbreviation, being meaningless in the connection in which it was used, in no manner affected the legal construction of the agreement, and therefore might be regarded as surplusage. *Harrison v. McCormick*, 28 Pac. 830, 831, 89 Cal. 327, 23 Am. St. Rep. 469.

### As indefinite term.

In a deed reserving the right to cross a lot for the purpose of carting wood, etc., the addition of the abbreviation "etc." is void, by reason of its vagueness and uncertainty, being without meaning or effect. *Myers v. Dunn*, 49 Conn. 71, 76.

"Etc.," as used in a pleading alleging damages to furniture, etc., was meaningless. It was not descriptive of any class of goods, and would not allow proof of loss other than to furniture. *Whitmore v. Bowman* (Iowa) 4 G. Greene, 148, 149.

In a bond for security of costs in a suit by a nonresident in the circuit court, payable to one defendant named, the addition of the expression "etc." cannot be taken as descriptive of any individual or class, and cannot supply the names of individuals. *Ham's Adm'r v. Tinchener*, 19 Ky. (3 T. B. Mon.) 196.

"Etc." is equivalent to saying, "and others," which is not a specific designation of anything; and an appropriation for certain described objects, etc., is not a specific appropriation within the Constitution. *State v. Wallichs*, 11 N. W. 860, 861, 12 Neb. 407.

### As others of like character.

"Etc." imports other purposes of a like character to those which have been named. *In re Schouler*, 134 Mass. 426, 427.

"Etc.," as used in a will giving all the balance "of my books, furniture, etc.," means other things of the same character, and, though it carried to the devisee a piece of statuary, photographs, views, drawings, and portfolios, it did not include articles of wear-

ing apparel and of personal ornament and use. *Tefft v. Tillinghart*, 7 R. I. 434, 436.

#### As relating to correlated matters.

A bill of particulars which set out as one item "To 61 days' work on house, etc., \$122," was sufficient to admit evidence of plaintiff's work on grading about the house. *Hayes v. Wilson*, 105 Mass. 21, 22.

"Etc.," as used in a contract for the sale of a boat, where the parties agreed to take the boat, "provided upon trial they were satisfied with the soundness of her machinery, boiler, etc.," meant "other things," referring to other material parts of the boat. *Gray v. Central R. Co.* (N. Y.) 11 Hun, 70, 75.

Where a contract made by the grantor with the trustee, on postponing the sale of the property after advertising, provided that the grantor should make certain payments and pay "the costs and charges of advertising, etc., of the mortgage," the word "etc." does not mean commissions provided for in the deed of trust, but refers only to expenses and moneys necessarily expended in the legitimate discharge of fiduciary duties. *Whitaker v. Old Dominion Guano Co.*, 31 S. E. 629, 123 N. C. 368.

In a lease providing that "all improvements placed in the buildings by the lessees, viz., elevators, boilers, heating apparatus, etc., shall be deemed fixtures not to be removed," "etc." does not enlarge the scope of the clause further than to clearly indicate that it was the intention of the parties to include within its terms articles directly connected with those specified. *Loeser v. Liebmann*, 14 N. Y. Supp. 569, 570, 60 Hun, 579.

As used in an instrument conveying the undivided interest of defendant "in the livery stock, horses, buggies, etc.," of a certain firm, "etc." must be intended and understood to mean all the interest of the seller in the partnership property of the firm. *Shuler v. Dutton*, 39 N. W. 239, 240, 75 Iowa, 155.

The phrase "et cetera," of which "etc." is an abbreviation, imports other purposes of a like character to those which have been named; and where an applicant for life insurance stated that his business was that he "managed a restaurant, etc.," and he in fact managed a saloon and restaurant, and attended bar 12 hours each day, the statement was not untruthful, since keeping a restaurant is so commonly associated with the sale of liquors that the statement would convey the idea that he sold liquors. *High Court I. O. F. v. Schweitzer*, 70 Ill. App. 139, 143.

#### As similiter in pleading.

After verdict, the expression "etc.," in place of the similiter in a pleading, will be considered to mean every necessary matter that ought to be expressed, and judgment

will not be arrested. *Sayer v. Pocock*, 1 Cowp. 407, 408.

In Act July 23, 1868, § 10, providing that, when any real estate is to be sold under a lien for labor, such as ditching, building levees, etc., the justice of the peace should file a copy of the judgment rendered in a county clerk's office, and the county clerk should place it in his judgment docket and cause the clerk to sell such real estate, "etc." should not be construed to mean and include railroads. The abbreviation "etc." is sometimes used in pleadings to avoid repetitions, and when so used usually relates to things unnecessary to be stated. *Dano v. Mississippi, O. & R. R. Co.*, 27 Ark. 564, 568.

A plea in an action of trespass for assault, battery, and imprisonment, enumerating and professing to answer the assault, "etc.," and imprisonment, and keeping and detaining in prison, should be construed to include the beating, without setting it out at length. *Bryan v. Bates*, 15 Ill. 87, 88.

In a pleading an "et cetera" may be allowed only to supply what must necessarily be inferred from what is expressed, or where the words inserted will equally admit of a conclusion to the court or jury, and therefore, where the court cannot supply the words omitted by any necessary implication, the close of the plea with "et cetera" leaves it subject to demurrer. *Cooke v. Beale's Ex'r* (Va.) 1 Wash. 313, 318.

#### As surplusage in title of statute.

The letters "etc." are an abbreviation of "et cetera," meaning "and others," "and other things," "and so forth," and will be construed to have no meaning as a part of the title of an act, at least so as to render the act void on the ground that it embraces more than one subject. *State v. Arnold*, 38 N. E. 820, 821, 140 Ind. 628.

The abbreviation "etc.," used at the end and as a part of the title to a statute prohibiting the keeping of certain games in public places, was not to be rejected as surplusage. Webster defines the term as meaning "et cetera; and others; and so forth." This definition, as used in such statute, means "and other games," or "and the rest of the games." The abbreviation is thoroughly incorporated into the English language, and is in almost common use. It cannot mean "and for other purposes," as contended, for the reason that such definitions would include any and all, however foreign to the object of the legislation. *Garvin v. State*, 81 Tenn. (13 Lea) 162, 168.

## ETCHING.

"Etching" is a distinct art, much older than photography, so that a copyright of an

etching was not an infringement of a copyright on a photograph, though there were only slight changes in the negative made by etching. *Snow v. Laird* (U. S.) 98 Fed. 818, 816, 39 C. C. A. 311.

## EUROPEAN PLAN.

A European plan hotel is a hotel which furnishes rooms and lodging without board. *Vonderbank v. Schmidt*, 10 South. 616, 617, 44 La. Ann. 264, 15 L. R. A. 462, 32 Am. St. Rep. 336.

The term "European plan," when used to characterize hotels, means a hotel conducted by renting rooms, separate from the furnishing of meals, and the maintenance of a restaurant for meals. *Bernstein v. Sweeney*, 33 N. Y. Super. Ct. (1 Jones & S.) 271, 272.

## EVANGELICAL

The term "evangelical" is defined by Webster to mean "according to the Gospel; consonant to the doctrines and principles of the Gospel; contained in the Gospel; found in the doctrines of the Gospel." That the word is sometimes employed in a more narrow and restricted sense does in no particular deprive the plaintiffs of their just claim to its use in its more broad and catholic signification, and that this is its true meaning, as used in the preamble of their constitution, providing that "we, the subscribers, actuated by a desire to promote the evangelical religion among young men residing in or visiting this city," etc., is, we think, most evident from all that we have extracted from articles 1 and 4 of the constitution. *Young Men's Christian Association v. Donohugh* (Pa.) 7 Wkly. Notes Cas. 209, 211.

## EVANGELIST.

The term "evangelist," in the religious body known as the "Disciples of Christ," is a minister who exercises his office in the organization of church societies and becomes the official and public functionary in setting churches and their officers in order. In *re Reinhart*, 9 Ohio Dec. 441, 447.

## EVASION.

"Evasion of service," within the meaning of Laws 1853, c. 511, providing for substituted service when the defendant evades service, includes the act of a mother in preventing service of process on her infant children residing with her. *Steinhardt v. Baker*, 57 N. E. 629, 163 N. Y. 410.

## EVEN.

A city ordinance providing that a sidewalk should be laid on an even grade does not direct the grade of the walk or the height of the curbing; such words having no special and well-established technical meaning. *Job v. People*, 61 N. E. 1079, 1081, 193 Ill. 609.

## EVEN IF.

In an instruction that "if, before the accident, and after the driver of the car which caused the injury discovered, or might by the exercise of reasonable care on his part have discovered, the danger in which plaintiff was, he, the said driver, could by the exercise of reasonable care have averted the injuries complained of, in such case the negligence of plaintiff, even if the jury find he was negligent, will not in itself defeat the recovery by him in this case," the words "even if" signify "although," and were not intended to be used in any different sense. *Burnstein v. Cass Ave. & F. G. Ry. Co.*, 56 Mo. App. 45, 54.

## EVEN THOUGH.

The words "even though," as used in a bond of an officer given as security while he holds office, "even though" he hold under successive appointment, are words of inclusion, and not of exclusion; the word "even" being used in the sense of "also" or "likewise," and by its use it is intended to bring within the scope of the instrument a subject or condition that otherwise might not be included, or its inclusion at least be a subject of doubt. *Ulster County Sav. Inst. v. Young*, 44 N. Y. Supp. 493, 494, 15 App. Div. 181.

## EVENT.

See "Unforeseen event."

Fortuitous event, see "Fortuitous."

"Event," as used in Code 1849, § 398, declaring that no person offered as a witness shall be excluded by reason of his interest in the event of the action, means the issue, conclusion, end, or result. *Fitch v. Bates* (N. Y.) 11 Barb. 471, 473.

"Event of the award," as used in a reference to arbitration of a cause and all matters in difference, including an equity suit, with power to the arbitrator to direct such verdict as he might think proper and to determine what should be done by either party, and providing that the costs of the cause and equity suit were to abide the event of the award, meant the ultimate and general event, and not each particular part. *Reeves v. McGregor*, 9 Adol. & E. 576.

In an indictment charging defendant with having made a bet upon the event of an election, the word "event" is as expressive as the word "result." It means issue, hap, a chance, success that follows doing anything, and is appropriately used to express the idea upon which the bet depended. An allegation of the pendency of the election, and that the defendant bet upon the event of that election, is sufficient, and it was not necessary to allege that he bet upon the success of any particular candidate. *State v. Cross*, 21 Tenn. (2 Humph.) 301, 302.

The word "event," in a judgment of reversal of an action with costs to abide event, has a more extended meaning than usual; for it means not only final success in the action, but also a valid award of costs generally, under Code, § 1836, which lays down a special rule governing the recovery of costs against executors. *Benjamin v. Ver Nooy*, 61 N. E. 971, 973, 168 N. Y. 578.

A bail bond conditioned that defendant would appear and "abide the event of the court and jury" was either without meaning, or imposed no other obligation than that which arose out of a condition to appear, to wit, to abide the judgment of the court and remain within reach of its process. *Saunders v. Hughes* (S. C.) 2 Bailey, 504, 513.

A stipulation that certain cases shall abide the "event" of another case means that the cases shall abide the final outcome and end of the litigation. *Commercial Union Assurance Co. v. Scammon*, 85 Ill. App. 659, 660.

Gen. St. 1878, c. 73, § 8, prohibiting any one interested in the event of the action from testifying in an action for or against executors, administrators, etc., as to transactions or conversations with a deceased person, does not authorize the exclusion of the evidence of a person not having a direct interest in the event of the suit, and hence not to exclude evidence of a witness, belonging to a subordinate lodge of an insurance association, in an action on a policy against such association. *Perine v. Grand Lodge A. O. U. W.*, 50 N. W. 1022, 1024, 48 Minn. 82.

"To render a person incompetent as a witness on the ground of interest, he must have some legal, certain, and immediate interest, either in the event of the case itself, or in the record as an instrument of evidence for or against him in some other action. The interest must be pecuniary, certain, direct, and immediate, and not an uncertain, contingent, remote, or merely possible interest." *Bent v. Baker*, 3 Term R. 27; *Perine v. Grand Lodge A. O. U. W.*, 50 N. W. 1022, 1023, 48 Minn. 82.

#### EVENTUAL CONDEMNATION MONEY.

As the term "eventual condemnation money" is used with reference to an injunc-

tion bond, it is the amount "ultimately fixed and settled by the judgment or decree of the court in the case." *Lockwood v. Saffold*, 1 Ga. (1 Kelly) 72, 74.

The expression "eventual condemnation money," as used by sureties on a bond obligating themselves to pay the eventual condemnation money, meant whatever amount might be found against their principal by the jury upon the trial, and to bind them, the issue should have been submitted to the jury. *Willis v. Bivins*, 76 Ga. 745, 748.

#### EVENTUAL ESTATE.

Rev. St. p. 726, § 40, provides that where, in consequence of a valid limitation of an expectant estate, there shall be an existence of the power of alienation or of ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents shall belong to the persons presumptively entitled to the next "eventual estate." Held, that the phrase "eventual estate" relates to that which is to take effect on the happening of the event which leaves the rents and profits undisposed of, and not to that which is ultimately to take effect. *Van Emburgh v. Ackerman* (N. Y.) 3 Redf. Sur. 499, 502.

#### EVENTUALLY.

"Eventually," as used in a bond conditioned that the plaintiff was to pay defendant such damages as he might sustain by reason of the injunction to be issued in the cause if the court should eventually decide that the plaintiff was equitably entitled to such injunction, etc., relates to the final decision on the equity of the bill asking for the injunction. *Dunkin v. Lawrence* (N. Y.) 1 Barb. 447, 448.

#### EVENTUALLY ACCOUNTABLE.

The effect of the words "eventually accountable," immediately preceding the name of the payee as indorser of a promissory note, is to hold such payee liable as indorser, waiving demand and notice, and do not restrict or qualify the transfer. *McDonald v. Bailey*, 14 Me. (2 Shep.) 101, 108.

#### EVER.

"In the Public Health Law, § 140, prohibiting any person who has ever been convicted of a felony from practicing medicine," the word "ever" indicates the legislative intention to prohibit the practice of medicine on the part of any person who has been convicted of a felony either before or after the passage of the law. *People v. Hawker*, 46 N. E. 607, 608, 152 N. Y. 234.

**EVERY.**

Every way fitted for the voyage, see "Fit."

**As all.**

"Every" means each one of all. It includes all the separate individuals which constitute the whole, regarded one by one. An exception reserved to the giving of each and "every" one of certain numbered instructions constitutes a specific objection to all the instructions given, and is sufficient. *Geary v. Parker*, 47 S. W. 238, 239, 65 Ark. 521.

In Rev. St. 2335, allowing to every family one wagon exempt from execution, "every" is used literally, and means every family, whether it be employed by the head of the family in his business or not. *Cone v. Lewis*, 64 Tex. 331, 333, 53 Am. Rep. 767.

"Every," as used in a statute providing that "every action upon the case for words" shall be commenced within one year, includes words spoken and written. *Menter v. Stewart*, 3 Miss (2 How.) 698, 699.

According to Johnson, "every" means each one of all, and he gives this example: "All the congregation are holy, 'every' one of them." The same lexicographer defines "any" to mean "every," and says "It is, in all its senses, applied indifferently to persons or things." And in a statutory provision that "every" bill altering, etc., any body politic, etc., "every" means all corporations. "It appears to me not within the power of man to select from the English language words more exactly fitted to convey the idea that all corporations, both public and private, were to be embraced in the phrase, than those actually employed." *Purdy v. People* (N.Y.) 4 Hill, 384, 413. Thus the use of the word "any" instead of "every," in the stock corporation law, § 52, as amended by Laws 1897, c. 384, providing a penalty for any refusal by such corporations to allow an inspection of their stockbooks by stockholders and certain other persons, does not limit the scope of the statute. The statute makes it the duty of the corporation to have the book within the reach of the stockholders daily. A stockholder has a clear right to see the book every day, and it may be important for him to have this privilege. The denial of this right on one day does not give a right to deny the right on a second or a third day, nor is the plaintiff obliged to bring an action for the former refusals in order that he may be protected of his rights. *Cox v. Island Mining Co.*, 73 N. Y. Supp. 69, 74, 65 App. Div. 508.

Where a submission to arbitration was general, and embraced "every demand and cause of action in law or equity," parol evidence was not admissible to limit the extent of

the submission and show that it was to be confined to certain matters, inasmuch as no language could have been employed more comprehensive than "every demand and cause of action," etc. *De Long v. Stanton* (N. Y.) 9 Johns 38, 42.

**As each.**

"Every," as used in Act 1878, c. 143, giving a state power to open or widen any street, and securing to every property owner the right to have decided by jury trial whether any damage has been caused or any benefit has accrued to them, means "each," as well as every one. While the word refers to a whole class, it means that each shall be separately considered, and hence secures to each owner the right to a separate jury trial if he demand it. *Friedenwald v. City of Baltimore*, 21 Atl. 555, 74 Md. 118.

Rev. St. c. 179, § 3, providing that "every person" indicted for an offense not punishable by imprisonment for life shall be entitled to challenge peremptorily four of the jurors, and no more, and the district attorney shall be entitled to the same number of challenges, should be construed as meaning, when persons are jointly indicted, that each individual defendant separately considered is entitled to the four peremptory challenges. *Washington v. State*, 17 Wis. 147, 148.

"Every," as used in a statute providing that every allegation of the complaint should be denied by the answer, means, clearly, each allegation, specifically and separately considered. *Spaulding v. Harvey*, 7 Ind. 429, 432.

The phrase "every such overseer," in a statute requiring that each overseer of a borough divided into nine districts, and having an overseer of the parish in each district, should each forfeit a certain sum for failing to make out or sign the parish list, was construed to authorize the collection of the penalty from each overseer so failing to sign such a list. *King v. Share*, 3 Q. B. 30, 37.

**Every case.**

"Every case," as used in Code, § 3521, which provides that all acts of the Legislature in every case for which it had been provided by the Code are repealed by the repealing clause forming the subject-matter of article 3521, means every category, class of causes, or subject-matter on which the Code contains express provisions. *D'Apremont v. Berry*, 6 La. Ann. 464, 465.

The phrase "every such case," in Rev. St. § 4068, providing that no person shall be disqualified as a witness in any action or proceeding, civil or criminal, by reason of his interest in the event of the same as a party or otherwise, and every party shall be in "every such case" a competent witness,



except, etc., means every such action or proceeding, civil or criminal, previously mentioned in the section, and does not mean in every case in which the party is a party in interest. *Snell v. Bray*, 14 N. W. 14, 16, 56 Wis. 156.

#### **Every copy.**

"Every copy," as used in Rev. Laws, p. 399, providing that the Secretary of State is entitled to fees as follows: "For entering writings on the record, for each sheet, 8c; for every copy of the same and other papers in his office, for each sheet, 8c."—means every copy, both manuscript and printed, which the Secretary of State furnishes either for individuals or for members of the Legislature, and includes printed copies of the state laws which the Secretary of State has printed, as required by law, for the purpose of furnishing different newspapers in the state copies for republication. *State v. Kelsey*, 44 N. J. Law (15 Vroom) 1, 27.

#### **Every day.**

A charter party providing for demurrage for "every day, day by day," is to be construed as referring to running days, and not working days, and all days are to be counted, including rainy days, Sundays, and other holidays. *The Oluf* (U. S.) 19 Fed. 459.

#### **Every instance.**

See "In Every Instance."

#### **Every laborer or mechanic.**

Code 1880, § 1244, provides that the following property shall be exempt from seizure under execution or attachment, to wit: The tools of a mechanic necessary for carrying on his trade; certain property of each head of a family, and certain property raised in the state by the debtor; and the wages of "every laborer or mechanic" to the amount of \$100—shall be exempt from garnishment or other legal process. Held, that only a mechanic or laborer who is the head of a family can claim the exemption of wages. By every rule of grammatical construction the exemption is limited to heads of families, and by that simple rule of legal interpretation the general words "every laborer or mechanic," following the particular words "each head of a family," are to be referred to and controlled by such first used particular words, and the true reading will therefore be "the wages of every laborer or mechanic who is the head of a family to the amount of one hundred dollars shall be exempt." *McLarty v. Tibbs*, 12 South 557, 69 Miss. 357.

#### **Every person.**

"Every person," as used in Const. § 8, declaring that every person shall be entitled to certain remedy in the law for all wrongs

and injuries, is not employed literally, inasmuch as that would include aliens and enemies, but was limited in its application to the people of the state, or such as resided within its limits and are subject to its laws. *Davis v. Pierse*, 7 Minn. 13, 21 (Gil 1, 5), 82 Am. Dec. 65.

As used in the general crimes act of 1861 (p. 58), declaring that every person convicted of murder shall suffer death, and every person convicted of murder in the second degree shall suffer imprisonment in the state prison for a term of not less than ten years, "every person" does not embrace an Indian belonging to a tribe which is recognized and treated with by the federal government, and has its chief and tribal laws, and hence the state courts have not jurisdiction of such an Indian who has committed murder in the state. *State v. McKenney*, 2 Pac. 171, 181, 18 Nev. 182.

Rev. St. 1879, § 3710, giving the right of appeal to "every person aggrieved" by any final judgment or decision of any circuit court in any civil case, is not limited to persons who are technical parties to the suit, but includes every person whose rights are in any respect concluded by the judgment. *Nolan v. Johns*, 18 S. W. 1107, 1108, 108 Mo. 431.

#### **Every property.**

"Every property," as used in a statute giving a lien for wages upon every property belonging to an insolvent person or corporation, is an expression of general description. It is intended to include only articles of the same generic character as those already enumerated in the statute. In re *Thompson Glass Co.'s Estate*, 40 Atl. 526, 528, 186 Pa. 383.

#### **Every sentence.**

The phrase "every sentence," as used in 82 Ohio Laws, p. 237, § 2, providing that every person who, after having been twice convicted, is sentenced and imprisoned in some institution for felony, whether committed heretofore or hereafter, shall be convicted, sentenced, and imprisoned for felony hereafter committed, shall be deemed and taken to be an habitual criminal, and on the expiration of the term for which he shall be so sentenced he shall not be discharged from imprisonment in the penitentiary, but shall be detained therein for and during his natural life, unless pardoned, and the liability to be so detained shall be and constitute a part of "every sentence" to imprisonment in the penitentiary, should be taken to mean every sentence for a felony falling under this statute; that is, a third felony, for it is only on account of a third felony that a convict is made liable to a life sentence. *Blackburn v. State*, 36 N. E. 18, 21, 50 Ohio St. 423.

**Every town in the state.**

"Every town in the state," as used in Laws 1840, c. 143, providing that in every town in the state the town meeting could by vote authorize an additional amount of \$750 in any year to the \$500 authorized by existing laws for the improvement of highways, means every town in the state where there is no local law pertaining to this matter. *People v. Westchester County Sup'rs* (N. Y.) 40 Hun, 853, 854.

**Every writ.**

"Any and every writ," in Act April 4, 1873, as amended by Act June 20, 1883, providing that no foreign insurance company shall do any business in the state unless it has filed a stipulation agreeing that no legal process served on an agent shall have the same effect as if served personally upon the company within the state, and that the term "process" shall include "any and every writ," clearly comprehends an attachment execution. *Kennedy v. Agricultural Ins. Co.*, 80 Atl. 724, 725, 165 Pa. 179.

**EVERY OF THEM.**

A bond executed by two obligors, binding themselves and "every of them," meant that the obligors bound themselves severally. If the term "all of them" had been used, the bond would have been joint. Such words are often used to create a severalty of obligation in a joint instrument. *Besore v. Potter* (Pa.) 12 Serg. & R. 154, 158.

"Every of them," as used in a bond by several persons reciting that we "bind ourselves, our executors, and every of them," should be construed as applying only to their immediate antecedents, heirs, executors, and administrators, and not to include or extend to the obligors themselves, so as to make them separately and individually liable, and therefore the bond is a joint, and not a joint and several, one. *Pecker v. Julius* (Pa.) 2 Browne, 31, 32.

A bond in which the obligors declared themselves to be jointly held and firmly bound to the obligees in a certain sum, to which payment they bind themselves, their heirs, executors, and administrators, and "every of them," is a joint, and not a joint and several, bond. *Moser v. Libenguth* (Pa.) 1 Rawle, 255; *Wood v. Hummel* (Pa.) 4 Watts, 50, 51.

**EVERY OTHER.**

See "All and Every Other."

A will wherein the testator gave to his wife "every article of household furniture in or on such premises," etc., and "every other article of personal property" in and about said homestead, or wherever found, belong-

ing to the estate, would include family stores, carriages, live stock, farming tools, and all other chattels. *Benton v. Benton*, 63 N. H. 289, 295, 56 Am. Rep. 512.

**EVERYTHING.**

See "All and Everything."

The phrase "everything I die possessed of," when used in a will, is sufficient to pass the fee in testator's real estate, when such intention in manifest from the entire instrument. *Chamberlain v. Owings*, 30 Md. 447; *Wilce v. Wilce*, 7 Bing. 664.

A clause in a will providing that the testator gave and bequeathed to her grand-nephew all her household effects, books, and papers of value, and "everything the house contained," held, that the words "everything the house contained" should be held to mean merely household effects, such as articles to be used in the household by the family, and that such term did not include notes and a bankbook evidencing the testatrix's deposit in a savings bank which she held at the time of her death. *Webster v. Wiers*, 51 Conn. 569, 575.

**EVERYWHERE.**

The statement in an advertisement that the advertiser's thread was sold "everywhere" was insufficient to charge the advertiser with fraud. No sane man would understand these words literally. If "everywhere," when so used, is synonymous with "the earth," the advertiser could be convicted of falsehood by proof that the thread was unknown in Tasmania or Siam. It is a harmless exaggeration, understood and discounted by all. It is not fraud, but merely trade talk. *Clark Thread Co. v. Armitage* (U. S.) 67 Fed. 896, 899.

**EVICTION.**

See "Actual Eviction"; "Constructive Eviction."

To constitute an eviction, one must be actually dispossessed by one having the real title. In an action of covenant on a warranty of title to land, plaintiff must aver and prove an eviction by an elder and better title before the commencement of his action; and the recovery of a judgment in ejectment, by the party having the better title, against the warrantee, and suing out a writ of possession, without its being executed, is not a sufficient evidence of an eviction. *Ferriss v. Harshea*, 8 Tenn. (Mart. & Y.) 48, 17 Am. Dec. 782.

It is frequently said that a covenant of warranty is broken only by an eviction, but this is so often explained by the words "con-

structive eviction," or "what is equivalent to an eviction," or some such qualifying term, that its meaning is left uncertain. Perhaps a more correct statement, drawn from the modern use of the word, would be that an eviction is what will constitute a breach of the covenant of warranty. The words "warranty" and "eviction" and "voucher" are borrowed from the feudal law, and are often misleading when adopted into our modern system of conveyancing and of actions. An eviction is a breach of the covenant by each of the successive covenantors whose covenants have all passed with the land, and each is bound to each subsequent covenantee to make satisfaction for the breach. *Kramer v. Carter*, 186 Mass. 504, 507, 508.

It is not necessary, in order to constitute an eviction, that the possessors of land be expelled therefrom, but it is sufficient if there is a disturbance of the free and uninterrupted use thereof. *Eller v. Moore*, 63 N. Y. Supp. 88, 89, 48 App. Div. 403.

"Eviction" requires a disturbance in or deprivation or cessation of the possession by the prosecution and operation of legal measures, and where, by reason of an antecedent mortgage, the whole premises are absorbed in the discharge of the mortgage debt, it constitutes an eviction. *Stewart v. Drake*, 9 N. J. Law (4 Halst.) 139, 141.

"Eviction" is a turning out of possession, or placing the party in such a situation that, his expulsion being inevitable, he voluntarily surrenders the possession to save expulsion. *Reasoner v. Edmundson*, 5 Ind. 393, 395.

Where a patent has been repealed, or where a licensee has been enjoined from acting under a license at the suit of the owner of a senior patent, there is an eviction from such license. *McKay v. Smith* (U. S.) 39 Fed. 556, 557.

Eviction is the loss suffered by the buyer of the totality of the thing sold, or a part thereof, occasioned by the right or claims of a third person. Civ. Code La. 1900, art. 2500.

#### Legal process unnecessary.

It was at one time held that to constitute an eviction there must be a disturbance of the premises by legal process. Such is not now the rule. Possession may be surrendered, to one having a paramount title, with the same right to resort to the grantor's covenants of warranty that would have been brought about by an eviction under process of law. *Cowdrey v. Colt*, 44 N. Y. 882, 892, 4 Am. Rep. 690.

"Eviction," as used in the statement that eviction is necessary to a breach of the covenants for quiet enjoyment or warranty,

"originally meant an expulsion by the assertion of a paramount title and by process of law; but the idea that the ouster must be by process of law has long since been abandoned, and the rule now is that an eviction sufficient to constitute a breach of these covenants exists whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible title." *Fritz v. Pusey*, 18 N. W. 94, 95, 31 Minn. 368.

No doubt the original and technical meaning attached to the word "eviction" was an expulsion by the assertion of a paramount title and by process of law. But the idea that the ouster must be by the process of law has long since been abandoned. Constructive eviction is caused by the inability of the purchaser to obtain possession by reason of the paramount title. When, at the time of the conveyance, he finds the premises in possession of one claiming under paramount title, the covenants for quiet possession or of warranty will be held broken without any other act on the part of either the grantee or the claimant, for the latter can do no more towards the assertion of his title, and, as to the former, the law will compel no one to commit a trespass in order to establish a lawful right in another action. *Brass v. Vandecar* (Neb.) 96 N. W. 1035, 1036.

"Eviction" is technically a lawful disturbance of possession, or dispossession by judgment of law. An eviction by judgment of law is not, however, necessary. The party may voluntarily yield the possession to him who has the better title, or may purchase and hold it, and this is a sufficient ouster or disturbance to sustain an action on the covenant of warranty; but if he yields possession or buys in an outstanding title, he does so at his peril. If the title to which he yields or which he buys is not good, he must stand the loss; and in either case, in an action against his warrantor, the burden of proof is on him to show that the title was paramount to that of his grantor, though it is otherwise in case of an eviction by force of a judgment at law with notice of the suit to his warrantor. *Thomas v. Stickle*, 32 Iowa, 71, 76.

#### Diversion of water.

A diversion of water from waterworks, and thereby rendering them useless, does not constitute an eviction. *Mitchell v. Warner*, 5 Conn. 497, 521.

#### EVICITION (Of Tenant).

An eviction is not a mere trespass and nothing more, but something of a grave and permanent character, done by the landlord for the purpose and with the intention of depriving the tenant of the enjoyment of the

demised premises. *Hayner v. Smith*, 63 Ill. 430, 435, 14 Am. Rep. 124; *Lynch v. Baldwin*, 69 Ill. 210; *Barrett v. Boddie*, 42 N. E. 143, 144, 158 Ill. 479, 49 Am. St. Rep. 172; *Rice v. Dudley*, 65 Ala. 68, 71; *Miller v. Maguire*, 30 Atl. 966, 967, 18 B. L. 770; *Royce v. Guggenheim*, 106 Mass. 201, 203, 8 Am. Rep. 322.

There are a variety of circumstances which are deemed such a disturbance of the possession of a tenant as to constitute eviction, short of physical force or legal process. Any interference on the part of the landlord which impairs the beneficial enjoyment of the premises by the tenant, such as the creation of a nuisance in another portion of the same building, or the like, constitutes eviction. So where a tenant yields the possession in pursuance of a judgment for the recovery of possession, and in consequence of it, to a person adjudged to be the rightful owner, it is an eviction. *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370, 372.

To constitute an eviction of a tenant, he must be put out of possession either of part or of the whole of the premises demised. There can be no eviction if the tenant continues in the possession of the whole, however much he may be disturbed in the beneficial enjoyment. Every eviction includes an ouster, either of the whole or of some part. It must amount to a deprivation of possession, the possession must be given up by the tenant in consequence of the acts of the landlord, and the acts must be such as to warrant and justify the tenant in so doing, or the landlord must have taken the possession forcibly from the tenant. In short, there must be a change of possession. It must be out of the tenant and in the landlord. *Edgerton v. Page* (N. Y.) 5 Abb. Prac. 1, 3.

When the wrongful acts of a lessor upon or in regard to the leased premises are such as to deprive the lessee of the beneficial enjoyment of them, and the lessee in consequence abandons the premises, it amounts in law to an eviction, without other evidence that the landlord intended to deprive the tenant of the possession. *Waite v. O'Neill* (U. S.) 76 Fed. 406, 417, 22 C. C. A. 248; 34 L. R. A. 550.

"An eviction depends on the materiality of the deprivation. If trifling, and producing no substantial discomfort or serious inconvenience, it will be disregarded, and will not afford cause for the termination of the relation of landlord and tenant." A tenant in an apartment house is not at liberty to abandon his apartment and cancel his liability under a lease because his nervous sensibilities may be excited or his rest disturbed by the noise and prattle of children in another apartment of the same building. "Leases would not be worth the paper on

which they are written if the engagements of the parties could be set at naught upon such slight and trivial pretexts. To constitute a constructive eviction, there must be an intentional and injurious interference by the landlord which deprives a tenant of the beneficial enjoyment of the demised premises, or materially impairs such beneficial enjoyment." *Seaboard Realty Co. v. Fuller*, 67 N. Y. Supp. 146, 147, 33 Misc. Rep. 109.

An eviction of a tenant is an interference with his possession of the premises, or some part thereof, by or with the consent of the landlord, by which the tenant is deprived of the use without his assent; but where the rented premises were destroyed and the rent was not to recommence until the premises were rebuilt, and the tenant is present at negotiations to relet the premises to a third person and does not object, but at the same time is proposing a surrender on his own part, a possession by such third person under such circumstances, and particularly before the building was finished, could not be considered an eviction. *Ogden v. Sanderson* (N. Y.) 3 E. D. Smith, 166, 169.

Where premises were forcibly taken possession of by the sheriff under orders from the lessor, and after retaining possession for some days the sheriff delivered the keys to the lessor, who retained them, and also possession from that time, and placed on the premises a notice that they were for rent, and that the application should be made to him, it constituted an eviction. *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 48 Pac. 671, 673, 9 Colo. App. 299.

#### Dispossession necessary.

There is no eviction of a tenant as long as he remains in possession of the demised premises. There is an actual eviction when he is dispossessed by process of law, and there is a constructive eviction when he yields possession to the title which is actually paramount. There cannot be a constructive eviction without abandonment of possession. *Mead v. Stackpole* (N. Y.) 40 Hun, 473, 476.

An eviction consists either in actually putting out from possession, or, what is now regarded as equivalent to it, an exclusion, under a paramount title, from the peaceful enjoyment of the property. *Allis v. Nininger*, 25 Minn. 525, 527.

#### Legal process unnecessary.

It is extremely difficult at the present day to define with technical accuracy what is an eviction. The word "eviction" was formerly used to denote an expulsion by the operation of a title paramount and by process of law; but that sort of an eviction is not necessary to constitute a suspension of the rent, because it is now well settled that,

if the tenant lose the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term "eviction" is now properly applied to every class of expulsion or amotion. *Walker v. Tucker*, 70 Ill. 527, 541 (citing *Hayner v. Smith*, 63 Ill. 430, 14 Am. Rep. 124); *Upton v. Townend*, 17 O. B. 39; *Hoeverler v. Fleming*, 91 Pa. 322; *Edmison v. Lowry*, 52 N. W. 583, 585, 3 S. D. 77, 17 L. R. A. 275, 44 Am. St. Rep. 774.

It is true that if the tenant consents to an unlawful ouster he cannot afterwards be entitled to a remedy for such ouster; but an ouster may be lawful, and in that case the tenant may yield to a dispossession without losing his remedy on the covenant of warranty. While to prove an "eviction," according to its strict and technical meaning, a judgment of court is necessary, the term may be given a more extended signification, and be treated as synonymous with "ouster." *Hamilton v. Cutts*, 4 Mass. 349, 350, 352, 3 Am. Dec. 222.

#### Physical expulsion unnecessary.

The modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction. *Wusthoff v. Schwartz*, 78 Pac. 407, 408, 32 Wash. 337.

"Eviction" is defined to exist where there has been an obstruction to the beneficial enjoyment of the premises, and a diminution of the consideration of the contract by the acts of a landlord. *McAdam, Landl. & T.* 478, 479. It is not necessary that there should be actual expulsion of the tenant from the premises. If the landlord commits or suffers acts to be committed which make it necessary for the tenant to remove, this is equivalent to expulsion. *Tallman v. Murphy*, 120 N. Y. 345, 351, 24 N. E. 716 (citing *Edgerton v. Page*, 20 N. Y. 281, 283; *Dyett v. Pendleton* [N. Y.] 8 Cow. 727, 728).

It is said "the modern doctrine as to what constitutes an eviction is that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the premises will amount to an eviction in law." Hence, where the owner of a lot leased it, and thereafter obstructed the street in front of the entrance to the store building on such lot by placing thereon lumber and building material, thereby depriving defendant of free access, such obstruction constituted an eviction. *Edmison v. Lowry*, 52 N. W. 583, 585, 3 S. D. 77, 17 L. R. A. 275, 44 Am. St. Rep. 774.

An "eviction" is defined to be when there has been an obstruction to the beneficial enjoyment of the premises, and the diminu-

tion of the consideration of the contract by the act of the landlord, and it is not necessary that there should be the actual expulsion of the tenant from the premises. If the landlord commits or suffers acts to be committed which make it necessary for the tenant to remove, this is equivalent to expulsion. Leakage and overflow from a tank on the roof, which rendered the apartment so damp and unhealthful that the tenant was compelled to vacate, constituted an eviction. *Romaine v. Brewster*, 27 N. Y. Supp. 138, 139, 6 Misc. Rep. 531.

To constitute an eviction which will operate as a suspension of rent, it is not necessary that there should be an actual physical expulsion of the tenant from any part of the premises. Any act of a permanent character done by the landlord, or by his procurement, with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons possession, may be treated as an eviction. *Smith v. Raleigh*, 8 Camp. 513.

"Eviction" does not imply an actual physical expulsion, but any interference with the tenant's beneficial enjoyment will constitute an eviction. *Doran v. Chase*, 2 Wkly. Notes Cas. 609.

#### Condemnation of property.

An eviction is necessarily the act of the landlord, or of a third party holding under a paramount title. A condemnation by eminent domain of part of the landlord's reversion is not in law an eviction or partial eviction, and therefore the condemnation of a portion of leased land does not operate to abate any portion of the rent reserved, as being a partial eviction. *Gluck v. City of Baltimore*, 32 Atl. 515, 516, 81 Md. 315, 48 Am. St. Rep. 515.

#### Failure to give possession.

An eviction consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to be in possession of something which by the agreement of the parties he ought to have enjoyed. The omission of a landlord, therefore, to put the tenant in the possession of the whole demised premises, does not amount to an eviction. *O'Brien v. Smith*, 18 N. Y. Supp. 408, 409, 59 Hun, 624 (citing *Vanderpool v. Smith* [N. Y.] 4 Abb. Dec. 484; *Etheridge v. Osborn* [N. Y.] 12 Wend. 529).

To constitute an eviction or expulsion, there must be some affirmative act on the part of the party sought to be charged with the consequences flowing therefrom. An eviction does not consist in refusing to put a tenant in possession of something which by the agreement of the parties he ought to

have enjoyed. The lessee's remedy in such event is by an action to recover damages for a breach of the covenant. Hence where, by the terms of the lease, the landlord reserved to his own use a certain building until a specified date, and, no demand being made by the tenant, continued to occupy it after such date, he certainly was guilty of no eviction, and it would seem that he would not have been guilty of an eviction even though the tenant had demanded possession on the day appointed. *Vanderpool v. Smith* (N. Y.) 4 Abb. Dec. 461, 464.

Eviction cannot arise where it is admitted that the tenant never went into possession. Before the tenant has gone into actual possession he can maintain trespass on a trespasser's invasion of the property, when by such invasion his rights may be in any wise affected. The legal effect of eviction is so penal that the doctrine is not to be favored; and although, in some cases, the question of eviction on a constructive expulsion has been tried, it has never yet been justified that an eviction can be based on a constructive possession. *Birchhead v. Cummins*, 33 N. J. Law (4 Vroom) 44, 55.

"An eviction consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of something which by the agreement he ought to have enjoyed. A tenant cannot be evicted from that which he never possessed." *Etheridge v. Osborn* (N. Y.) 12 Wend. 529, 532.

"An 'eviction,' according to all the best authorities, means some change in the possession of the party by the disturbance of an actual or constructive possession, which has been displaced by a paramount title to which the party has been compelled by law, or by satisfactory proof of genuineness, to submit. Some of the authorities hold that there can be no eviction of one who is not in actual possession. Others more liberally extend the rule to a constructive possession. But it would be going to an absurd length to hold that a person can be said to have been disturbed or evicted when he never had either kind of possession." *Matteson v. Vaughn*, 88 Mich. 373, 375.

#### Neglect to drain cellar.

Any default, as well as any overt act of the lessor, that renders the tenement dangerous to the life of the tenant, may be treated by the lessee as an eviction. Thus it has been held that evidence of the lessor's neglect to drain the cellar constituted an eviction. *Alger v. Kennedy*, 49 Vt. 109, 110, 24 Am. Rep. 117.

#### Partial dispossession.

It is always to be implied, in the absence of a stipulation to the contrary, that

the tenant shall have the entire occupancy and use of the whole of the rented premises, and if he be ousted from any material part thereof he may treat such interference by the landlord as an eviction and abandon the lease; and, in the event of the tenant's electing to take this course, he is exonerated from the payment of rent. *Rice v. Dudley*, 65 Ala. 68, 71 (citing *Tayl. Land. & Ten.* § 315).

#### Voluntary abandonment.

Eviction of the whole or any part of the demised premises is a good plea in bar to an action by the landlord against the tenant, either of debt or covenant for the rent, but there can be no eviction without an actual entry. The very definition of the term "eviction" is an expulsion of the lessee out of all or some part of the demised premises, and, where a tenant of two rooms in a house voluntarily abandoned the premises because the landlord had leased other rooms in the house for illegal and immoral purposes, there was no eviction. *Pendleton v. Dyett* (N. Y.) 4 Cow. 581, 585.

"To constitute an eviction of a tenant by a landlord, there must be an amotion of the tenant from the demised premises by or in consequence of some act of the landlord in derogation of the rights of the tenant, and with the intent to determine the tenancy, or to deprive the tenant of the enjoyment of the premises, or some part thereof. The amotion may be by physical expulsion by the landlord, or by abandonment by the tenant upon some act of the landlord which amounts to an eviction at the election of the tenant. The intent with which the act is done may be an actual intent accompanying and characterizing the act, or it may be inferred from the act itself. If wrongful acts of the lessor upon demised premises are such as to permanently deprive the lessee of the beneficial enjoyment of them, and the lessee, in consequence thereof, abandons the premises, it is an eviction." *Skally v. Shute*, 132 Mass. 367, 370.

#### EVIDENCE.

See "Best Evidence"; "Circumstantial Evidence"; "Clear Evidence or Proof"; "Competent Evidence"; "Conclusive Evidence"; "Corroborating Evidence"; "Cumulative Evidence"; "Direct Evidence"; "Extrinsic Evidence"; "Hearsay Evidence"; "Illegal Evidence"; "Incompetent Evidence"; "Indirect Evidence"; "Indispensable Evidence"; "Insufficient Evidence"; "Judicial Evidence"; "Legal Evidence"; "Newly Discovered Evidence"; "Original Evidence"; "Partial Evidence"; "Positive Evidence"; "Presumptive Evidence"; "Prima Facie Evidence"; "Primary Evidence"; "Probable Evidence"; "Re-

butting Evidence"; "Satisfactory Evidence"; "Secondary Evidence"; "Slight Evidence"; "Sufficient Evidence"; "Unanswerable Evidence"; "Written Evidence."

See "Against Evidence"; "Circumstances of Evidence"; "Weight of Evidence."

Any evidence, see "Any."

"Evidence," in legal acceptance, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." *Wyoming Loan & Trust Co. v. W. H. Holliday Co.*, 24 Pac. 193, 194, 3 Wyo. 386 (quoting 1 Greenl. Ev. § 1); *Schloss v. His Creditors*, 31 Cal. 201, 203; *Hotchkiss v. Newton*, 10 Ga. 560, 567; *Tift v. Jones*, 3 S. E. 399, 401, 77 Ga. 181; *Nelson v. Johnson*, 18 Ind. 329, 332; *Roberts v. State*, 56 N. E. 203, 205, 25 Ind. App. 366; *State v. Thomas*, 23 South. 250, 252, 50 La. Ann. 148; *Auditor General v. Menominee County Sup'rs*, 51 N. W. 483, 505, 89 Mich. 552; *Lapham v. Marshall*, 3 N. Y. Supp. 601, 603, 51 Hun. 36; *McEntyre v. Tucker*, 25 N. Y. Supp. 95, 96, 5 Misc. Rep. 228.

"Evidence is any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." *Cook v. New Durham*, 13 A. 650, 651, 64 N. H. 419 (citing 1 Benth. Jud. Ev. 17); *State v. Ward*, 17 Atl. 483, 437, 61 Vt. 153 (citing 1 Best, Ev. § 11).

Evidence, "as a part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted." *Kring v. Missouri*, 2 Sup. Ct. 443, 452, 107 U. S. 221, 27 L. Ed. 306.

"Evidence," as defined by lexicographers and law-writers, includes all the means by which, in a judicial trial, it is sought to establish or disprove any material allegation of a civil or criminal pleading. Any circumstance which affords an inference as to whether the matter alleged is true or false is therefore "evidence," and is commonly understood to be within the meaning of that term. *O'Brien v. State (Neb.)* 96 N. W. 649, 650.

"Evidence is simply the means of proving a fact; that which tends to establish a fact." *People v. Bowers (Cal.)* 13 Pac. 660, 665.

"Evidence" is said to be that which demonstrates and makes clear a question of fact in issue. *Mallery v. Young*, 22 S. E. 142, 143, 94 Ga. 804.

"Evidence" is defined to be that which makes a matter in dispute clear, evident.

Belief cannot be given to one who has been hired by the plaintiff to appear as a witness in the case, and who is to be paid a certain sum if plaintiff wins the suit; and hence the testimony of such a witness should not be received, and such "evidence" ought not to be given. *Holland v. Ingram (S. C.)* 6 Rich. Law, 50, 52.

"Evidence," in its narrow and technical sense, is a machine for the discovery of truth, fettered and restrained by municipal law, and by local regulations which vary greatly in different countries. In its wider and universal sense, it embraces all questions by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. International tribunals are not bound by local restraint; they always exercise great latitude in such matters, and give to affidavits, and sometimes even to unverified statements, the force of depositions. Dissenting opinion in *Hubbell v. United States (U. S.)* 15 Ct. Cl. 546, 606.

In a request for an instruction that the jury has nothing to do with the equity or inequity of the testator's dispositions of property, provided they believe from the evidence that the alleged testator had sufficient mental capacity to make a will, etc., the word "evidence" signifies that given by witnesses, as distinguished from the contents of the will. While the latter is "evidence" in a broad sense, yet it is evident that the word was used in a more limited sense, and hence the request was properly refused. *Appeal of Crandall*, 28 Atl. 531, 63 Conn. 365, 38 Am. St. Rep. 375.

In an action to set aside a deed as fraudulent as to creditors, an instruction that "the use to which a deed is applied is evidence of the intent with which it was made. If the deed was used to hinder and delay creditors, then it is evidence that it was so intended; and if found to be so, is void as to existing creditors"—though technically correct, would be apt to be misunderstood by the jurors, who are rarely skilled in legal or technical lore, and are accustomed to place the general or popular construction on language. The term "evidence," in a legal technical sense, is almost the synonym of "instrument of proof." *Greenleaf (volume 1, § 1)* says "it includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." This is its technical meaning. *Bouv. Dict.* Its general popular signification is much broader. Its primary obvious meaning is that which makes evident or manifest; the ground of belief or judgment; conclusive testimony; a statement which contains proofs, as the "evidence" of our senses; "evidence" of truth or falsehood. *Webster, Dict.* It is frequently said

of a proposition that it furnishes the evidence of its truth, or carries with it evidence of its own truth. "Self-evident," "evidently," are employed to express the idea of full proof; conviction. *McWilliams v. Rogers*, 56 Ala. 87, 98.

Evidence is of two kinds: That which, if true, directly proves the fact in issue; and that which proves another fact from which the fact in issue may be inferred. *Hart v. Newland*, 10 N. C. 122, 123.

#### **Affidavit.**

See "Affidavit."

#### **As competent or legal evidence.**

Evidence is whatever may properly be considered by the court, or properly be submitted to the jury for its consideration. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 456.

Evidence is such testimony as court or presiding officer may regard as competent and admit as proof under a pending issue. *Brightwood R. Co. v. O'Neal* (D. C.) 10 App. Cas. 205, 236.

A decree of the probate court reciting that it was adjudged "after a full hearing of all the evidence adduced," it was held that the word "evidence" must be construed to mean legal evidence, including documentary evidence, admission of parties, or the testimony of witnesses duly sworn; and that therefore, on the proof for certiorari to review said decree, testimony was not admissible that no sworn evidence was heard by the court. *Wheeler v. Court of Probate of Westerly*, 41 Atl. 574, 575, 21 R. I. 49.

#### **Facts synonymous.**

While the "facts" and the "evidence" are quite different things, since the facts can neither be added to nor taken from, while evidence may be added to, weakened, or even destroyed, yet it may sometimes happen that they constitute one and the same thing. In view of this, where a bill of exceptions stated that the case was submitted on an agreed state of facts, which it recited, and that such statement contained all the facts agreed which were admitted to court or heard by the court in determination of the cause, it was construed to sufficiently show that such facts constituted all the evidence given in the cause. *Gates v. Haw*, 50 N. E. 299, 150 Ind. 870.

#### **Proof distinguished.**

Evidence is the medium of proof. Proof is the effect of evidence. *People v. Beckwith*, 15 N. E. 53, 55, 108 N. Y. 67; *Perry v. Dubuque S. W. Ry. Co.*, 36 Iowa, 102, 106.

The words "evidence" and "proof" are often used as synonymous. In strictness,

however, the latter is the effect of the former. *Buffalo & State Line R. R. Co. v. Reynolds* (N. Y.) 6 How. Prac. 96, 98; *Jastremski v. Marxhausen*, 79 N. W. 935, 937, 120 Mich. 677; *Hill v. Watson*, 10 S. C. (10 Rich.) 263, 273; *Glenn v. State*, 2 South. 109, 110, 64 Miss. 724. See, also, *Snowden v. State*, 62 Miss. 100, 105.

"The words 'evidence' and 'proof' are often used indifferently as synonymous with each other, but the latter is applied by the most accurate logicians to the effect of evidence, and not to the medium by which truth is established." *Tift v. Jones*, 3 S. E. 390, 401, 77 Ga. 181 (quoting 1 Greenl. Ev. § 1); *State v. Thomas*, 23 South. 250, 252, 50 La. Ann. 148; *Glenn v. State*, 2 South. 109, 110, 64 Miss. 724.

"There is an obvious difference between the words 'evidence' and 'proof.' The former, in legal acceptance, includes the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter is the effect or result of evidence." 1 Greenl. Ev. § 1. These words are often used indifferently as expressive of the same thing. *Schloss v. His Creditors*, 81 Cal. 201, 203.

#### **As tangible evidence.**

"Evidence," as used in Code, § 1105, authorizing a new trial when the jury has received any evidence, paper, document, etc., not allowed by the court, to the prejudice of the substantial rights of the defendant, means tangible evidence, as books, papers, documents, etc. *Doctor Jack v. Territory*, 8 Pac. 882, 886, 2 Wash. T. 101.

#### **Testimony distinguished.**

"The term 'evidence' is the more comprehensive word, and includes testimony, which latter, strictly speaking, means only that evidence which comes from living witnesses who testify orally, but in common language the two words are frequently used synonymously." *Mann v. Higgins*, 23 Pac. 206, 207, 83 Cal. 66; *Noyes v. Pugin*, 27 Pac. 548, 550, 2 Wash. St. 653 (quoting *Bouv. Law Dict.*); *Carroll v. Bancker*, 10 South. 187, 192, 43 La. Ann. 1078, 1194; *People v. Kenyon* (N. Y.) 5 Parker, Cr. R. 254, 288.

The word "testimony" is not synonymous with "evidence," and in habeas corpus proceedings a certificate of the magistrate that the testimony sent up is all the "testimony" taken in the case is insufficient to show that it is all the "evidence" in the case. *Ex parte Brenner*, 26 Pac. 993, 3 Wyo. 412.

"Evidence" includes all testimony, while "testimony" does not include all evidence, and where a bill of exceptions concludes with the words, "the above was all the testimony introduced on the trial," it does not



show that it contains all the evidence, but it must affirmatively and clearly appear that no other species, class, or kind of evidence except testimony was introduced on the trial of the case. *McDonald v. Elfes*, 61 Ind. 279, 284.

"Testimony" is not "evidence," and where the bill of exceptions, after setting out certain evidence, says, "This was all the testimony," it is insufficient to show that it contains all the evidence in the case. *Harvey v. Smith*, 17 Ind. 272, 279; *Central Union Telephone Co. v. State*, 12 N. E. 136, 137, 110 Ind. 203; *McConaha v. Carr*, 18 Ind. 443; *Downs v. Downs*, 17 Ind. 95, 96; *Kleyla v. State*, 13 N. E. 255, 112 Ind. 146; *Craggs v. Bohart* (Ind. T.) 69 S. W. 931, 934.

"Evidence" is not equivalent to "testimony," as used in a bill of exceptions stating that all the "testimony" was in the record. "Testimony is one species of evidence, but the word 'evidence' is a generic term, which includes every species of it; and in a bill of exceptions the general term covering all species should be used as to embracing the 'evidence,' instead of the term 'testimony,' which is satisfied if the bill only contains all of that species of evidence." *Gazette Printing Co. v. Morsa*, 60 Ind. 153, 157.

#### EVIDENCE OF DEBT.

As chose in action, see "Chose in Action."

In a will providing that if at the distribution there should be due to the estate from any of the legatees obligations of any kind, or evidences of debt of any kind, they should be deducted from such legatees' share, the term "evidences of debt" was meant to embrace instruments, not obligations or promises to pay, and which might not be even acknowledgments of indebtedness, as, for example, receipts for advances of money. *Hill v. Bloom*, 7 Atl. 438, 440, 41 N. J. Eq. 276.

"Evidences of debt," as used in Comp. Laws, § 7151, excepting bank bills, notes, or other evidences of debt issued by any bank from the provisions of the statute relating to the limitation of actions, has reference to the ordinary deposits which are like a running account, on which the time of limitation only begins when there is a special occasion for making a new departure; but on all demand paper not excepted by the statute the time runs from the beginning, and no one can be a bona fide purchaser who does not take it within some reasonably short time. To hold otherwise would enable banks to issue certificates of deposit of any denomination for circulation as ordinary bank bills, and with a like effect. *Tripp v.*

*Curtenius*, 36 Mich. 494, 499, 24 Am. Rep. 610.

Rev. St. § 5214, which declares that all transfers, notes, bonds, bills of exchange, or other evidences of debt, owed to any national banking association, made after the commission of an act of insolvency, or in contemplation thereof, etc., shall be utterly null and void, etc., means only those evidences of debt which are part of the assets of the bank, and does not include evidences of debt which are merely in the possession of the bank, but are the property of another. *First Nat. Bank of Decatur v. Johnston*, 11 South. 690, 691, 97 Ala. 655.

An action by a depositor against a stockholder for the balance of his account, as evidenced by entries in his passbook written by officers of the bank, is an action on "evidences of indebtedness in writing" within the meaning of the statute of limitations. *Schalucky v. Field*, 16 N. E. 904, 906, 124 Ill. 617, 7 Am. St. Rep. 399.

#### Certificate of deposit.

1 Rev. St. p. 600, § 4, declares that no corporation created and not expressly incorporated for banking purposes shall be deemed to possess the power to discount bills or to issue notes or other evidences of debt. Section 21 of the act incorporating the New York Life Insurance & Trust Company (Sess. Laws 1830, p. 80, § 75) provides that "the said company shall not in any case or for any purpose issue discount bills, notes, or other evidences of debt, for circulation as money." Held, that the term "evidence of debt," as so used, properly describes certificates of deposit redeemable within 20 years and bearing interest, issued as loans by such company, and hence the issuance thereof was contrary to and a violation of the charter. *New York Life Ins. & Trust Co. v. Beebe*, 7 N. Y. (3 Seld.) 364, 367.

#### Insurance policy.

Code Civ. Proc. § 1778, providing that, in an action against an administrator or foreign corporation on an "evidence of debt for the absolute payment of money on demand or at a particular time," the defendant must serve with his answer a copy of an order of the judge directing that the issues presented by the pleadings be tried, cannot be construed to apply to an ordinary life insurance policy, it being evidence of no debt in itself, but a conditional contract. *McKee v. Metropolitan Life Ins. Co.* (N. Y.) 25 Hun, 583, 584; *New York Life Ins. Co. v. Universal Life Ins. Co.*, 88 N. Y. 424, 427.

#### Judgment.

An evidence of debt is anything by which a debt may be proved, and, as used in Comp. Laws, subd. 3, § 4760, declaring that

personal property shall include money, goods, chattels, things in action, and evidences of debt, includes judgments. *McLaughlin v. Alexander*, 49 N. W. 99, 100 2 S. D. 226.

#### Letter.

A letter which merely recites what has been done under a contract assumed to have been previously made, and which does not state all the terms of the contract, is not an "evidence of indebtedness in writing," with in Rev. St. c. 83, § 16, which provides that actions on evidences of indebtedness in writing may be begun within 10 years after the cause of action accrues. *Wilson v. Williams* (Ill.) 33 N. E. 884.

#### Mortgage.

Act 1876 (Supp. Code, §§ 420-423), providing for the summary establishment, by copies, of any lost bond, note, bill, draft, check, or other evidence of indebtedness, cannot be construed to include a mortgage, which is a security for debt, and not, strictly speaking, a mere evidence of indebtedness. It is a deed defeasible if the debt be paid, but still a deed to secure the debt. It is very different from a bond, bill, note, draft, or check, and not a mere evidence of debt. It is a lien, binds the property in it, and is a much more solemn and binding instrument than any simple evidence of indebtedness. *Littlefield v. Clary*, 66 Ga. 322, 323.

"Evidence of indebtedness," as used in a will which provided that whatever advances testator had made to any child, or to the husband of any child, for which receipts or evidence of indebtedness should be found among his papers after his decease, should be allowed such child, meant evidences of loans whereby the claims could be enforced, and included a mortgage given by one of the testator's children for money borrowed of the testator. *Chase v. Ewing* (N. Y.) 51 Barb. 597, 613.

#### Open account.

"Evidence of debt," as used in Gould, Dig. c. 133, § 1, providing that suits at law may be commenced by filing in the clerk's office a note or writing obligatory, or due-bill, or other evidence of debt on which a summons or *capias* may issue, means an instrument which shows on its face a cause of action or a right of action, without any auxiliary averment. Therefore, under such definition, the term "evidence of debt" is not satisfied by the mere filing of an open account. *Gaines v. Craig*, 24 Ark. 477, 478.

#### EVIDENCE WITHOUT FURTHER PROOF.

The phrase "evidence without further proof," as used in a statute providing that an instrument certified in the manner pre-

scribed by law is made evidence without further proof thereof, indicates that the facts certified are proof per se. Thus the words of a certificate of acknowledgment become evidence for what they import, and acquire probative force by command of the statute. The officer, by solemn official acts, certifies to the acts and declarations of the person appearing before him, and those acts and declarations are thereby stamped with the character of evidence tending to establish whatever those acts and declarations would establish if proved by oral testimony in a court of justice. *Albany County Sav. Bank v. McCarty*, 43 N. E. 427, 481, 149 N. Y. 71.

#### EVIDENT.

The word "evident" is defined by Webster as "clear to the mind; obvious; plain; manifest; notorious; palpable." *Ex parte Foster*, 5 Tex. App. 625, 647, 32 Am. Rep. 577.

The term "proof is evident," as used in the constitutional provision that all prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, means "when the evidence is of such a character as would authorize a judge to sustain a capital conviction if pronounced by a jury, and which would lead a well-guarded and dispassionate judgment to the conclusion that the offense had been committed by the accused, and that he would probably be punished capitally." *Ex parte Foster*, 5 Tex. App. 625, 646, 32 Am. Rep. 577.

Mr. Webster defines "evident" as manifest, plain, clear, obvious, apparent, notorious; and as used in a Bill of Rights providing that all persons shall be bailable by sufficient surety, unless for capital offense, when the proof is evident, it means unless it plainly, clearly, and obviously appears by the proof that the accused killed the deceased. *Ex parte Boyett*, 19 Tex. App. 17, 45. The term is as definite to the legal mind as any words of explanation would make it, and is intended to indicate the same degree of certainty, whether the evidence be direct or circumstantial. The design is to secure the right of bail in all cases except those in which the facts might show with reasonable certainty that the prisoner is guilty of a capital offense. *McCoy v. State*, 25 Tex. 33, 38, 78 Am. Dec. 520. It cannot be construed to include evidence which is all circumstantial. Proof by circumstantial evidence is always insufficient unless it excludes, to a moral certainty, every other reasonable hypothesis but that of the guilt of the accused. *Ex parte Acree*, 63 Ala. 234.

Where two successive juries have failed to agree in their verdict on an indictment, that fact is a circumstance strongly going to show that, as to the person's guilt, the proof

was not evident, nor the presumption great, and, when coupled with other circumstances going to show that the accused will meet the coming trial, will authorize his admittance to bail. In re Alexander, 59 Mo. 598, 600, 21 Am. Rep. 398.

The mere fact that a jury has failed to agree upon a verdict in a murder case does not entitle the defendant to bail, under the constitutional provision that all offenses are bailable, except capital offenses, of which the proof of guilt is evident. Webb v. State, 4 Tex. App. 167, 169.

#### EVIDENT MISCALCULATION.

Rev. St. 1894, § 858 (Rev. St. 1881, § 846), providing that an award of arbitrators, presented to a court of record for judgment to be entered thereon, may be modified when there is an evident miscalculation of figures, means only such miscalculation as arises upon the face of the record. Brown v. Harness, 38 N. E. 1098, 11 Ind. App. 426.

#### EVIDENTLY UNSUITABLE.

"Evidently unsuitable," as used in Pub. St. c. 139, § 21, authorizing the removal of a guardian when he is evidently unsuitable therefor, construed to require that the guardian must be manifestly, obviously, and unmistakably unsuitable. Gray v. Parke, 29 N. E. 641, 155 Mass. 433.

"Evidently unsuitable," as used in Rev. St. c. 63, § 7, providing that where any executor shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the judge of probate may remove him, implies no want of capacity or mental infirmity, but an unfitness arising out of the situation of the person, in connection with the estate which he is administering, either by reason of his being indebted to it, or having claims on it, or in the interest he has under a will, or his situation as an heir at law. It is not restricted to a cause of unfitness equivalent to insanity or incapability. Thayer v. Homer, 52 Mass. (11 Metc.) 104, 109.

#### EVINCE.

A rule requiring the petition for a commission in lunacy to be accompanied by affidavits evincing the lunacy of the party should be construed to be answered by an affidavit in which the deponent swears expressly that, for the space of six or seven years last past, he has, by frequently observing the behavior, words, and actions of the person, looked upon him to be deprived of his reason and understanding, so as to be incapable of the government of himself and incompetent to manage his affairs, though it sets forth no particular act or expression

of the alleged lunatic from which the court might be enabled to form some opinion of the propriety of granting the application. In re Covenhoven, 1 N. J. Eq. (Saxt.) 19, 24.

#### EX.

A sale by a broker of "\$500,000 United States 4 per cent. bonds at 103, ex. July coupons," meant a sale reserving the coupons; that is, a sale in which the seller receives, in addition to the purchase price, the benefit of the coupons, which benefit he may realize either by detaching them, or receiving from the buyer an equivalent consideration. Porter v. Wormser, 94 N. Y. 431, 443.

The abbreviation "Ex," as used in a bill of exceptions in which appears "Ex. A introduced," means "Exhibit A." Dugan v. Trisler, 69 Ind. 553, 555.

#### EX ÆQUUS.

See "Æquus."

#### EX CONTRACTU.

See "Action Ex Contractu"; "Damages Ex Contractu."

Under the Revised Statutes, limiting the right of appeal in all actions ex contractu, and providing that the term "ex contractu" shall not be construed to include actions involving a penalty, no appeal lies from the decision of the appellate court on a prosecution for bastardy where a judgment was rendered for \$50, since such proceeding, being a civil action under the form of a criminal prosecution, is not an action ex contractu, and the judgment thereon, being for the assistance of the mother in supporting the child, is not a penalty. Scharf v. People, 24 N. E. 761, 124 Ill. 240.

#### EX DELICTO.

See "Action Ex Delicto"; "Damages Ex Delicto."

Claims ex delicto as claims, see "Claim."

#### EX MALEFICIO.

See "Trust Ex Maleficio."

#### EX MALITIA.

"Ex malitia," in its legal signification, imports a publication that is false and without legal excuse. Dixon v. Allen, 11 Pac. 179, 180, 69 Cal. 527.

#### EX PARTE.

"Ex parte," as used when speaking of an ex parte examination of witnesses, im-

plies an examination in the presence of one of the parties and in the absence of the other. *Lincoln v. Cook*, 3 Ill. (2 Scam.) 61, 62.

### EX PARTE MATERNA.

The words "ex parte materna" are found constantly used in the books to denote the line or blood of the mother, and have no restricted or limited sense, as from the mother exclusively. *Banta v. Demarest*, 24 N. J. Law (4 Zab.) 431, 433.

### EX PARTE PATERNA.

The words "ex parte paterna" are found constantly used in the books to denote the line or blood of the father, and have no such restricted or limited sense as from the father exclusively. *Banta v. Demarest*, 24 N. J. Law (4 Zab.) 431, 433.

### EX POST FACTO.

As retrospective law, see "Retrospective Law."

A law is ex post facto when, after an action indifferent in itself is committed, the Legislature, for the first time, declares it a crime, and inflicts a punishment on the person who has committed it. *Woart v. Winnick*, 3 N. H. 473, 475, 14 Am. Dec. 384 (citing 1 Bl. Comm. 46); *Martindale v. Moore* (Ind.) 3 Blackf. 275, 279. The words "ex post facto," when applied to a law, have a technical meaning, and, in legal phraseology, apply to crimes, pains, and penalties. Blackstone's description of the term is clear and accurate. There is, says he, a still more unreasonable method than this, which is called "making of laws ex post facto," where, after an action indifferent in itself is committed, the legislature then for the first time declares it to be a crime, and inflicts a punishment on the person who has committed it. 1 Bl. Comm. 46. In the Constitutions of Massachusetts, Delaware, Maryland, and North Carolina the term "ex post facto" is understood in the same sense. *White v. Wayne* (Ga.) T. U. P. Charlt. 94, 106.

A law which was in existence at the time the act complained of was committed could not in any sense, in relation to that act, be called an ex post facto law. *Kring v. State*, 2 Sup. Ct. 443, 447, 107 U. S. 221, 27 L. Ed. 506; *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 635.

An ex post facto law is one which makes an act punishable in a manner in which it was not punishable when committed. *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 138, 3 L. Ed. 162; *Ex parte Larkin*, 25 Pac. 745, 746, 1 Okl. 53, 11 L. R. A. 418; *Nottage v. City of Portland*, 58 Pac. 883, 887, 35 Or. 539, 76 Am. St. Rep. 513; *Ex parte Law* (U.

S.) 35 Ga. 285, 298, 15 Fed. Cas. 3; *Wilson v. Ohio & M. Ry. Co.*, 64 Ill. 542, 546, 16 Am. Rep. 565; *In re Ross*, 19 Mass. (2 Pick.) 165, 170; *State v. Ryan*, 13 Minn. 370, 375 (Gil. 343, 347); *State v. Willis*, 66 Mo. 131, 135; *Hartung v. People*, 22 N. Y. 95, 104; *People v. Hayes*, 24 N. Y. Supp. 194, 199, 70 Hun, 111; *Shepherd v. People*, 24 How. Prac. 388, 395.

An ex post facto law is one which is enacted after the offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. *In re Wright*, 27 Pac. 505, 566, 3 Wyo. 478, 13 L. R. A. 748, 31 Am. St. Rep. 94; *United States v. Hall* (U. S.) 20 Fed. Cas. 84, 86; *Kring v. State*, 107 U. S. 221, 2 Sup. Ct. 443, 448, 27 L. Ed. 506; *Cummings v. State*, 71 U. S. (4 Wall.) 277, 286, 18 L. Ed. 356; *Wooler v. Watkins*, 22 Pac. 102, 106, 2 Idaho (Hash.) 590; *Marion v. State*, 20 N. W. 289, 291, 16 Neb. 849.

An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed. *Meffert v. State Board of Medical Registration and Examination*, 72 Pac. 247, 251, 66 Kan. 710; *Burgess v. Salmon*, 97 U. S. 381, 385, 24 L. Ed. 1104, 1106 (citing *Carpenter v. Pennsylvania*, 58 U. S. [17 How.] 456, 15 L. Ed. 127).

An ex post facto law is one which inflicts a punishment for doing an act innocent at the time of its commission. *Bennett v. Boggs* (U. S.) 3 Fed. Cas. 221, 228.

Ex post facto laws are such as subject the party to punishment or forfeiture for an act antecedently done, and which, when done, was not punishable at all, or not in the manner or to the extent prescribed. *Berdan v. Van Riper*, 16 N. J. Law (1 Har.) 7, 11 (citing *Watson v. Mercer*, 33 U. S. [8 Pet.] 88, 8 L. Ed. 876).

An ex post facto law is one that has relation to a past act, and punishes as criminal an act that was innocent at the time it was done, or adds to the punishment of an act that was criminal when done, or increases the malignity of the crime, or so retrenches the rules of evidence as to make conviction more easy. *Gotcheus v. Matheson* (N. Y.) 40 How. Prac. 97, 101 (citing *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Calder v. Ball*, 3 U. S. [3 Dall.] 386, 1 L. Ed. 648).

An ex post facto law is one that originates a punishment, or increases punishment for an act already done. *State v. Moore*, 42 N. J. Law (13 Vroom) 208, 228.

An ex post facto law is defined to be a law whereby an act is declared to be a crime, and made punishable as such, which was

not a crime when done, or whereby the act of a crime is aggravated in enormity or punishment. *Green v. Shumway*, 89 N. Y. 418, 431.

The leading case upon *ex post facto* laws, within the meaning of constitutional provisions prohibiting the passing of such laws, is that of *Calder v. Bull*, 8 U. S. (3 Dall.) 386, 1 L. Ed. 648, decided by Justice Chase, in the Supreme Court of the United States, in 1798. He said that the term included "(1) every law that makes an action done before the passing of the law and which was innocent when done, criminal, and punishes such action; (2) every law that aggravates a crime, and makes it greater than it was when committed; (3) every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; (4) every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender." *Cummings v. State*, 71 U. S. (4 Wall.) 277, 286, 18 L. Ed. 356; *Kring v. State*, 107 U. S. 221, 2 Sup. Ct. 443, 448, 27 L. Ed. 506; *Duncan v. State*, 14 Sup. Ct. 570, 572, 152 U. S. 377, 38 L. Ed. 485; *Thompson v. State*, 18 Sup. Ct. 922, 923, 171 U. S. 380, 43 L. Ed. 204; *Mallett v. State*, 21 Sup. Ct. 730, 732, 181 U. S. 589, 45 L. Ed. 1015; *United States v. Hall* (U. S.) 26 Fed. Cas. 84, 85; *Garvey v. People*, 6 Colo. 559, 568, 45 Am. Rep. 531; *In re Tyson*, 22 Pac. 810, 18 Colo. 482, 6 L. R. A. 472; *State v. Hoyt*, 47 Conn. 518, 532, 36 Am. Rep. 89; *Boston v. Cummins*, 16 Ga. 102, 106, 60 Am. Dec. 717; *Strong v. State* (Ind.) 1 Blackf. 193, 196; *Martindale v. Moore* (Ind.) 3 Blackf. 275, 279; *Davis v. Ballard*, 24 Ky. (1 J. J. Marsh.) 563, 578; *State v. Ardoin*, 24 South. 802, 51 La. Ann. 169, 72 Am. St. Rep. 454; *State v. Read*, 26 South. 828, 52 La. Ann. 271; *State v. Johnson*, 12 Minn. 478 (Gil. 378, 388), 93 Am. Dec. 241 (quoting *Calder v. Bull*, 8 U. S. [3 Dall.] 386, 387); *McGuire v. State*, 25 South. 495, 497, 76 Miss. 504; *Ex parte Bethurum*, 66 Mo. 545, 548; *State v. Kyle*, 65 S. W. 763, 768, 166 Mo. 287, 56 L. R. A. 115; *Marion v. State*, 20 N. W. 289, 291, 16 Neb. 349; *Woart v. Winnick*, 3 N. H. 473, 475, 14 Am. Dec. 384; *Green v. Shumway* (N. Y.) 86 How. Prac. 5, 7; *Hartung v. People*, 22 N. Y. 95, 104; *People v. Hayes*, 35 N. E. 951, 952, 140 N. Y. 484, 23 L. R. A. 830, 37 Am. St. Rep. 572; *People v. Hawker*, 46 N. E. 607, 608, 152 N. Y. 234; *Shepherd v. People* (N. Y.) 23 How. Prac. 337, 342; *Dickinson v. Dickinson*, 7 N. C. 327, 330, 9 Am. Dec. 608; *Ex parte Larkins*, 25 Pac. 745, 746, 1 Okl. 53, 11 L. R. A. 418; *Dawson v. State*, 6 Tex. 347, 348; *Holt v. State*, 2 Tex. 363, 364; *City Council of Anderson v. O'Donnell*, 7 S. E. 523, 526, 29 S. C. 355, 1 L. R. A. 632, 18 Am. St. Rep. 728; *Bitten-*

*haus v. Johnston*, 66 N. W. 805, 92 Wis. 538, 32 L. R. A. 380; *In re Wright*, 27 Pac. 565, 566, 3 Wyo. 478, 13 L. R. A. 748, 31 Am. St. Rep. 94.

There is a distinction to be noted between laws *ex post facto* and those which are retrospective. Every *ex post facto* law must necessarily be retroactive, but every retroactive law is not *ex post facto*. The former are prohibited by the Constitution; the latter are not. A law that takes away or impairs rights vested agreeably to existing law is retrospective and may be unjust, but it is not necessarily unconstitutional. There is nothing in the Constitution of the United States or of Pennsylvania to prevent retrospective legislation, provided it does not impair the obligation of a contract, or change the punishment of a criminal act. *Commonwealth v. Taylor* (Pa.) 2 Kulp, 364, 366 (citing *Lane v. Nelson* [Pa.] 2 Wkly. Notes Cas. 216).

#### Application to civil actions.

The provision of the Constitution of the United States prohibiting any state to pass *ex post facto* laws applies only to legislation concerning crimes. *In re Sawyer*, 8 Sup. Ct. 482, 484, 124 U. S. 200, 31 L. Ed. 402; *Calder v. Bull*, 8 U. S. (3 Dall.) 386, 399, 1 L. Ed. 648; *Watson v. Mercer*, 33 U. S. (8 Pet.) 88, 110, 8 L. Ed. 876; *Walker v. Whitehead*, 83 U. S. (16 Wall.) 314, 317, 21 L. Ed. 357; *Kring v. State*, 2 Sup. Ct. 443, 448, 107 U. S. 221, 27 L. Ed. 506; *In re Medley*, 10 Sup. Ct. 384, 387, 134 U. S. 160, 33 L. Ed. 835; *Davis v. Ballard*, 24 Ky. (1 J. J. Marsh.) 563, 578; *Fisher v. Cockerill*, 21 Ky. (5 T. B. Mon.) 129, 133; *Boston v. Cummins*, 16 Ga. 102, 106, 60 Am. Dec. 717; *Ex parte Law* (U. S.) 35 Ga. 285, 293, 15 Fed. Cas. 3; *Wilder v. Lumpkin*, 4 Ga. 208, 219; *Dash v. Van Kleeck* (N. Y.) 7 Johns. 477, 483, 5 Am. Dec. 291; *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 51 U. S. (10 How.) 395, 402, 13 L. Ed. 469; *Burch v. Newbury*, 10 N. Y. (6 Seld.) 374, 385; *Dash v. Van Kleeck* (N. Y.) 7 Johns. 477, 503, 5 Am. Dec. 291; *Locke v. Dane*, 9 Mass. 860, 862; *Jacquins v. Commonwealth*, 63 Mass. (9 Cush.) 279, 281; *Bonney v. Reed*, 31 N. J. Law (2 Vroom) 133, 135; *Suydam v. Receivers of Bank of New Brunswick*, 3 N. J. Eq. (2 H. W. Green) 114, 117; *Coles v. Madison County*, 1 Ill. (Breese) 154, 155, 12 Am. Dec. 161; *Commonwealth v. Lewis* (Pa.) 6 Bin. 266, 271; *Grim v. Weisenberg School Dist.*, 57 Pa. (7 P. F. Smith) 433, 435, 98 Am. Dec. 237; *Nottage v. City of Portland*, 58 Pac. 883, 887, 35 Or. 539, 76 Am. St. Rep. 513; *Sutherland v. De Leon*, 1 Tex. 250, 303, 46 Am. Dec. 100; *Town of Danville v. Pace* (Va.) 25 Gratt. 1, 9, 18 Am. Rep. 663; *Ex parte Quarrier*, 4 W. Va. 210, 224.

*Ex post facto* laws relate only to criminal and penal proceedings which impose

punishment and forfeitures. *Gotchens v. Mathleson* (N. Y.) 40 How. Prac. 97, 101.

The term "ex post facto law," as used in the Constitution, prohibiting the enactment of an ex post facto law, relates exclusively to laws of a punitive character. *Bloodgood v. Cammack* (Ala.) 5 Stew. & P. 276, 280.

Ex post facto laws embrace only such as impose or affect penalties or forfeitures. They do not include statutes having any other operation. The term "ex post facto," literally construed, would apply to any act operating upon a previous fact, yet the restricted sense stated is the one in which it has always been held. It was the sense in which it was understood both in this country and in England when the Constitution was adopted. *Locke v. New Orleans*, 71 U. S. (4 Wall.) 172, 173, 18 L. Ed. 334.

An ordinance providing that licenses to sell liquor shall not be granted to persons who have employed females as waitresses is not an ex post facto law, since it is not criminal, and does not punish any past act committed, done, or suffered to be done, but simply furnishes a standard applicable to all persons, by which their fitness to conduct a business in itself dangerous to the morals and good character of the city shall be measured. *Foster v. Board of Police Com'rs*, 87 Pac. 763, 765, 102 Cal. 483, 41 Am. St. Rep. 194.

An act which invalidates a prior marriage would not be an ex post facto law. *Callahan v. Callahan*, 15 S. E. 727, 730, 36 S. C. 454.

A statute enacting that "no mispleading or lack of pleading shall hereafter render any executor or administrator liable," etc., could not be an ex post facto law. *Martindale v. Moore* (Ind.) 3 Blackf. 275, 279.

The prohibition of the federal Constitution against the passage of ex post facto laws does not preclude the passing of laws divesting vested property rights. *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 51 U. S. (10 How.) 395, 402, 13 L. Ed. 469.

A retrospective transfer tax law is not an ex post facto law. *Orr v. Gilman*, 22 Sup. Ct. 213, 216, 183 U. S. 278, 46 L. Ed. 196.

The federal Constitution does not prohibit states from passing retrospective laws, and hence a state may adopt new remedies for the collection of taxes, and apply those remedies to taxes already delinquent. *League v. State*, 22 Sup. Ct. 475, 477, 184 U. S. 156, 46 L. Ed. 478.

A law which is merely retrospective and unjust because interfering with vested rights is not an ex post facto law, within the mean-

ing of the Constitution; that phrase relating only to criminal statutes. *Albee v. May* (U. S.) 1 Fed. Cas. 296, 297.

The Legislature may pass laws altering, modifying, or even taking away the remedies for the recovery of debts, without incurring a violation of the clause of the Constitution which forbids the passage of ex post facto laws; and, where the provisions of such laws in relation to remedies apply only to future proceedings, there is no ground whatever for seeking to apply such constitutional restriction. Hence an act providing that no greater estate than that of the person or persons in possession at the time of commencing a building on account of which a mechanic's lien was sought shall be sold by virtue of any execution issuing on account of such lien was not unconstitutional, as an ex post facto law, though applied to a lien which was filed before the passage of the act. *Evans v. Montgomery* (Pa.) 4 Watts & S. 218, 220.

A law providing that those who did not make certain improvements on land held by them within a specified time should forfeit such lands, without judicial process, to those in possession, is within the spirit of the provision against ex post facto laws in cases where the time given was not reasonably sufficient for the completion of the improvements. The act may not fall literally within the definition of an ex post facto law, but it is fully within the reason and policy of the inhibition against the passage of such laws. *Gaines v. Buford*, 81 Ky. (1 Dana) 481, 507.

The term "ex post facto laws" applies to civil as well as criminal acts. *Ogden v. Saunders*, 25 U. S. (12 Wheat.) 213, 286, 6 L. Ed. 606 (citing 1 Shep. Touch. 68, 73); *Moore v. State*, 43 N. J. Law [14 Vroom] 203, 214, 39 Am. Rep. 558.

The limitation of the definition of "ex post facto law" to criminal laws is "an idea purely American, and not the worse for that; but it is incorrect. 'Ex post facto law'—'ex jure post facto,' translated 'ex post facto law'—embraces civil contracts as well as criminal acts. The *pœna* and the action, *ex jure post facto*, or arising on an act done or a contract made before the law was passed, are both embraced by this term. Our Constitutions use the phrase 'ex post facto law,' or 'law impairing contracts.' They mean no more than to specify, under the idea of impairing contracts, a kind of ex post facto law which was embraced under the general term 'ex post facto.'" *Stoddart v. Smith* (Pa.) 5 Bin. 355, 369.

A law which simply prescribes the qualifications of voters, and provides a mode of ascertaining those qualifications, which is entirely present and prospective in its oper-

ation, is in no sense an ex post facto law. *Wooley v. Watkins*, 22 Pac. 102, 106, 2 Idaho (Hasb.) 590.

#### **Imposition or change of penalty.**

The term "ex post facto laws," in the Constitution, means laws making acts criminal which were not so when done. A retroactive statute authorizing vindictive damages, being highly punitive, and not for compensation, merely, is invalid, as partaking of the obnoxious spirit of all ex post facto legislation. *O'Donoghue v. Akin*, 63 Ky. (2 Duv.) 478, 480.

An act requiring the recording of mortgages, and making those unrecorded void as against purchasers, is ex post facto as to precedent mortgages, being highway penal. *Low v. Goldtrap*, 1 N. J. Law (Coxe) 272, 276.

An act was an ex post facto law which changed a fixed penalty of \$50 to a discretionary penalty not exceeding \$100. *Wilson v. Ohio & M. Ry. Co.*, 64 Ill. 542, 546, 16 Am. Rep. 565.

#### **Prosecution after bar by limitations.**

Ex post facto laws are, in a general sense, enactments after the facts to which they relate, and the expression includes both criminal and civil statutes. In *Low v. Goldtrap*, 1 N. J. Law (Coxe) 272, Chief Justice Kinsey, in the Supreme Court, said of a law for the recording of pre-existing mortgages, "This act, strictly speaking, is ex post facto." Not long afterwards the same court adjudged a statute declaring that, in certain cases, payments made in Continental money should be credited as specie, to be an ex post facto law; but it has now long been settled that, as used in the Constitution, the phrase embraces only retrospective statutes of a criminal or penal nature. To what extent it includes these is not definitely settled. It has sometimes been said that at the time of the adoption of the federal Constitution the words had acquired a fixed meaning as a technical term, but a reference to the citations shows that this statement is not exactly true; and in *Calder v. Bull*, 3 U. S. (3 Dall.) 386, 395, 1 L. Ed. 648, Judge Chase says the words "ex post facto laws" have not any certain meaning attached to them. A statute which purports to authorize the prosecution, trial, and punishment for an offense previously committed, and as to which the prosecution trial and punishment were at its passage already barred, according to the pre-existing statutes of limitation, is ex post facto. *Moore v. State*, 43 N. J. Law (14 Vroom) 208, 228, 39 Am. Rep. 558.

#### **Repeal of amnesty act.**

The Ordinance of 1868, c. 29, repealing the amnesty act of 1866, which pardoned all felonies committed by persons in the Con-

federate army in the discharge of their duty, was an ex post facto law, inasmuch as it rendered criminal what before its ratification was not so, and took away vested rights to immunity. *State v. Keith*, 63 N. C. 140, 144.

#### **Test oaths.**

The term "ex post facto laws," within the meaning of the Constitution, was held to include a law passed after the Civil War requiring all attorneys practicing in the United States Supreme Court to take an oath that they had not engaged in any rebellion against the government, or assisted or encouraged its enemies. *Ex parte Garland*, 71 U. S. (4 Wall.) 833, 877, 18 L. Ed. 366.

Act March 29, 1867, providing for a convention to revise and amend the Constitution of a state excluding from the privilege of voting all who refused to swear that they had never voluntarily borne arms against the United States since they had been citizens thereof; that they had voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto, and that they had neither sought nor expected nor attempted to exercise the functions of any office whatever under any authority or pretended authority in hostility to the United States; that they had not yielded a voluntary support to any pretended government, authority, power, or Constitution within the United States, hostile or inimical thereto, and did not willfully desert from the military or naval service of the United States, or leave the state to avoid a draft, during the late Rebellion—is an ex post facto law, and void, for it imposes punishment for acts not punishable at the time they were committed, and changes the rule of testimony required to convict. *Green v. Shumway* (N. Y.) 86 How. Prac. 5, 7.

#### **Nature and extent of punishment.**

An act which merely provides that, if the accused is sentenced to a confinement different from that required by law, the court before whom he may be brought on habeas corpus should sentence him to confinement in the proper place, and, if sentenced for a longer term than the law authorized, the court should sentence him for the proper time, merely provides for the correction by such court of an error patent upon the record, and is not an ex post facto law. *Ex parte Bethurum*, 66 Mo. 545, 548.

An act which abolishes the minimum limit of the punishment for an offense is not an ex post facto law. *People v. Hayes*, 24 N. Y. Supp. 194, 199, 70 Hun, 111.

#### **Same—Increasing punishment.**

A law which increases the punishment with which the act was punishable when committed is ex post facto. *Shepherd v. People*, 25 N. Y. 406, 415.

Where a law changed the punishment prescribed for the crime of murder from either death or imprisonment for life, the penalty to be fixed by the jury in their verdict, to death alone for murder in the first degree, and devested the jury of the authority to fix the penalty, such law, as to the crime of murder committed before its passage, is *ex post facto*. *Marion v. State*, 20 N. W. 289, 291, 16 Neb. 349 (quoting and approving *Calder v. Bull* [Pa.] 3 Dall. 386, 1 L. Ed. 648).

Under the head of *ex post facto* is included every law which changes the punishment and inflicts a severer penalty than was authorized by the law annexed to the crime committed. *State v. Read*, 26 South. 826, 828, 52 La. Ann. 271.

An act passed by Seventh General Assembly of Colorado, substituting the State Penitentiary for the county jail as the place of confinement pending execution, and directing that execution, which had before taken place publicly, thereafter take place within the penitentiary, is not in these respects *ex post facto* as to one under sentence when the act took effect, as it does not change the punishment to his disadvantage; nor is the act *ex post facto*, in that it designates the confinement as solitary, where it also provides that the accused may be visited by attendants, counsel, physician, and spiritual adviser, and members of his family. *In re Tyson*, 22 Pac. 810, 18 Colo. 482, 6 L. R. A. 472.

A law changing the punishment for perjury from whipping, not exceeding 100 stripes, to confinement in the penitentiary, not exceeding seven years, was not an increase of punishment, and hence not *ex post facto*. *Strong v. State* (Ind.) 1 Blackf. 193, 196.

The words "*ex post facto* law" have a definite, technical significance. The plain and obvious meaning of the constitutional prohibition against such laws is that the Legislature shall not pass any law after a fact done by any citizen which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment that which was criminal, or to increase the malignity of the crime, or to retrench on rules of evidence so as to make a conviction more easy. Act March 8, 1897, known as the "Indeterminate Sentence Law," is not an *ex post facto* law, in being applied to a sentence on conviction of a crime committed before its passage, since such a sentence does not add to or increase the punishment beyond that existing when the crime was committed. *Davis v. State*, 51 N. E. 928, 929, 152 Ind. 84, 71 Am. St. Rep. 322.

An act providing that those convicted of murder, who formerly were executed within

from four to eight weeks after sentence, should not be executed until after at least one year in the penitentiary, and that after that time the fixing of the date of their execution should be left to the Governor, was an *ex post facto* law, as applied to acts committed before the passage of the act. *Hartung v. People*, 22 N. Y. 95, 104.

A law is an *ex post facto* law when it renders an act punishable in a manner in which it was not punishable when committed, unless the change consists in mitigation of the character of punishment. Accordingly a law which provided that persons sentenced to death, who previously would have been executed in from four to eight weeks, should not be executed within less than a year from the time of conviction, and which left to the Governor the fixing of the day on which the execution should take place, was an *ex post facto* law, though under the later enactment the sentence might never be executed, for it prescribes at least one year's imprisonment as an additional penalty, and after that time leaves the prisoner's life embittered by the dread of impending death. *In re Petty*, 22 Kan. 477, 481.

The infliction of a different but not a greater punishment for a crime does not make the statute *ex post facto*, as applicable to crimes previously committed. *McGuire v. State*, 25 South. 495, 497, 76 Miss. 504.

#### Same—Mitigating punishment.

No law can be considered an *ex post facto* law which modifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. *Murray v. State*, 1 Tex. App. 417, 428; *Calder v. Bull*, 3 U. S. (3 Dall.) 386, 389, 1 L. Ed. 648; *Strong v. State* (Ind.) 1 Blackf. 193, 196; *McGuire v. State*, 25 South. 495, 497, 76 Miss. 504.

Laws which mitigate the character of punishment of a crime already committed do not fall within the prohibition in the Constitution against *ex post facto* laws, for they are in favor of the citizen. *State v. Willis*, 66 Mo. 181, 185 (citing 2 Sto. Const. § 1345).

A law which retains the manner of punishment, but simply reduces its extent, is not *ex post facto* as to offenses committed before its passage. *Commonwealth v. Wyman*, 66 Mass. (12 Cush.) 237, 239; *State v. Arlin*, 39 N. H. 179, 180.

*Ex post facto* laws are not such as modify the rigors of the criminal law, but those only that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. A mere remedy which ameliorates punishment, and inures solely to the benefit of the



party to be punished, can in no sense be regarded as an ex post facto law, and especially when it is within the option of the offender to elect the original penalty. Thus a statute which changes a provision requiring the infliction of the death penalty for murder in the first degree, by which either death or imprisonment for life may be inflicted, is not an ex post facto law. *McInturf v. State*, 20 Tex. App. 335, 352.

No law that mollifies the rigor of the criminal law is regarded as an ex post facto law, and it is nowhere suggested in any of the cases that any legislative interference by way of mitigating the punishment of an offense can be regarded as an ex post facto law, if applicable to offenses committed before its passage. *People v. Hayes*, 35 N. E. 951, 952, 140 N. Y. 484, 23 L. R. A. 830, 37 Am. St. Rep. 572.

**Same—Authorizing conviction of offense included in that charged.**

Rev. St. 1879, § 1655, authorizing the conviction of a defendant of any offense, the commission of which is necessarily included in that charged, is not an ex post facto law, or retrospective in its operation (Const. 1875, art. 2, § 15) when applied to a case in which the offense was committed and the indictment found prior to the taking effect of said section, and the trial had thereafter, notwithstanding such conviction was not authorized by the law in force at the time the offense was committed and indictment found (2 Wag. St. § 1, p. 852). *State v. Johnson*, 81 Mo. 60, 62.

It is well settled that any law which has the effect to alter the situation of a party to his disadvantage is ex post facto as to him, and therefore an amendment to Code Civ. Proc. § 444, which provides that on a trial for murder or manslaughter, the defendant may be convicted of assault in any degree is ex post facto, as to a pending indictment. *People v. Cox*, 73 N. Y. Supp. 774, 776, 67 App. Div. 344.

**Same—Prescribing punishment for second offense.**

The provision in St. 1817, c. 176, § 5, that, where a person has been convicted of a crime punishable by being confined to hard labor, he shall, upon conviction of another offense punishable in like manner, be sentenced to a punishment in addition to the one prescribed by law for the last offense, is not ex post facto, when applied to a case in which the second offense was committed after the passing of the statute. The general nature of ex post facto laws is to make acts criminal which at the time when they were done were innocent, and which had not been made an offense by any previous law. *In re Ross*, 19 Mass. (2 Pick.) 165, 170.

An act declaring that persons thereafter convicted of certain offenses committed after the passage of the act may be, if shown to have committed like offenses before the passage of the act, subjected to a greater punishment than that prescribed for those who have not committed such former offenses, is not objectionable as an ex post facto law. *Rand v. Commonwealth (Va.)* 9 Grat. 738, 743.

**Procedure.**

The prescribing of different modes of procedure, and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing laws surround a person accused of crime, are not considered within the constitutional inhibition as to ex post facto laws. *Duncan v. State*, 14 Sup. Ct. 570, 572, 152 U. S. 377, 38 L. Ed. 485.

An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed, and an act which relates neither to the crime, nor the punishment for it, and neither directly nor indirectly changes or aggravates either, but merely establishes the mode of proceeding in trials to be had after its passage, by giving the state the right to peremptorily challenge seven petit jurors, is not an ex post facto law, and is not even retroactive. *State v. Ryan*, 13 Minn. 370, 375 (Gil. 343, 347).

A provision for an appeal by the state in a criminal case from the grant of a new trial is not an ex post facto law. *Mallett v. State*, 21 Sup. Ct. 730, 732, 181 U. S. 589, 45 L. Ed. 1015.

A constitutional amendment authorizing prosecution of felonies by information was not ex post facto as to offenses committed before it took effect, since it merely changed the mode of procedure. *State v. Kyle*, 65 S. W. 763, 768, 166 Mo. 287, 56 L. R. A. 115.

An act which provides that all crimes, misdemeanors, and offenses may be prosecuted either by indictment as thereafter provided, or by information, and that no grand jury shall hereafter be summoned unless the same be ordered by the court, is not an ex post facto law, in applying to offenses committed prior to its passage. *In re Wright*, 27 Pac. 565, 566, 3 Wyo. 478, 13 L. R. A. 748, 81 Am. St. Rep. 94.

**Same—Jurisdiction and venue.**

An ex post facto law does not involve in any of its definitions a change of the place of trial of an alleged offense after its commission. *Gut v. Minnesota*, 76 U. S. (9 Wall.) 35, 38, 19 L. Ed. 573. Thus an act giving a court jurisdiction of crimes committed in a strip of land known as "No

Man's Land" is not an *ex post facto* law. *Cook v. United States*, 11 Sup. Ct. 268, 275, 138 U. S. 157, 34 L. Ed. 906.

A statute erecting a new tribunal, or giving jurisdiction to an existing court to try past offenses, is not *ex post facto*, where no change is made in the description of the offense, or the manner of punishment, or requisites as to proof. *Commonwealth v. Phillips*, 28 Mass. (11 Pick.) 28, 32.

The term "*ex post facto* law" does not include in any of its definitions a change of the place of trial of an alleged offense after its commission. *Gut v. State*, 76 U. S. (9 Wall.) 85, 38, 19 L. Ed. 573.

Sess. Laws 1895, c. 84, repealing Rev. St. § 4431, providing that, upon any criminal examination, either party was entitled to a change of venue on affidavit of prejudice of the justice, though it deprives the accused of such right in an examination for an offense committed before the repealing act took place, is not an *ex post facto* law. *People v. McDonald*, 42 Pac. 15, 17, 5 Wyo. 526, 29 L. R. A. 834.

#### Same—Rules of Evidence.

State statutes authorizing the comparison of a disputed handwriting with any handwriting proved to be genuine is not an *ex post facto* law, in its application to crimes previously committed, as altering the legal rule of evidence at the time of the commission of the offense. *Thompson v. State*, 18 Sup. Ct. 922, 923, 171 U. S. 380, 43 L. Ed. 204.

The change in Rev. Pen. Code, art. 746, giving the word "horse" a generic application, instead of its specific signification under the previous law in relation to the theft of a horse, in a trial for a horse theft committed before the change in the revision took effect, would be *ex post facto*. *Valesco v. State*, 9 Tex. App. 76.

Rev. Code Cr. Proc. art. 426, providing that, where property is owned in common or jointly by two or more persons, the ownership may be alleged to be in either or all of them, and authorizing a conviction on different evidence than a pre-existing law with reference to offenses committed before the Code took effect, is *ex post facto*. *Calloway v. State*, 7 Tex. App. 585, 586.

#### Same—Trial.

Laws which affect the procedure only are not *ex post facto*. Thus a law diminishing the number of grand jurors, and allowing a conviction on the concurrence of 9 of a jury of 12, while formerly a concurrence of all was required, is not *ex post facto* in character. *State v. Caldwell*, 23 South. 869, 870, 50 La. Ann. 666, 41 L. R. A. 718, 69 Am. St. Rep. 465.

Article 116, Const. 1898, substituting the concurrence of 9 of the jury for that of 12 to convict of crime, is *ex post facto* legislation, so far as it applies to offenses committed prior to the adoption of the Constitution. *State v. Ardoin*, 24 South. 802, 51 La. Ann. 169, 72 Am. St. Rep. 454.

Article 10, § 1, of the Constitution of Utah, providing that in capital cases the jury shall consist of eight jurors, is *ex post facto* as to offenses committed before the territory became a state. *Thompson v. State*, 18 Sup. Ct. 620, 621, 170 U. S. 343, 42 L. Ed. 1061.

The phrase "*ex post facto* law," as found in the Constitution, forbidding the passage of such a law, includes the provision of the Constitution of 1898 providing for the trial of criminal cases not necessarily punishable at hard labor by the court without a jury, in its application to offenses committed before the Constitution was adopted. *State v. Baker*, 24 South. 240, 241, 50 La. Ann. 1247, 69 Am. St. Rep. 472.

A law requiring the jury, instead of the judge, as previously, to assess the punishment, is not an *ex post facto* law. *Holt v. State*, 2 Tex. 863, 864.

#### EX SHIP.

A contract of sale of goods, where the price is stipulated to be so much per pound "*ex ship*," these words do not restrict the transportation of the goods to any particular ship, but simply denote that the property in the goods shall pass to the buyer on leaving the ship's tackle, and that he shall be liable for all subsequent charges of landing. They do not constitute a condition of the contract, but are inserted for the benefit of the seller. *Harrison v. Fortlage*, 16 Sup. Ct. 488, 490, 161 U. S. 57, 40 L. Ed. 616 (citing *Neill v. Whitworth*, 18 C. B. [N. S.] 435).

#### EX VESSEL.

A bill of sale of goods at the time of the sale in a foreign country, in bulk, "*delivered ex vessel* in New York Harbor," means that the merchandise should be delivered at New York, and not at the place where it was when sold. *Tinsley v. Weidinger*, 8 N. Y. Supp. 476, 477, 15 Daly, 534.

#### EX VI TERMINI.

See "*Way Ex Vi Termini*."

#### EXACT.

A statutory power conferred on a city to exact license money from all persons licensed to retail intoxicating liquors by

county or state authority does not confer the power to prohibit the sale of intoxicating liquors. *Sweet v. City of Wabash*, 41 Ind. 7-11.

The term "exacting labor," as used in a statute prohibiting the officers of any street car company exacting more than ten hours' labor a day, implies a demand, and a compliance with that demand in some way, whether that demand be made lawfully or unlawfully, by virtue of the terms of an existing contract, or by superior force, although, in a sense, labor cannot be exacted of a free man. In *re Ten Hour Law for St. Ry. Corps.*, 54 Atl. 602, 609, 24 R. L. 603, 61 L. R. A. 612.

### EXACT CENSUS.

School Law, § 1869, providing that it shall be the duty of the district clerk to take an exact census of all children residing in the district, etc., means a census which is precisely accurate. *School Dist. No. 7 v. Patterson*, 24 Pac. 698, 10 Mont. 17.

### EXACTION.

A statement in a complaint that there had been an unjust exaction of a tax which plaintiffs sought to recover was equivalent to the use of the words "ascertainment and liquidation," as used in Rev. St. U. S. § 2931, giving the right to recover, and implied a payment of the tax. *Laidlaw v. Abraham* (U. S.) 43 Fed. 297.

The word "exaction," as used in a publication alleging that the "exactions of the wife are said to be the prime factors in bringing about the self-destruction of the husband," is a stronger word, and implies more, than the word "caused," and manifestly for the reason that the word "caused" may have been an innocent one, so far as the wife is concerned. *Brown v. Tribune Ass'n*, 77 N. Y. Supp. 461, 463, 74 App. Div. 359.

### EXAMINE—EXAMINATION.

See "Cross-Examination"; "Cursory Examination"; "Direct Examination"; "Due Examination"; "Judicial Examination"; "Oral Examination"; "Personal Examination"; "Preliminary Examination"; "Private Examination"; "Privy Examination."

Dissection as, see "Dissect—Dissection."

The term "examination," as used in Act April 6, 1850, concerning conveyances (section 23), providing that the certificate of acknowledgment shall set forth that a married woman joining in a conveyance acknowledged, on private examination apart from and without the hearing of her husband, that she executed the same freely

and voluntarily, means an inquiry in response to which the married woman shall declare that she has executed the deed freely and voluntarily, etc. *Muir v. Galloway*, 61 Cal. 498, 506.

Rev. St. c. 109, authorizing the commissioners of an insolvent estate, or the court on an appeal from their decision, to require a claimant against such estate to submit to an examination in relation to his claim, cannot be construed to authorize the admission of the claimant to be a witness on the motion of his own counsel to prove his claim. *Morse v. Page*, 25 Me. (12 Shep.) 496, 498.

The power to examine and correct errors is the distinguishing characteristic of appellate power, as in the same manner the power to hear and determine is an essential ingredient of original jurisdiction. *Commonwealth v. Simpson* (Pa.) 2 Grant, Cas. 438, 439.

The word "examination," as used in the statutory definition of a trial as "a judicial examination of the issues between the parties," is clearly not as extensive as "investigation," and certainly not as "litigation." It does not imply a laborious or contested inquiry. In the absence of either party, where an issue has been joined, it is the duty of the court to examine what it is, in order to give the proper judgment. Without counsel or protector, the court becomes the guardian of the rights of the absent or unprotected, to see that no more is decreed against them than the claim and issue warrant. Indeed, there is much more room for confining the meaning of judicial examination to such an inspection and scrutiny of what the issues are, than enlarging it to every imaginable legal argument or testimony. *Worcester*, in contrasting "examination" with its synonyms, says it is "a general term," and "is made in order to form a judgment." He adds, "An investigation is a minute inquiry; a scrutiny, a strict examination." The Code does not declare how long, strict, or minute an examination is to be, in order to become a trial. It is enough that there is an inquiry of some kind. *Mora v. Great Western Ins. Co.*, 23 N. Y. Super. Ct. (10 Bosw.) 622, 627, 628.

"Examination," as used in equity rule 48, directing the master not to make any statement of facts, charge, affidavit, examination, etc., part of his report, but merely to identify and refer to it, means written examination of witnesses, taken either by the master himself, or by examiners appointed for the purpose. *Clapp v. Sherman*, 17 Atl. 130, 131, 16 R. I. 870.

### Re-examination.

Gen. St. 1878, c. 86, § 67, requiring a county superintendent of schools to keep records of all examinations of teachers, in-

cludes re-examinations. *School Dist. No. 10 v. Thelander*, 21 N. W. 554, 555, 82 Minn. 476.

**Reject.**

The statutes authorizing the board of supervisors of each county to examine, settle, and allow all accounts chargeable against such county seem necessarily to imply the exercise of judgment and discretion in settling and allowing, and to involve the right to reject if sufficient reasons for allowing are not, in their opinion, presented. *People v. Supervisors of Dutchess (N. Y.)* 9 Wend. 506, 509.

**Of person charged with crime.**

Within the provision fixing the fees of the United States attorney for examination before a judge or commissioner of persons charged with crime, the words "examination of the person charged" mean investigation of the case, so that allowances are made for attendances before commissioners when sworn testimony is taken, although the person charged with crime is not himself examined. But where no accusation has been made, and no witnesses sworn and examined by the commissioner, there was not an examination of the person charged, within the statute. *United States v. Stanton (U. S.)* 70 Fed. 890, 891, 17 C. C. A. 475.

Code, § 1146, provides that, at the commencement of the examination of a prisoner before a magistrate, he shall be informed that he is at liberty to refuse to answer questions, and that his refusal to answer shall not be used to his prejudice. Held, that the commencement of the examination, as the term is used in such statute, should be construed to mean when, after the warrant of arrest is returned executed, the accused is present before the magistrate, and the latter, having called and noticed the matter of the charge, proceeds to read the warrant or state the substance of the charge orally; and hence any statement made by the accused before the warrant was returned might be properly used, though he was not warned that he was at liberty not to answer. *State v. Conrad*, 95 N. C. 668, 669.

**Same—Trial.**

In the case of *Conelly v. Dakota County*, 29 N. W. 1, 35 Minn. 365, the word "examination," in the Minnesota statute allowing a fee to the sheriff for bringing any prisoner before any court for examination, was held not to include a trial. "The statute nowhere applies the term to such a trial. When used in a criminal proceeding, it is applied always to a preliminary inquiry, and never to a final trial on indictment. At common law an arrest and examination were proceedings preliminary to a final trial, and the term 'examination,' in a criminal proceeding, is a well-

known and well-understood proceeding, distinct from final trial." *Wagener v. Ramsey County Com'rs*, 79 N. W. 166, 167, 76 Minn. 368.

**Of records.**

Code 1876, § 698, providing that the records of the judge of probate's office must be free for the examination of all persons when not in use by him, cannot be construed to entitle attorneys at law who are engaged in loaning money to have access to the records for the purpose of making abstracts of all the titles of real estate in the county, to enable them in future transactions to furnish abstracts promptly as required. *Randolph v. State*, 2 South. 714, 715, 82 Ala. 527, 60 Am. Rep. 761.

Comp. Laws 1885, c. 25, § 211, providing that all books and papers required to be in the offices of county officers shall be opened for the examination of any person, means an examination by persons desiring some information which may be readily gained by a personal inspection of the records. It does not give the right to make copies of the entire records in an office for the purpose of making a set of abstract books. *Cormacks v. Wolcott*, 15 Pac. 245, 247, 87 Kan. 391.

1 Rev. St. p. 601, § 1, provides that a stockholder of a private corporation shall have a right at any reasonable time during the usual business hours, and within 30 days previous to an election of directors, to examine the books for the purpose of ascertaining who are stockholders, and thus entitled to vote. Held, that the term "examine," as there used, was not limited to a mere inspection, but, in addition, authorized stockholders to inspect and take a copy or list of the names of the stockholders. *Cotheal v. Brouwer*, 5 N. Y. (1 Seld.) 562; *Brouwer v. Cotheal*, 10 Barb. 216.

**Of votes.**

Pub. St. c. 7, § 45, providing that the Governor, with five, at least, of the council, shall examine the return of votes made by the city and town clerks to the secretary of the commonwealth, as required by section 40, and that he shall issue his summons to such person as appears to be chosen, does not extend to an examination or a recount of the votes themselves, but includes merely an examination of the returns to ascertain the persons appearing to have been chosen or elected on the face of the returns. *Opinion of Justices*, 136 Mass. 583, 586.

**EXAMINATION OF A LONG ACCOUNT.**

"Examination of a long account," as used in Act 1788 and the Code, authorizing a compulsory reference in actions requiring the examination of a long account, means

such a case as requires proof by testimony of the correctness of the items of composition and long account, and does not merely mean a case where it is necessary to examine the account, and ascertain the result or effect of it. The practice came into use when New York was a colony under the Dutch, and was continued after the conquest of the colony by the English as a more satisfactory mode of procedure for the investigation of matters of account than on a trial by a jury. The Dutch, as was the usage in Amsterdam, referred the settlement of all such matters of account to three persons called "arbitrators," and, like some other Dutch usages or laws, this was continued for many years after New York became an English colony; these three persons being sometimes called "arbitrators," and sometimes "referees." (Introduction to *E. D. Smith's Reports*, xlv; 2 *Rec. of Mayor's Court*; *Rec. of Mayors*, vols. 2 to 7.) The charter of liberties and privileges of 1683, however, provided that all trials should be by the verdict of 12 men (appendix No. 11 to 2 *Rev. Laws* 1818), which virtually abolished this mode of procedure; and there was no way then by which a matter involving an account could be tried at common law, except by an action of account. Baron Gilbert, writing at a much later period, says that in an action of indebitatus assumpsit "no evidence can be given of an account current, because such an examination would be tedious upon issues, and therefore in this case an action of account is provided, wherein there is judgment quod computet before a master or auditor, where the whole matters upon both sides are examined, stated, and balanced." Gilbert, *Ev.* p. 192. And see, also, *Trials per Pais*, p. 401; *Nasworthy v. Wyldman*, 1 *Mod.* 42; *Lincoln v. Parr*, 2 *Keb.* 781; *Scott v. Macintosh*, 2 *Camp.* 238. But the action of account was intricate in its course of procedure, dilatory, expensive, and, moreover, did not reach all cases of accounts, so that a bill in equity for an accounting was preferable. This action therefore fell into disuse, and the practice arose in England of bringing indebitatus assumpsit in place of it, the parties usually consenting, where the account was obviously too complicated to be tried by a jury, to refer it as in equity; and finally the usage became so general that it was at last held (disregarding the old cases) that indebitatus assumpsit would lie, no matter how numerous the items in the account, the practical effect of which compelled parties to consent to refer where the accounts were long or complicated. *Tomkins v. Willsheare*, 5 *Taunt.* 431; *Arnold v. Webb*, *Id.*, note. In the colony of New York the same result took place at an earlier period. It was found not only that this action would not reach all cases of accounts, but also that the course of procedure in it could not be adapted to a trial by jury, which was obligatory in the

colony by the charter of liberties and privileges, for in this ancient action there were two judgments—first, that the defendant account, or, as it was called, "quod computet," upon which the court assigned two auditors, who were usually officers of the court, who examined the parties under oath respecting the account (a practice which did not exist in other common-law actions); and there might be a new pleading before the auditors of matter in discharge of the defendant's liability, which, if the plaintiff denied, an issue was created, which the auditors certified to the court, by whom a venire was awarded to try it, and if that issue was found for the plaintiff, or if by the examination before the auditors any amount was found to be due by the defendant, there was a second judgment, that he pay to the plaintiff the sum found by the auditors to be due. *Godfrey v. Saunders*, 3 *Wils.* 73, 88 to 118; 4 *Anne*, c. 16, § 27; *Wyche's Practice*, 14; *Co. Lit.* 90b; *Williams v. Lee*, 1 *Mod.* 42. Such a procedure as this was wholly inapplicable to the trial of the issues of fact joined in an action by a jury, and, as the remedy in equity was then but imperfectly understood in the colony, the action of assumpsit was resorted to as a necessity; and matters of account appear to have been tried in that form before a jury down to 1768, when the investigation of accounts before juries proved to be so inconvenient and unsatisfactory that a statute was passed in that year establishing our present mode of trial before referees. *Magown v. Sinclair* (N. Y.) 5 *Daly*, 63, 67.

#### EXAMINATION ON OATH.

*Rev. St. c. 109, § 78*, declares that, if one summoned as a trustee in foreign attachment knowingly and willfully answers falsely on his examination on oath, he shall be punished, etc. Held, that the words "examination on oath" were not necessarily limited to an actual examination in court on interrogatories propounded, but included, as well, a case where the person summoned voluntarily appeared and made oath to his answer before interrogatories were put to him. *Loughran v. Kelly*, 62 *Mass.* (8 *Cush.*) 199, 204.

*Practice Act, § 131*, provides that any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before a court and be examined on oath respecting the same. This section also provides that the defendant may be required to attend for the purpose of giving information respecting his property, and may be examined on oath. Held, that the word "examine," as there used, was not limited to an examination in relation to property of the defendant in possession of others, so as to limit the examination of the defendant only to the exam-

ination of him in the capacity of a witness against the garnishee, but comprehended an examination of the defendant himself in a direct proceeding against him for the discovery of property concealed, etc. *Bivins v. Harris*, 8 Nev. 153, 155.

#### EXAMINATION PRO INTERESSE SUO.

When any person claims to be entitled to an estate or other property sequestered, whether by mortgage or judgment, lease, or otherwise, or has a title paramount to the sequestration, he should apply to the court to direct an inquiry whether the applicant has any, and what, interest in the property sequestered. This inquiry is called an "examination pro interesse suo." *Krippeendorf v. Hyde*, 4 Sup. Ct. 27, 30, 110 U. S. 276, 28 L. Ed. 145 (citing *Daniell*, Ch. Prac. p. 1057).

Where a person claims title to an estate or other property sequestered, whether by mortgage or judgment liens or otherwise, or has a title paramount to the sequestration, the proper course is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may examine as to his title to the estate. An examination of this sort is called an "examination pro interesse suo." *Hitz v. Jenks*, 22 Sup. Ct. 598, 603, 185 Sup. Ct. 155, 46 L. Ed. 851.

#### EXAMINING COURT.

When the magistrate sits for the purpose of inquiry into a criminal accusation against any person, this is called an "examining court." Code Cr. Proc. Tex. 1895, art. 62.

On the hearing of a writ of habeas corpus, a judge does not constitute an examining court, and the testimony of a witness there taken, reduced to writing and signed by him, is incompetent on the trial. *Childers v. State*, 30 Tex. App. 160, 16 S. W. 903, 28 Am. St. Rep. 899.

#### EXAPPROPRIATION.

"Exappropriation" is a seizure of so much of private owners' property as is necessary for the public use. When the public purpose is accomplished or has ceased to exist, the residue of the property belongs to the original owner. *Brownsville v. Cavazos*, 4 Fed. Cas. 460, 465.

#### EXCAVATE.

"Excavating," as used in Gen. St. 1894, § 6230, giving any one who performs labor in grading, filling in, or excavating any land a mechanic's lien therefor, "excavating" does

not mean any digging or making a hole, but refers to excavations in making improvements on the land; and so drilling for the purpose of exploring mines is not such an excavation as will entitle one to a mechanic's lien therefor. *Colvin v. Welmer*, 65 N. W. 1079, 1080, 64 Minn. 37.

"Excavating," as used in a written contract providing that a person should do all the excavating, grading, etc., for a certain sum, does not include the blasting of rock. *Hellwig v. Blumenberg*, 7 N. Y. Supp. 746, 55 Hun, 605.

#### EXCAVATION.

Digging synonymous, see "Digging."

The term "excavations and workings," as used in the act relating to mines and mining, includes all the excavated parts of a mine—those abandoned as well as the places actually being worked—also all underground workings and shafts, tunnels, and other ways and openings, all such shafts, slopes, tunnels, and other openings in the course of being sunk or driven, together with all roads, appliances, machinery, and material connected with the same below the surface. *Purd. Dig. Laws Pa. 1894*, vol. 2, col. 3150, § 349.

#### EXCEED.

See "Not Exceeding."

A statement by the owner of a homestead, filed in claiming his exemption, which states that the property does not exceed in value the sum of \$5,000, is to be construed as meaning an estimation that the property is worth about \$5,000. *Southwick v. Davis*, 21 Pac. 121, 122, 78 Cal. 504.

9 & 10 Vict. c. 95, § 122, the object of which was to give a summary remedy in the county court to the landlord on a holding over by the tenant "where the value of the premises, or the rent payable in respect of such tenancy, did not exceed the sum of fifty pounds" by the year, would give the county court jurisdiction if either the rent or the value fall short of £50. In re *Earl of Harrington*, 2 El. & Bl. 669, 671.

Code Prac. art. 575, giving the appellant the right to a suspensive appeal, provided he give his obligation, with a good security, residing within the jurisdiction of the court, for a sum "exceeding by one-half" the amount for which the judgment was given, means an amount that is at least greater by one-half; and hence, where the judgment was for \$300, a bond for \$1,000 was sufficient. *State ex rel. Adams v. Judge Second Judicial Dist.*, 21 La. Ann. 64, 65.

**EXCELLENT.**

A statement in negotiations leading to the sale of cloth that it is an excellent piece of cloth, even though false, is not a false representation, but is a mere puffing of the goods. *State v. Hefner*, 84 N. C. 751, 753.

**EXCEPT.**

The word "except" means "not including." *Austin v. Willis*, 8 South. 94, 90 Ala. 421.

The phrase "except as herein provided," in the printed part of a fire insurance policy issued to a carrier, in which the insurer agrees to make good unto the said insured the immediate loss and damage, not exceeding, etc., "except as herein provided," as shall happen by fire to the property, modifies the immediate preceding clause, and not the words "loss or damage." The words of the phrase, in the connection which they stand, are quite susceptible of being read as referring to the written as well as the subsequent printed portions, and as modifying the immediately preceding terms, limiting the extent of liability. *Fire Ins. Ass'n v. Merchants' & Miners' Transp. Co.*, 7 Atl. 905, 908, 66 Md. 339, 59 Am. Rep. 162.

"Sunday excepted," as used in Const. art. 4, § 17, limiting the time within which the Governor may return a bill to the Legislature without his approval to 10 days, "Sunday excepted," prevents the Governor from being deprived of one of the 10 days in case the last day should fall on Sunday, which, being a holiday, would take away the opportunity of returning the bill with his objections on that day, and does not mean any intervening Sunday. *People v. Whitman*, 6 Cal. 659, 660.

**As accepted.**

The word "except," written and signed by the drawee of a bill of exchange, is an acceptance of it. *Vanstrum v. Liljengren*, 33 N. W. 555, 37 Minn. 191. And parol proof that this is so is admissible. *Cortelyou v. Maben*, 36 N. W. 159, 160, 22 Neb. 697, 3 Am. St. Rep. 284.

In an action against the drawee of a bill of exchange, who wrote across the bill, "excepted, Apr. 22, '61," and signed his name thereto, it was contended that the word "excepted," written across the face of the bill, was equivocal, and not an absolute acceptance, and liable, therefore, to be qualified by parol testimony of what took place at the time. The court said: "To constitute an acceptance, no special words are necessary. The signature alone of the drawee across the face of the bill will constitute a written acceptance. It is a presumption of law in this case that the word 'excepted'

was used in the sense of 'accepted,' and constitutes an absolute written acceptance—as much so as if the word 'accepted' had been used. This being the legal result of the facts, it follows that no parol evidence can be admitted to prove a conditional acceptance, as that would be contradicting the written evidence." *Meyer v. Beardsley*, 30 N. J. Law (1 Vroom) 236, 243.

**As until.**

A contract between several parties by which they covenanted with each other to open a road leading to and crossing their several premises, and keep the same open, and build and support fences according to such road, referring to a gate then constructed across the road, stated: "N. B. The gate above mentioned across said road is to be kept up except by the consent of the parties." Thereafter, by agreement, the road was widened, and thereupon the gate was removed. Thereafter plaintiff re-established the gate across the road; claiming that either party to the covenant, refusing to have the gate down, might put it up and maintain it. This construction was clearly erroneous. The memorandum means that the gate is to be kept up, except by consent "it shall be pulled down and removed." These words must be added to make sense of the clause, and in this reading the word "except" has properly the sense of "until," and then the removal determined the right. *Fowle v. Bigelow*, 10 Mass. 379, 383.

**EXCEPTION.**

An "exception," as the term is used with reference to contracts, is the taking some part of the subject-matter of the contract out of it. *Wilmington & R. R. Co. v. Robeson*, 27 N. C. 391, 393.

The word "exception," as used in a contract, indicates that something is taken out from the principal matter provided for in the clause or paragraph in which the word is found, and not that something is taken out of or changed from other provisions in other clauses of the entire contract. Thus, in a subsequent agreement for the sale of ore in different levels of a mine according to the original contract of sale, but containing an exception as to the percentage of mineral in the ore, cannot apply to the first contract. *Anvil Min. Co. v. Humble*, 14 Sup. Ct. 876, 878, 153 U. S. 540, 38 L. Ed. 814.

In *Columbia Ins. Co. of Alexandria v. Lawrence*, 35 U. S. (10 Pet.) 507, 517, 518, 9 L. Ed. 512, the court expressed the opinion "that a loss by fire occasioned by the mere fault and negligence of the assured, or his servants or agents, and without fraud or design," is a loss within the policy, upon the general ground that the fire is the prox-

imate cause of the loss, and also upon the ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies. *St. John v. American Mut. Fire & Marine Ins. Co.* (N. Y.) 1 Duer, 371, 381.

#### **Proviso distinguished.**

See, also, "Proviso."

An exception exempts absolutely from the operation of an engagement or an enactment. A proviso defeats their operation conditionally. An exception takes out of an engagement or an enactment something which would otherwise be part of the subject-matter of it. A proviso avoids them by way of defeasance or excuse. *N. & M. Friedman Co. v. Atlas Assur. Co.* (Mich.) 94 N. W. 757, 761 (citing *Western Assur. Co. v. J. H. Mohlman* [U. S.] 28 C. C. A. 157, 40 L. R. A. 561, 83 Fed. 811); *State ex rel. Crow v. City of St. Louis*, 78 S. W. 623, 629, 174 Mo. 125, 61 L. R. A. 593; *Rowell v. Janvrin*, 45 N. E. 398, 400, 151 N. Y. 60; *Acker, Merrill & Condit v. Richards*, 71 N. Y. Supp. 929, 931, 63 App. Div. 305.

In determining whether a provision is an exception or a proviso, the mere location of the clause—as to whether it is in close connection, or not, with the subject-matter of the insurance—is not, of course, controlling; nor is it to be construed as if it were removed from its position among the provisos, and incorporated with the clause descriptive of the subject-matter, by the mere use of the words "except as hereinafter provided." The most important element, however, in determining whether a particular clause expresses a condition or an exception, is the nature of the clause itself. Therefore a clause in an insurance policy, among the provisos, which provided that if the building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease, was a condition subsequent, and not an exception. *Western Assur. Co. v. J. H. Mohlman Co.* (U. S.) 83 Fed. 811, 818, 28 C. C. A. 157, 40 L. R. A. 761.

#### **EXCEPTION (In Deed).**

"An exception in a deed is always a part of the thing granted and of a thing in being." *Morrison v. First Nat. Bank*, 33 Atl. 782, 88 Me. 155.

In 1 *Shep. Touch*, 77, an exception in a deed is thus defined, and its requisites stated: "An exception is a clause in a deed whereby the feoffer, donor, grantor, lessor, etc., doth except somewhat out of that which he had granted before by the deed. \* \* \* In every good exception these things must always concur: (1) The exception must be by apt words. (2) It must be of part of the

thing granted, and not of some other thing. (3) It must be part of the thing only, and not of all, the greater part, or the effect of the thing granted. (4) It must be of such a thing as is severable from the thing granted, and not of an inseparable incident. (5) It must be of such a thing as he that doth except may have, and doth properly belong to him. (6) It must be of a particular out of a general thing, and not of a particular out of a particular thing, or of a part of a certainty. (7) It must be certainly described and set down." *Frank v. Myers*, 11 South. 832, 834, 97 Ala. 437.

An exception in a deed or other instrument is something existing before as a part of the thing granted, and which is excepted from the operation of the conveyance. *Gould v. Glass*, 19 Barb. 179, 192; *La Point v. Cady* (Wis.) 2 Pin. 515, 522 (quoting 1 *Sanders, Pl. & Ev.* 393); *Elliot v. Small*, 29 N. W. 153, 159, 35 Minn. 396, 59 Am. Rep. 329; *Winston v. Johnson*, 45 N. W. 958, 959, 42 Minn. 398; *State v. Wilson*, 42 Me. 9, 21; *Gould v. Howe*, 23 N. E. 602, 603, 131 Ill. 490; *Engel v. Ayer*, 27 Atl. 352, 354, 85 Me. 448; *Inhabitants of Winthrop v. Fairbanks*, 41 Me. 307, 311; *Blackman v. Striker*, 37 N. E. 484, 485, 142 N. Y. 555; *Langdon v. City of New York*, 6 Abb. N. C. 314, 321; *Case v. Haight* (N. Y.) 3 Wend. 632, 635; *Fischer v. Laack*, 45 N. W. 104, 105, 78 Wis. 313; *Darling v. Crowell*, 6 N. H. 421, 423 (quoting *Ploud.* 195, 361; *Dyer*, 59; *Co. Lit.* 47; *Pet. Ab.* 7, 673).

Whatever may pass by the words of the grant may be excepted by like words, and the same consequences attach to such an exception as would attach, had it been a grant. *Loveland v. Clark*, 18 Pac. 544, 548, 11 Colo. 265 (citing 3 *Washb. Real Prop.* 431, 435).

An exception is always a part of the thing granted and of a thing in esse, as an acre out of the manor; that is, out of the original a part may be excepted, but no part of a certainty, as out of 20 acres 1. *Cutler v. Tufts*, 20 Mass. (3 Pick.) 272-277 (citing 1 *Co. Inst.* 47a).

"Excepting," as used in a conveyance granting real estate, but excepting something connected therewith, implies "an exception out of the conveyance of a part or parcel of the very thing granted, and is appropriate to describe the exclusion of the land itself from the operation of the deed." *Keeler v. Wood*, 30 Vt. 242, 246.

An exception in a deed, "excepting and reserving, however, the full right, forever, of keeping and maintaining a booth or booths on the flats between high and low water mark of said river along the premises hereby conveyed, either to use myself, or to let or sell to other persons," shows a clear and unmistakable intention to except and reserve a



perpetual right, inheritable and transferable, and not a personal easement, limited by lifetime. *Engel v. Ayer*, 27 Atl. 352, 354, 85 Me. 448.

Where a deed conveying land in certain grants described boundaries which included 40,000 acres, and excepted and reserved all of such grants not included within such boundaries, in construing such deed it is not necessary to notice the distinction found in the books between an exception and a reservation. Under our system of conveyancing, treating all instruments as mere contracts, in which the intention of the parties is to be arrived at from the language used by them, in connection with the surrounding circumstances, the result in such a deed would be the same, whether the term were "reservation" or "exception," and the distinction stated by the text-writers is of no practical importance. The grants referred to specifically define the land embraced in them, and the 40,000-acre boundary renders certain where the exception is to be found. The effect of an exception or reservation, in this view, is held by all the authorities to be that the same consequences attach to such an exception as would have attached had it been a grant. And so the reservation in such a deed is held to be a grant to a right out of the granted premises by force and effect of the reservation itself. And a deed purporting to be inter partes, by which an estate is conveyed to the grantee, if the deed is accepted by the grantee, is held to be the deed of both parties, though only signed by the grantor. *Coal Creek Min. Co. v. Heck*, 83 Tenn. 497, 504, 505.

A provision in a deed to a railroad company, "said company to build a crossing over said railroad to pass to the back land with cart or otherwise," could not constitute an exception. The office of a provision of that description is to exclude from the grant, and retain to the grantor, some portion of his estate; whatever is thus excluded remaining in him as of his former right and title, because it is not granted. A reservation, on the other hand, is a new creation of something not previously existing. The grantee under the deed was subjected by its terms to the duty of building a crossing over the proposed railroad, to be used to pass to the back land with cart or otherwise. The railroad was yet to be constructed. Whatever was thus to be done was to be done as a new thing in the future, and the words in question therefore are to be construed as a reservation. *Knowlton v. New York, N. H. & H. R. Co.*, 44 Atl. 8, 9, 72 Conn. 188.

The phrase "except two acres in the southeast corner," as contained in the description of a deed, must be construed to mean two acres in such corner, lying in a square, and bounded by four equal sides.

*Green v. Jordan*, 8 South. 513, 514, 83 Ala. 220, 3 Am. St. Rep. 711 (citing *Doe v. Clayton*, 81 Ala. 391, 2 South. 24).

#### **Reservation distinguished.**

An exception in a deed is something reserved out of the thing granted which was in existence at the time of the execution of the conveyance. It differs from a reservation, which is something created or reserved out of the thing granted which had no prior existence, as an easement, etc. *Winston v. Johnson*, 45 N. W. 958, 959, 42 Minn. 398; *Cunningham v. Knight* (N. Y.) 1 Barb. 399, 407 (citing *Crulise's Dig. tit. 32, "Deed," c. 3*); *Smith v. Cornell University*, 45 N. Y. Supp. 640, 641, 21 Misc. Rep. 220; *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 538, 80 Am. St. Rep. 699; *Schoonmaker v. Hoyt*, 25 N. Y. Supp. 337, 339, 72 Hun. 407; *Myers v. Bell Tel. Co.*, 82 N. Y. Supp. 83, 84, 83 App. Div. 623; *Inhabitants of Wintthrop v. Fairbanks*, 41 Me. 307, 311, 312; *Randall v. Randall*, 59 Me. 338, 340; *Klister v. Reeser*, 98 Pa. 1, 5, 42 Am. Rep. 608; *Moffitt v. Lytle*, 30 Atl. 922, 923, 185 Pa. 178; *Cocheco Mfg. Co. v. Whittier*, 10 N. H. 305, 310; *Snoddy v. Bolen*, 24 S. W. 142, 143, 122 Mo. 479, 24 L. R. A. 507; *Hurd v. Curtis*, 48 Mass. (7 Metc.) 94, 110; *Sears v. Ackerman*, 72 Pac. 171, 172, 138 Cal. 583.

"According to *Shep. Touchst.* 80, a reservation is a clause in a deed whereby the donor, lessor, grantor, etc., doth reserve some new thing to himself out of that which he granted before. An exception is a clause in a deed whereby the grantor, etc., doth except somewhat out of that which he had granted before by the deed. A reservation differs from an exception in this: that the latter is ever part of the thing granted and of the thing in esse at the time, but the former is of a thing newly created or reserved out of a thing demised that was not in esse before." *Bryan v. Bradley*, 18 Conn. 474, 482; *Bowman v. Wathem*, Fed. Cas. 1740; *Cunningham v. Knight* (N. Y.) 1 Barb. 399, 407; *Craig v. Wells*, 11 N. Y. 315, 321, 322; *Goodrich v. Eastern R. R.*, 37 N. H. 149, 164, 167.

Where the owner of platted lands dedicates the streets to the public, except the right to all valuable minerals in such land, which are reserved, together with the right to mine the same, such provision constitutes an exception, and not a reservation. *Snoddy v. Bolen* (Mo.) 24 S. W. 142, 144, 24 L. R. A. 507.

An exception is equivalent to the reconveyance of land already conveyed. A right of way is not an exception, but a reservation. *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 59 Pac. 607, 615, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

Both a reservation and an exception must be a part of or arise out of that which

is granted in a deed. The difference is that an exception is something taken back out of the estate then existing and clearly granted, while a reservation is something issuing out of what is granted. So, where a man grants a tract of land described by metes and bounds, except one acre, which is also practically described, there is an exception if the acre never passes; but, on the other hand, if one grants a tract of land without any exception of a part, but reserves rent or some right which he may exercise in relation to the estate as to cutting timber, or to have an easement of some kind therein, this is a reservation; and so, where a conveyance of a sawmill provided that the grantor reserved all slabs made at the mill, there was a reservation. *Adams v. Morse*, 51 Me. 497, 498; *Winthrop v. Fairbanks*, 41 Me. 307, 311.

The distinction between a reservation and an exception is that a reservation is never of any part of the estate itself, but of something issuing out of it—as, for instance, rent or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, upon the other hand, must be a part of the thing granted, or described as granted, and can be nothing else. A reservation is always of something taken back out of that which is already granted, while an exception is of some part of the estate not granted at all. *Craig v. Wells*, 11 N.Y. (1 Kern) 315, approved in *Blackman v. Striker*, 87 N. E. 484, 485, 142 N. Y. 555. A provision in a deed of two lots saving and excepting therefrom 15 square feet as a way to the grantor's cellar, the property containing the cellar being conveyed to a third person by a deed including the right of way mentioned in the first deed, such reservation constitutes an exception, and not a reservation. *Mount v. Hambley*, 50 N. Y. Supp. 813, 815, 22 Misc. Rep. 454.

An exception is said to be a withdrawal from the operation of a grant of some part of the thing granted, while a reservation is of some new thing issuing out of what is granted. Thus, where real estate is granted, a portion thereof may be excepted from the terms of the conveyance, or the trees or woods grown thereon. If the exception be valid, the title to the thing excepted remains in the grantor, the same as if no grant had been made. A reservation, while not affecting the title to the thing granted, may reserve to the grantor the right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like. Thus a conveyance of land subject to a lease which expires on a specified day (the 6th), subject to the lease, does not create an exception or reservation. *Eiseley v. Spooner*, 36 N. W. 659, 660, 23 Neb. 470, 8 Am. St. Rep. 128.

It is said that, although the terms "exception" and "reservation" are frequently

used as substantially synonymous, yet they are in reality different. A reservation is a clause in a deed whereby the grantor reserves something to himself out of that which he granted before. This differs from an exception, which is always a part of the thing granted, and of a thing in existence at the time. A reservation is always something taken back out of that which is granted, while an exception is some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it—as, for instance, rent, or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted, or described as granted, and must also be of something which can be enjoyed separately from the thing granted. Where a deed of a certain piece of land reserved the right to cut and remove all the pine timber or trees upon said premises, and provided that the right "is hereby reserved by the grantor to enter upon said lands at any time within two years from the date of the deed for the purpose of cutting or removing the trees or timber so reserved," it was held that there was a reservation, and not an exception, so that the absolute right of property in the trees was not excepted out of the estate granted, but there was only a right reserved to enter within two years and cut and remove the trees. *Rich v. Zellsdorff*, 22 Wis. 544, 547, 99 Am. Dec. 81.

A reservation, and not an exception, is created by a deed conveying certain premises by excepting and reserving the right and privilege of taking water from a stream on the premises conveyed, and also the right and privilege of three watering places. *Smith v. Cornell University*, 45 N. Y. Supp. 640, 641, 21 Misc. Rep. 220.

A deed conveying certain premises, excepting and reserving the right of interment on the land reserved for that purpose in the land conveyed, is an exception and not a reservation. *Mitchell v. Thorne*, 32 N. E. 10, 12, 134 N. Y. 536, 30 Am. St. Rep. 699.

The owner of a parcel of land granted, by a deed duly recorded, to A., a part of the land, and a right to maintain a dam on the rest, and afterwards conveyed to a third person the whole parcel, reserving all the rights of A., his heirs and assignees, therein. Held, that this created an exception, and not a reservation. *Stockwell v. Couillard*, 129 Mass. 231, 233.

#### Reservation synonymous.

The terms "exception" and "reservation" are often used in the same sense, the technical distinction being disregarded. Though apt words of reservation be used, they will be construed as an exception if such was the design of the parties. *Kister v. Reeser*, 98 Pa. 1, 5, 42 Am. Rep. 608; *Bryan v. Brad-*

ley, 16 Conn. 474, 482; *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, 212, 5 Wash. 509; *Winthrop v. Inhabitants of Fairbanks*, 41 Me. 307, 311, 312.

The words "exception" and "reservation" are used synonymously in grants, and have the same effect. The effect of a deed does not depend upon the use of one or the other of these terms, but on the facts which they represent. *Bowman v. Wathen*, 3 Fed. Cas. 1076, 1082.

The words "reserving" and "excepting" are often used indiscriminately, and whether a particular provision is an exception or a reservation does not depend upon the use of the word "reserving" or "excepting," but upon the nature and effect of the provision itself. *Stockwell v. Couillard*, 129 Mass. 231, 233; *Martin v. Cook*, 60 N. W. 679, 680, 102 Mich. 267; *Negaunee Iron Co. v. Iron Cliffs Co.* (Mich.) 96 N. W. 468, 474; *Smith v. Furbish*, 44 Atl. 398, 406, 68 N. H. 123, 47 L. R. A. 226; *Fischer v. Laack*, 45 N. W. 104, 105, 76 Wis. 313.

A deed contained a specific description of the land conveyed, and also this clause: "Said R. reserving lots sold, Nos. 1, 2, 3," etc.; designating by number 29 lots. The grantee claimed that the grantor excepted from his deed such lots only as he had in fact sold, and that such of the lots specified in the reservation as he had in fact not sold passed to the grantee in the deed. The word "reserving," used in this deed, in a strict sense means excepting. The office of an exception in a deed is to take something out of the thing granted that would otherwise pass, while a reservation creates in favor of the grantor some new right out of the thing granted which was not before in esse. The terms, however, as used in deeds, are even treated as synonymous; and words creating an exception are to have effect as such, although the word "reservation" is employed. In this case the grantor undertook to withdraw from his grant certain lots, and the language is to be construed as an exception. The same rules of construction apply to an exception in a deed as govern the grant itself. Indeed, all books treat of an exception upon the theory that it is a regrant by the grantee to the grantor of the estate described in the exception. *Roberts v. Robertson*, 53 Vt. 690, 692, 38 Am. Rep. 710.

The words "exception" and "reservation" are frequently used indiscriminately, and it not infrequently happens in a deed that what purports to be a reservation has the force of an exception, or vice versa. A provision in a deed reserving to the grantor so much of the premises as may be needful for his enjoyment of the waters of a creek, and all water rights for mining purposes, is a reservation, pure and simple. *Wilson v. Higbee* (U. S.) 62 Fed. 723, 726.

In construing a deed of a tract of land "reserving always a right of way as now used, on the west side of the above-described premises for cattle and carriages from the public highways to a piece of land now owned by R., lying north of and adjoining the premises hereby conveyed," the court said: "A right of way cannot be created by an exception in a deed. It may be created by a reservation. If the word 'excepting,' or an equivalent word, is used in the deed for the purpose of creating the right, the court have considered it as meaning 'reserving,' in order to give effect to the intention of the parties." *Bridge v. Pierson* (N. Y.) 66 Barb. 514, 518.

The terms "exception" and "reservation" are often used in deeds indiscriminately, and sometimes what purports to be a reservation as to form is an exception. A reservation is a thing issuing out of the land granted. Thus a provision in a deed conveying certain premises, except the dower of 50 acres, etc., is an exception. *McAfee v. Arline*, 10 S. E. 441, 442, 83 Ga. 645.

Though "exception" and "reservation" have been used promiscuously, it is well settled that, in giving construction to instruments, the intention of the party is to be effectuated, and, if a deed cannot effect the design of them in one mode known to the law, their purpose may be accomplished in another, provided no rule of law is violated. Hence the distinction between an exception and reservation is so obscure in many cases that it has been observed that that which in terms is a reservation in a deed is often construed to be an exception, in order that the object designed to be secured may not be lost. A deed from a father to a son of a tract of land lying between two other tracts owned by the father, and across which was a road connecting the two tracts retained by the father, contained a clause "reserving forever for myself the privilege of passing with teams and cattle across the same in suitable places to land I own south of the premises." This reservation was construed to be an exception. *Winthrop v. Fairbanks*, 41 Me. 307, 311, 312.

In a deed of railroad land, expressly reserving and excepting a strip of land for a right of way, the words must be construed to mean either a reservation or an exception; for, strictly speaking, a thing cannot be both reserved and excepted at the same time. The clause was held to create a reservation, and not an exception. *Biles v. Tacoma, O. & G. H. R. Co.*, 32 Pac. 211, 212, 5 Wash. 509.

#### EXCEPTION (In Practice).

See "Bill of Exceptions"; "Joint Exception."

An exception is an objection taken at the trial to a decision upon a matter of law.

Gen. St. Minn. 1894, § 5396; Code Civ. Proc. Mont. § 279; McKinstry v. Clark, 1 Pac. 750, 764, 4 Mont. 370; Frost v. O'Neill, 2 Pac. 315, 316, 4 Mont. 226; Klein-Schmidt v. McAndrews, 2 Pac. 286, 288, 4 Mont. 223.

An exception is an objection taken to a decision of the court upon a matter of law. Rev. St. Wyo. 1899, § 3739; Bates' Ann. St. Ohio 1904, § 5297; Kline v. Wynne, 10 Ohio St. 223, 228; Ann. St. Ind. T. 1899, § 8361; Farnsworth v. Coquillard's Adm'r, 22 Ind. 453, 456; Train v. Gridley, 36 Ind. 241, 248; Mills v. Miller, 2 Neb. 299, 316; Cobbey's Ann. St. Neb. 1903, § 1291; Poston v. Smith's Ex'r, 71 Ky. (8 Bush) 592.

An exception is an objection taken to a decision of the court or judge upon a matter of law. Gen. St. Kan. 1901, § 4746; St. Kan. par. 4394; City of Emporia v. Haussler, 50 Pac. 979, 980, 6 Kan. App. 747; Rev. St. Okl. 1903, § 4486.

An exception is an objection upon a matter of law to a decision made either before or after judgment by a court or judge in an action or proceeding. Rev. Codes N. D. 1899, § 5462; Code Civ. Proc. S. D. 1903, § 292.

An exception is an objection upon a matter of law to the decision made by a court, judge, referee, or other judicial officer in an action or proceeding. Rev. St. Utah 1898, § 3282.

An exception is an objection, upon a matter of law, to a decision made either before or after judgment by a court, tribunal, judge, or other judicial officer in an action or proceeding. Civ. Code Idaho 1901, § 3515; Code Civ. Proc. Cal. 1903, § 646.

An exception is a claim of error in a ruling or decision of a court, judge, or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein. Ballinger's Ann. Codes & St. Wash. 1897, § 5050.

An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referee, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in a charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. Comp. Laws Nev. 1900, § 3285; Ann. Codes & St. Or. 1901, § 169; St. John v. Kidd, 26 Cal. 263, 267; State v. Central Pac. R. Co., 30 Pac. 887, 890, 17 Nev. 259; McGurn v. McInnis, 55 Pac. 304, 305, 24 Nev. 870. Under this definition, an exception allowed by the court after the jury had withdrawn to consider their verdict, and before it was rendered, will not be disregarded by the Supreme Court, although, if the judge had refused to allow the exception, it would not have been considered error. St.

John v. Kidd, 26 Cal. 263, 267. Under such definition, an exception must not be taken to a ruling on a motion for a new trial. State v. Central Pac. R. Co., 30 Pac. 887, 890, 17 Nev. 259.

An exception must be particularly stated with so much of the evidence or other matter as may be necessary to explain it. McInnis v. McGurn, 55 Pac. 304, 305, 24 Nev. 870.

An exception is but the formula of dissent from a ruling expressed with sufficient clearness and definiteness to raise some concrete point upon appeal. This dissent, and the intention to question the ruling thereafter, are usually expressed by the phrase "I except." The right of review, however, is not lost merely because this technical phrase does not happen to be employed. Any other clear expression will suffice. Snelling v. Yetter, 49 N. Y. Supp. 917, 919, 25 App. Div. 590.

An exception is a formal protest against the ruling of the court upon a question of law. People v. Torres, 38 Cal. 141, 142.

The office of an exception is to call the attention of the court to some specific matter or item in an account in respect to which error is alleged. If it does not do this, the court will not notice it. Brown v. Haynes, 59 N. C. 49, 54.

An exception is an objection stated to a decision on a matter of law arising upon the trial. The points of law wherein error is charged should be specifically stated in exceptions. Morton v. Livingston, 14 S. C. 177, 178.

#### General appeal distinguished.

An exception to a final decree differs in effect from a general appeal, in that the latter opens up the whole case for rehearing on law and facts, and requires the transmission to the law court of copies of all the pleadings, orders, and evidence. The former presents solely a question of law for rehearing, and requires usually but a very small part of the record to be transmitted to the law court. Emery v. Bradley, 34 Atl. 167, 168, 88 Me. 357.

#### Office of.

The office of an exception is to point out wherein the excepting party claims to have been prejudiced by the ruling of the trial court. Dearing v. Pearson, 28 N. Y. Supp. 715, 718, 8 Misc. Rep. 269.

The office of an exception is to raise the question whether the affirmance and denial of the answer are sufficiently responsive to the allegation of the bill. An exception in equity is not equivalent to a demurrer, as testing the sufficiency of the affirmance of

the answer as a defense for the bill upon its merits. There is no such thing as a demurrer to an answer in equity. *Walker v. Jack* (U. S.) 88 Fed. 576, 577, 31 C. C. A. 462.

The object of exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon before further proceedings are had, to the end that, if the pleadings be insufficient, an amendment may be made, or the defect otherwise corrected. Exceptions for insufficiency of an answer can only be sustained where some material allegation, charge, or interrogatory in the bill is not fully answered. *Richardson v. Donehoo*, 16 W. Va. 685, 703.

The object of an exception is to definitely call the attention of the court to either an omission in the charge, or to some affirmative misstatement. *Pittsburgh & W. Ry. Co. v. Thompson* (U. S.) 82 Fed. 720, 728, 27 C. C. A. 333.

#### Objection synonymous.

"Excepted," as used in Rev. St. 1879, § 3586, providing that, for the purpose of review of an exception taken at the trial, the record must show that the party properly excepted, will be construed as synonymous with "objected," so that, where a record recites that a party objected to an instruction by the court, it sufficiently shows that he excepted for the purpose of review. *Elsner v. Supreme Lodge Knights & Ladies of Honor*, 11 S. W. 991, 992, 98 Mo. 640. See, also, *Ranahan v. Gibbons*, 62 Pac. 773, 775, 23 Wash. 255.

Exceptions, in the technical sense, are not usually taken in the court of last resort, but in the trial court, to preserve points for subsequent correction by another court of revisory power. In the broadest meaning of that term, however, as synonymous with "objection," exceptions are often taken in the Supreme Court. And in this broader sense the word should be understood in section 2302, Rev. St. 1889, providing that no exceptions shall be taken in an appeal or writ of error in any proceeding in the circuit court, except such as shall have been expressly decided by such court. *Lilly v. Menke*, 28 S. W. 994, 997, 126 Mo. 190.

#### Protest distinguished.

The words "protest" and "exception" are not equivalent terms in law. "Exception" has a technical signification. It implies that the exceptant reserves the right to present an adverse ruling to a court having cognizance of error for review. Its office is to put the decision objected to of record for the information of an appellate tribunal. Where a record shows that, on refusal of the court to grant further time for argument, the defendant earnestly protested, it is insufficient to show an exception reserved. *Robinson v. State*, 53 N. E. 223, 224, 152 Ind. 304.

#### In pleading.

Exceptions to an answer are allegations in writing stating the particular points or matters with respect to which the complainant considers the answer insufficient, scandalous, or impertinent. An exception must not be too broad, and must not be taken generally to the whole answer, but the matter excepted to should be distinctly specified. *Peck v. Osteen*, 20 South. 549, 550, 37 Fla. 427.

The object of such exceptions is to direct the attention of the court to the points excepted to, and to take its opinion thereon before further proceedings are had, to the end that, if the answer is insufficient, a better answer may be compelled, or, if scandalous or impertinent, that the scandalous or impertinent matter may be expunged. *Arnold v. Slaughter*, 15 S. E. 250, 252, 36 W. Va. 589 (citing *Richardson v. Donehoo*, 16 W. Va. 685).

#### As record.

See "Record."

### EXCESSIVE

In a declaration alleging that the defendants wrongfully took plaintiff's goods as a distress for £140, alleged to be due for a poor rate, whereby they levied an unreasonable and excessive distress for the said £140, the term "excessive" implied that something was due for poor rate. *Sturch v. Clarke*, 4 Barn. & Adol. 113, 116.

"Excessive" means tending to or marked by excess, which is the quality or state of exceeding the proper or reasonable limit or measure, so that to go upon a railroad at an excessive speed would be negligence; and an instruction to that effect was not erroneous, on the ground that there might be excessive speed without negligence. *Central of Georgia Ry. Co. v. Johnston*, 32 S. E. 78, 79, 106 Ga. 130.

#### EXCESSIVE BAIL.

"Excessive bail," as used in the clauses of the various Constitutions prohibiting the fixing of excessive bail, means bail in a sum "more than will be reasonably sufficient to prevent evasion of the law by flight or concealment." *In re Losasso*, 24 Pac. 1080, 1081, 15 Colo. 163, 10 L. R. A. 847.

To constitute excessive bail, it must be per se unreasonable and equally disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case; hence, where no peculiar circumstances were shown, it cannot be said, as a matter of law, that \$15,000 is excessive bail to be demanded of one

assumed to be guilty of assault with intent to murder. *Ex parte Ryan*, 44 Cal. 555, 558.

The sum of \$112,000 is not excessive bail for 10 distinct felonies, such being the amount alleged to have been received by the prisoner by reason of the commission of such felonies. Before the court is authorized to interfere and require bail to be reduced, as excessive, the bail demanded must be per se unreasonably great, and clearly disproportionate to the offense involved; and, in considering an application for the reduction of bail, the court must assume that the petitioner is guilty of the offense charged. *Ex parte Duncan*, 53 Cal. 410, 411.

### EXCESSIVE DAMAGES.

Excessive damages, sufficient to authorize a new trial, are those which "are so enormous as to show that the jury were under some improper influence, or were led astray by the violence of passion or prejudice. It is not enough for the judge to think he would not have given so much if he had been one of the jury. He ought to see clearly that the damages were flagrantly outrageous, and that the verdict cannot be just, before he will on that trial grant a new trial. Otherwise the verdict of the jury must in all cases depend on the opinion of the judge, and the constitutional trial by jury will be prostituted. *Taylor v. Giger*, 3 Ky. (Hardin) 586, 587.

Under the statute giving as one of the grounds for a new trial the fact that excessive damages were awarded, such ground is not applicable in any action, save for tort. *McCormick Harvesting Mach. Co. v. Gray*, 114 Ind. 840, 845, 16 N. E. 787; *Lake Erie & W. R. Co. v. Acres*, 108 Ind. 548, 550, 9 N. E. 453, 454; *Western Assur. Co. v. Studebaker Bros. Mfg. Co.*, 124 Ind. 176, 182, 23 N. E. 1138, 1140; *Smith v. State*, 117 Ind. 167, 173, 19 N. E. 744, 747; *McKinney v. State*, 117 Ind. 26, 30, 19 N. E. 613, 615.

### EXCESSIVE FINE.

The term "excessive fines," within the meaning of a constitutional provision prohibiting excessive fines, does not include a fine of \$50 for the illegal keeping of intoxicating liquors, although the defendant is also sentenced at hard labor in the house of correction for three months. *Pervear v. Commonwealth*, 72 U. S. (5 Wall.) 475, 480, 18 L. Ed. 608.

One hundred dollars for permitting any refuse from the manufacture of gas or of oil from whitefish to fall into the waters of the state cannot be said to be so disproportionate to the offense as to justify the court in holding the law to be void therefor. *Blydenburgh v. Miles*, 39 Conn. 484, 490.

It would seem that a law providing that those who did not make certain improvements on lands held by them should forfeit such lands, unless they should agree to be bound by statutes held unconstitutional by the Supreme Court of the United States, is in violation of the provision of the Constitution providing that excessive fines shall not be imposed, nor cruel punishments inflicted. This appears more plainly when it is considered that the Constitution forbids the forfeiting of the estates of even attainted traitors and felons, except during life. *Gaines v. Buford*, 31 Ky. (1 Dana) 481, 492.

### EXCESSIVE TAX.

Acts 1891, c. 326, § 78, authorizing the recovery of an excessive tax, means a tax exceeding what the tax would be if correctly calculated at the legal rate on the adjudged valuation as determined or apportioned by the board of commissioners. *Pickens v. Henderson County Com'rs*, 17 S. E. 438, 112 N. C. 698.

### EXCESSIVE VALUATION.

Acts 1891, c. 356, § 78, authorizing the recovery of a tax based on an excessive valuation, means a valuation exceeding that which was adjudged proper by the board authorized by the act to finally determine such valuation. *Pickens v. Henderson County Com'rs*, 17 S. E. 438, 112 N. C. 698.

### EXCESSIVE VIOLENCE.

"Excessive violence," as used when speaking of a course of conduct by one person toward another which would constitute a cause of civil action, is generally synonymous with "wanton or malicious force." *Atchison, T. & S. F. R. Co. v. Gants*, 17 Pac. 54, 64, 38 Kan. 608, 5 Am. St. Rep. 780.

### EXCESSIVELY BURDENED.

Within Laws Nov. 11, 1884, granting aid from the state to an excessively burdened town, as to its highways, the expression "excessively burdened" is a relative one, covering a consideration of complainant town's burdens in connection with the burdens of other towns benefited by such highway. A town is not excessively burdened by being required to build and maintain a highway within its limits, within the spirit and intent of the statute, unless its municipal burdens and taxation for necessary purposes would be increased thereby beyond its due measure and proportion, in comparison with the municipal burdens and taxation for necessary purposes of such other towns as are deemed to be especially benefited by such highway. *Town of Sheldon v. State*, 59 Vt. 36, 7 Atl. 901. "Excessively burdened," as used in Rev.

Laws, § 2960, providing that the commissioners, in determining whether a town would be excessively burdened by being compelled to defray the whole expense of building a highway situated within its limits, etc., is a relative term, and covers the consideration of the town's burdens in connection with the burdens of other towns benefited by the highway. A town is not excessively burdened by being required to build a highway within its limits unless its municipal burdens and taxation for necessary purposes would be increased thereby beyond its due measure and proportion, in comparison with the municipal burdens and taxation for necessary purposes of such other towns as are deemed to be especially benefited by such highway. *Weybridge v. Town of Addison*, 57 Vt. 569, 570, 572.

### EXCESSIVELY VICIOUS CONDUCT.

"Excessively vicious conduct," as used in Code, art. 18, § 37, making excessively vicious conduct on the part of a husband or wife ground for a divorce, are very indefinite, and cannot be construed to include the drunkenness of a wife, though frequent and accompanied by indecent and offensive language, and occasioning domestic broils. The term "excessively vicious conduct" is very indefinite, but it cannot be construed as applying to all the multiform vices to which mankind is liable, though indulged in to an excessive degree. *Shutt v. Shutt*, 17 Atl. 1024, 1025, 71 Md. 193, 17 Am. St. Rep. 519.

### EXCHANGE.

See "Telephone Exchange."  
Distinguished from sale, see "Sale."  
Synonymous with barter, see "Barter."

Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing nor both things being money only. Rev. Codes N. D. 1899, § 3996; Civ. Code S. D. 1903, § 1348; Civ. Code Mont. 1895, § 2430; Civ. Code Cal. 1893, § 1804.

Exchange is a contract by which the parties to the contract give to one another one thing for another, whatever it be, except money, for in that case it would be a sale. Civ. Code La. 1900, art. 2660.

An exchange is a transfer of certain goods for other goods received therefor. *Buffum v. Merry* (U. S.) 4 Fed. Cas. 604, 605; *Elwell v. Chamberlin*, 31 N. Y. 611, 624 (citing Chit. Cont. 374); *Cooper v. State*, 37 Ark. 412, 418.

An exchange is an executed contract operating per se as a reciprocal conveyance of the thing given and the thing received in exchange. It enters into the very idea of an

exchange that the thing given or taken in exchange shall be specified, and so distinguishable from other things of the like kind as to be clearly known and identified. *Preston v. Keene*, 39 U. S. (14 Pet.) 133, 137, 10 L. Ed. 387.

"Exchange," as used in a chattel mortgage covenanting that the mortgagor would not trade or exchange any of the property mortgaged without the written consent of the mortgagee, and that, in case he did, the property so obtained should be held and taken in place of that disposed of, clearly indicates the giving of one article, and the receiving of another, whether the article be money, or what is ordinarily understood to be a chattel, and cannot be construed to require the mortgagor to substitute other like animals for animals which have died, or to articles used or consumed by the mortgagor. *Hulsizier's Adm'r v. Opdyke* (N. J.) 13 Atl. 669.

The word "exchange," as applied to coin or bank notes, is to deliver in exchange for something else, and is equally expressed by the words "pass, sell, or deliver." *State v. Watson*, 65 Mo. 115, 119.

The use of the words "sell, exchange, and deliver," in an indictment for forgery, in place of the words used in the statute, "pass, utter, and publish," sufficiently describe the offense, for selling, exchanging, and delivering a bank bill or piece of money is, in common parlance, passing the bill or money. *State v. Mills*, 47 S. W. 933, 941, 146 Mo. 195 (citing *State v. Watson*, 65 Mo. 115).

### Certificates of stock.

"Exchange," as used in a power of attorney authorizing the attorney for the grantor, in his name and on his behalf, at any and all meetings of stockholders of companies or corporations in which he had or might thereafter have stock, to appear and vote on such number of shares as he might at such time be entitled to vote, and to exchange old issues or certificates, and receive new issues or certificates in lieu thereof, means the exchange of old certificates for new ones, and did not authorize an exchange or transfer of the property represented by the certificate. *Quay v. Presidio & F. R. Co.*, 22 Pac. 925, 926, 82 Cal. 1.

### Judges.

Rev. St. art. 1124, providing that any judge of the district court may hold court for or with any other district judge, and the judges of the several district courts may exchange districts whenever they may deem it expedient to do so, involves infinitely more than an authority to hold court for any other district judge. Under authority to "exchange districts," a judge whose district comprises only one county might exchange dis-

tracts with a judge whose district comprises more than one county, and thereby become immediately invested with all the judicial power of the district judge of that district, not only to hold all courts in such counties, but he could exercise all judicial power devolving on the office of district judge of the latter district in holding court and in vacation, whereas, if he was called on to hold court for such judge, it might be for a day, or for the trial of one cause in one county only; and the judge of such district might proceed to hold court in another county of his own district, and exercise his judicial power in vacation throughout his own district. *Wallace v. Helena Electric Ry. Co.*, 25 Pac. 278, 280, 10 Mont. 24.

#### Real estate.

"An exchange is defined to be a mutual grant of equal interests, or, rather, estates of the like denomination, in land and tenements—the one in consideration of the other. The word 'exchange,' in this connection, is a technical term used to denote a particular method of transferring property, with certain conditions and warranties in law incident and annexed to it. It is absolutely essential to this mode of conveyance that the estates exchanged be equal in interest, and be given the one for the other, and that the transfer be made by the use of the word exchange. No other word is regarded as equivalent thereto, nor does an averment that it was an exchange avail. In *Shep. Touch.* 294, it is said: 'The word "exchange" or "exchange" must be had and used between the parties in the making of the exchange, as if I grant to you Whiteacre, to have and to hold to you and your heirs in exchange for Blackacre, and in consideration thereof you grant to me and my heirs Blackacre in exchange for Whiteacre; for this word is so individually requisite as it cannot be supplied by any other word. Neither will an averment that it was an exchange help in this case, and therefore, if A. by deed intended to give to B. an acre of land in fee simple or for life for the acre of B., and by the same deed B. doth give to A. another acre of land in the same manner, this cannot inure as an exchange, and therefore, if there was no livery of seisin, so as it may take effect by way of grant, it is utterly void.'" *Windsor v. Collinson*, 52 Pac. 26, 27, 32 Or. 297; *Harland's Heirs v. Eastland*, 3 Ky. (Hardin) 590, 593.

An exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other—so much so that the law implies a contract of warranty by the act of exchange. *Brown v. Bailey*, 28 Atl. 245, 248, 159 Pa. 121.

Where there is a technical exchange of lands, the law annexes not a mere implied covenant of warranty, but an actual war-

ranty, with a condition of re-entry, so that if the title to either tract of land turns out to be bad, and the party or his assigns should be afterwards evicted, he or they can recover back the other tract of land which was given in exchange. But to produce this legal consequence, it is absolutely necessary that the word "exchange" should be used. No other word can supply its place, however equivalent in signification. Thus there was no technical exchange where a parol agreement was entered into to make an equal exchange of parcels of land, but that agreement was consummated, not by a deed of exchange, but by mutual deeds of bargain and sale, each expressed to be for a pecuniary consideration. *Gamble v. McClure*, 69 Pa. 282, 284, 285.

The term "exchange," as applied to lands, is a mutual grant of equal interests, as a fee simple for a fee simple, a lease of 20 years for a lease of twenty years, and the like. *Speigle v. Meredith* (U. S.) 22 Fed. Cas. 910, 911; *Wilcox v. Randall* (N. Y.) 7 Barb. 633, 638; *Hartwell v. De Vault*, 42 N. E. 789, 791, 159 Ill. 325; *Long v. Fuller*, 21 Wis. 121, 123.

A transfer of lands for coupon bonds is not an exchange. *Speigle v. Meredith* (U. S.) 22 Fed. Cas. 910, 911.

#### EXCHANGE (In Commercial Law).

See "Bill of Exchange"; "Second of Exchange"; "With Exchange."

Exchange is an incident to bills for the transmission of money from place to place. *Nicely v. Commercial Bank*, 44 N. E. 572, 574, 15 Ind. App. 563, 57 Am. St. Rep. 245; *Smith v. Kendall*, 9 Mich. 241, 242, 80 Am. Dec. 83.

Exchange is the amount paid for the collection of a draft or other commercial paper drawn at a distant point. *Flagg v. School Dist.* No. 70, 58 N. W. 499, 4 N. D. 30, 25 L. R. A. 363.

Where a note is made payable with exchange on New York, "exchange" means the cost of drawing such a bill and transmitting the money to New York to meet it. *Morgan v. Edwards*, 11 N. W. 21, 23, 53 Wis. 599, 40 Am. Rep. 781.

"Exchange and costs of collection," as used in a note made payable with exchange and costs of collection, cannot be construed to render the note negotiable. *Nicely v. Commercial Bank*, 44 N. E. 572, 573, 15 Ind. App. 563, 57 Am. St. Rep. 245.

#### EXCHANGE BROKER.

Exchange brokers are brokers who negotiate bills of exchange drawn on foreign



countries or on other places in this country. *City of Little Rock v. Barton*, 83 Ark. 436, 444.

Exchange brokers are those who make and conclude bargains for others in matters of money or merchandise. *City of Portland v. O'Neill*, 1 Or. 218, 219.

### EXCHANGE VALUE.

The "exchange value" of a thing means its general power of purchase—the command its position gives over purchasable commodities in general. *Marriner v. John L. Roper Co.*, 16 S. E. 906, 907, 112 N. C. 164.

The exchange value of a thing is its utility in the estimation of the purchaser. *State v. Carson City Sav. Bank*, 30 Pac. 703, 707, 17 Nev. 146.

### EXCHEQUER BILLS.

Exchequer bills are a class of bills of credit in England which are issued by the officers of the exchequer when a temporary loan is necessary to meet the exigencies of government. They were first termed "tallies of loan" and "orders of repayment," charged on the credit of the exchequer in general, and made assignable from one person to another. *Briscoe v. Bank of Kentucky*, 36 U. S. (11 Pet.) 257, 328, 9 L. Ed. 709, 928.

### EXCISE.

An excise duty is an inland impost levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108; *Patton v. Brady*, 22 Sup. Ct. 493, 496, 184 U. S. 608, 46 L. Ed. 713; *Black v. State*, 89 N. W. 522, 526, 113 Wis. 205, 90 Am. St. Rep. 853.

An excise is an inland imposition paid sometimes upon the consumption of the commodity, and frequently upon a retail sale, which is the last stage before the consumption. *Patton v. Brady*, 22 Sup. Ct. 493, 496, 184 U. S. 608, 46 L. Ed. 713; *Pacific Ins. Co. v. Soule*, 74 U. S. (7 Wall.) 433, 435, 19 L. Ed. 95; *Union Bank v. Hill*, 43 Tenn. (3 Cold.) 325, 328.

"Excise" is defined to be an inland duty or impost operating as an indirect tax on the consumer—a fixed, absolute, and direct charge laid on merchandise, products, or commodities. *Scholey v. Rew*, 90 U. S. (23 Wall.) 331, 346, 23 L. Ed. 99 (citing *Webst. Dict.*); *Patton v. Brady*, 22 Sup. Ct. 493, 496, 184 U. S. 608, 46 L. Ed. 713.

Excises are a species of tax consisting generally of duties laid upon the manufac-

ture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 851, 62 N. J. Law, 289, 42 L. R. A. 852 (citing *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 592, 15 Sup. Ct. 673, 694, 39 L. Ed. 759).

"Excise" is a term of very general signification, meaning tribute, custom tax, tollage, or assessment. It is limited as to its operation to produce, goods, wares, merchandise, and commodities. *Portland Bank v. Apthorp*, 12 Mass. 252, 256.

The succession tax imposed by Acts Cong. June 30, 1864, and June 13, 1866, is an excise, within the meaning of the United States Constitution. *Scholey v. Rew*, 90 U. S. (23 Wall.) 331, 346, 23 L. Ed. 99.

### EXCLUDE.

"Excluded," as used in 2 Wag. St. p. 888, § 6, declaring that the time within which an act is to be done shall be computed by excluding the first day and including the last, and, if the last day be Sunday, it shall be excluded, is to be so construed that, where the last day in which an act can be done falls on Sunday, it must be performed on the preceding Saturday. *Patrick v. Faulke*, 45 Mo. 312, 314.

The word "exclusion," when used with reference to the acquisition of a right to flow lands for the working of a mill, only means that the enjoyment of the easement as claimed, whether it be a limited or more general enjoyment, should exclude others from a participation in it. *Davis v. Brigham*, 29 Me. (16 Shep.) 391, 403.

#### As disallow.

An award stating that the arbitrator, in arriving at his result, had excluded every claim submitted by the parties, except the following mentioned ones, which he had allowed, cannot be construed to mean that he did not pass judgment on all claims submitted, but simply that he excluded certain ones from his computation in the result because he disallowed them. *Hammond v. Deehan*, 6 Atl. 3, 78 Me. 399.

#### As except or reserve.

"Excluding," in a deed, is generally used as a synonym of "reserving and excepting." *Smith v. Furbish*, 44 Atl. 398, 406, 68 N. H. 123, 47 L. R. A. 226.

"Excluding," as used in a marine time policy excluding during the term certain designated ports and places, should be construed to mean "excepting"; and hence the clause does not amount to a condition or

warranty that the vessel shall not enter such ports or places, but only suspends the risk during the time she is in such ports or places. "It is certainly true that in lexicographies the word 'exclude' has not ordinarily given to it, as one of its meanings, 'to except,' but nevertheless we shall find that one of the senses given to the word 'except' is 'to exclude,' and in common parlance the words are often used as equivalents." *Palmer v. Warren Ins. Co.* (U. S.) 18 Fed. Cas. 1056, 1058.

#### As nearly exclude.

A claim for a patent for an improved steering head for road vehicles, setting forth that dust shall be excluded from the bearing surface at the upper end of the steering post, may fairly be taken to mean nearly excluded, since it can hardly be supposed that the flange of the shoulder shall fit so closely as absolutely to exclude all dust. *Long v. Pope Mfg. Co.* (U. S.) 70 Fed. 855, 858.

#### As ouster.

The civil practice act provides for the bringing of actions for the usurpation of an office. Subsection 7, which provides that, when the defendant against whom such action has been brought is adjudged guilty of usurping or entering into or unlawfully holding any office, judgment shall be rendered that such defendant be excluded from the office, means that, if the party is guilty, he shall be deprived or precluded or hindered from entering into or holding the office, and does not mean ouster from or dispossession of it. *Lindsay v. People*, 1 Idaho, 438, 456.

#### As prohibit.

The word "excluding," in marine insurance, and also the customary meaning of the word, does not differ greatly from that of the words "prohibiting" or "prohibited from"; and hence, where a policy of marine insurance contained a printed clause which prohibited the vessel from certain waters, including the Gulf of C., which had written onto it the amount of insurance, the name of the vessel, and the terms of the policy, after which was written the words "excluding the Gulf of C.," the written words will not be construed as having been used for the purpose of qualifying the printed clause, but for calling particular attention to the Gulf of C., near which the vessel was when insured. *Parker v. China Mut. Ins. Co.*, 41 N. H. 287, 164 Mass. 237.

#### EXCLUSION.

Exclusion is the act of excluding or shutting out, whether by thrusting out or by preventing admission; and hence, as used in Laws 1893, p. 822 (Portland City Charter) § 35, subd. 23, giving the council power to

provide for the exclusion of slaughterhouses from the city limits, authorizes the council to compel the removal of slaughterhouses already in operation within the city. *City of Portland v. Meyer*, 52 Pac. 21, 22, 23 Or. 368, 67 Am. St. Rep. 533.

#### EXCLUSIVE.

"Exclusive of interest and costs," within the meaning of the statute regulating appellate jurisdiction, means the costs incurred in the suit, and embraced in the judgment from which the appeal is taken. *Nashville, C. & St. L. Ry. Co. v. Mattingly*, 40 S. W. 673, 101 Ky. 219.

"Exclusive of costs," as used in a statute relating to the jurisdiction of the chancery court, means exclusive of costs in that court; and, where a judgment is recovered at law, and suit is brought thereon by a creditors' bill, the costs in the judgment at law may be considered in determining the question of jurisdiction. *Van Tyne v. Bunce* (N. Y.) 1 Edw. Ch. 583, 584.

#### As besides.

A deed conveying 50 acres of land, "exclusive of water," means that the land which was flowed by water shall not be taken into account in computing the amount of land called for in the deed. The meaning is the same as if the clause read "besides" or "not computing," instead of "exclusive of," water. *Bartlett v. Corliss*, 63 Me. 287, 291.

Under the Constitution of Louisiana, fixing the jurisdictional limit of the city court at \$100, exclusive of interest, such court had jurisdiction of an action to recover a license fee of \$100, together with the interest of 2 per cent a month thereon from the time such license fee was due. *State ex rel. City of New Orleans v. Fernandez*, 49 La. Ann. 249, 250, 21 South. 260.

A grant of an exclusive right under a patent is the conveyance of an exclusive right to make, use, or vend within a designated territory. *Buss v. Putney*, 38 N. H. 44, 46.

#### As over and above.

The word "exclusive," as used in a verdict wherein the jury found a certain sum to be due, exclusive of a bond which was not denied, means over and above the bond. *Walker v. Gibbs*, 1 Yeates, 255.

A will giving to a certain legatee money, "exclusive of what I have already advanced her," means over and above that amount. *Coale v. Smith*, 4 Pa. (4 Barr) 376, 381.

#### Permanence implied.

The word "exclusive," as used in a contract giving a broker the exclusive right to

sell premises, embraces the idea of permanence, at least until there had been reasonable time for the broker's fulfillment of his contract, or some good reason shown for its breach by the owner. *Bathrick v. Coffin*, 43 N. Y. Supp. 313, 314, 13 App. Div. 101.

### EXCLUSIVE AGENCY.

A contract providing that defendant should have exclusive agency for the sale of certain products east of the state of California does not mean that the manufacturer of the products himself shall not have the right to sell such products east of the state of California. *Golden Gate Packing Co. v. Farmers' Union*, 55 Cal. 606, 607.

### EXCLUSIVE CONTROL.

Rev. St. 1879, art. 3783, providing that, when any city assumes control of a public school, the city council shall have exclusive power to regulate the same, confers upon the council, and the board of aldermen so assuming control, full powers as against any state or county official, but cannot affect powers thereafter given to boards of trustees for such city by the statute, which boards were unknown when such article became the law. *Board of School Trustees v. City of Sherman*, 42 S. W. 546, 548, 91 Tex. 188.

The grant from the Legislature in Olympia City Charter, § 62, providing that the wards, streets, and alleys within said city limits shall be under the exclusive control of the common council, "implies that control is deemed by the Legislature desirable and necessary for the accommodation of the public, and imposes the duty of exercising that control as far as public convenience and safety may require." *Hutchinson v. City of Olympia*, 5 Pac. 606, 607, 2 Wash. T. 314.

Consol. St. § 2572, conferring on the excise board of a city exclusive control of the regulation of the sale of liquors, was intended merely to give such board control in opposition to the mayor and city council, in whom prior to that time the authority was vested, with intent to bar all claims of authority by that body, but it was not intended to suspend the provisions of the General Statutes in relation to the sale of intoxicating liquors. *Sanders v. State*, 52 N. W. 721, 722, 34 Neb. 872. See, also, *Sloan v. State (Ind.)* 8 Blackf. 361, 362.

### EXCLUSIVE JURISDICTION.

"Exclusive of interest," as used in the constitutional provision giving the Supreme Court jurisdiction only when the matter in dispute, exclusive of interest, exceeds \$1,000, means that the jurisdiction must be determined without any regard to interest, whether accruing or accrued. *State ex rel. City of*

*New Orleans v. Fernandez*, 21 South. 290, 261, 49 La. Ann. 249.

"Exclusive jurisdiction," when given to a police court over certain enumerated or described offenses, does not exclude the authority of a justice of the peace to receive complaints, and to issue warrants, returnable before that court, against persons charged with those offenses, unless there is in the act or in a subsequent act a superadded provision by which such authority is excluded, either expressly or by necessary implication; and the grant of exclusive jurisdiction to such court, taken by itself alone, is a grant only of exclusive authority to try, or to examine and hold for trial, those who are charged with the offenses of which such court has cognizance. *Commonwealth v. O'Connell*, 74 Mass. (8 Gray) 464, 465.

The provision of an act establishing a police court which confers upon it "exclusive jurisdiction over all such criminal offenses committed within the limits of said city as are cognizable by justices of the peace or trial justices" means exclusive, not as against all courts, but only as against courts of the same grade, as against justices of the peace, and as against trial justices. The act allows the court to absorb the jurisdiction which before belonged to justices of the peace and trial justices. *State v. Jones*, 73 Me. 280, 282.

"Within the exclusive jurisdiction of the United States" is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy yards, and other places within the boundaries of a state, or even within a territory, over which the federal government has, by cession, by agreement, or by reservation, exclusive jurisdiction. *Ex parte Gon-shay-ee*, 9 Sup. Ct. 542, 545, 130 U. S. 843, 32 L. Ed. 973.

### EXCLUSIVE LICENSE.

"Exclusive license," as the term is used when speaking of an exclusive license to make an invention, includes an exclusive license to make a part of the invention which is covered by the patent—a segregated right for the particular employment of the invention. *Clement Mfg. Co. v. Upson & Hart Co.* (U. S.) 40 Fed. 471, 472.

### EXCLUSIVE POWER.

The term "exclusive power" designates a power to the donee of the power to select from the class pointed out as those in whose favor the power may be exercised. *Ingraham v. Meade* (U. S.) 18 Fed. Cas. 50.

### EXCLUSIVE POSSESSION.

The words "outward," "open," "actual," "visible," "substantial," and "exclusive," in

connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is, opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact; not merely nominal; opposed to form; actually existing; true; not including, admitting, or pertaining to any others; undivided; sole; opposed to "inclusive." *Bass v. Pease*, 79 Ill. App. 308, 318.

By "exclusive possession" is meant that the person who claims the property by reason of the statute of limitations, or those under whom he claims, must have had exclusive possession of it. When the occupation is in common with the public generally, it is not such exclusive possession as will constitute the basis of a title by adverse possession. *Johnston v. City of Albuquerque* (N. M.) 72 Pac. 8, 11.

Openness and notoriety and exclusiveness of possession, as the terms are used in the law of adverse possession, are shown by such acts in respect to the land in its condition at the time as comport with ownership—such acts as would ordinarily be performed by the true owner in appropriating the land or its avails to its own use, and in preventing others from the use of it, as far as reasonably practicable—and nearly akin to these are the acts evidencing the element of hostility toward all the world. *Goodson v. Brothers*, 20 South. 443, 445, 111 Ala. 589.

#### EXCLUSIVE PRIVILEGE, IMMUNITY, OR FRANCHISE.

An exclusive privilege, within Const. art. 3, § 18, prohibiting a Legislature from passing a private or local bill granting any private corporation, association, or individual any exclusive privilege, immunity, or franchise, is a privilege which shuts out or excludes others from enjoying a similar privilege. In *re Union Ferry Co.*, 98 N. Y. 139, 151 (cited in *Davenport v. Kleinschmidt*, 13 Pac. 249, 255, 6 Mont. 502).

An exclusive privilege, within Const. art. 3, § 18, is a grant in the nature of a monopoly, of such inherent or statutory character as to make impossible the coexistence of the same right in another. *Trustees of Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 328, 45 Am. Rep. 217.

"Exclusive," as used in Patent Act 1836, § 11, 5 Stat. 121, referring to the grant of an exclusive right in a patent, comprehends not only an exclusive right to the whole patent, but an exclusive right to the patent in a particular section of country. The term "exclusive" signifies the whole interest which

the patent conferred. *Washburn v. Gould* (U. S.) 29 Fed. Cas. 312, 326.

"Exclusive privilege," as used in a contract of agreement for the use of a patent, is synonymous with "all of the rights and privileges" under such patent, and by the words "all of the rights and privileges" are meant all the rights or the entire right which the grantor has. *Filkins v. Blackman* (U. S.) 9 Fed. Cas. 50, 51.

Const. par. 11, § 7, forbids the granting of any exclusive privilege, immunity, or franchise whatever to any individual or corporation by the Legislature. P. L. 1890, p. 280, enacted for the preservation of clams and oysters, provides that any person or persons, citizens of the state, now using or occupying any grounds lying under the tide waters of the state for the cultivation of oysters thereon, shall be confirmed in their right to use such grounds for such purpose, and the oysters planted and grown thereon shall be the personal property of the person or persons using or occupying such grounds. Held, that the right granted by the latter act was an exclusive privilege granted by the Legislature, inasmuch as it excluded all other persons from taking the oysters growing on such state lands. *State v. Post*, 26 Atl. 683, 684, 55 N. J. Law (26 Vroom) 264.

An exception is an objection taken between the time of calling the action for trial and the rendition of verdict or judgment. *Quivey v. Gambert*, 32 Cal. 304.

"Exclusive privilege," as used in a statute authorizing the courts of a state to grant franchises for the establishment of ferries, and to provide that the licensee shall have the exclusive right to transfer passengers at that place, means not only the exclusive privilege to use the landing of such ferry, but the exclusive right to transfer passengers at that place, even though other landings may be used. *Montgomery v. Multnomah Ry. Co.*, 3 Pac. 435, 11 Or. 344.

Gen. Laws, p. 731, § 40, which provides that every person licensed to keep a ferry shall have the exclusive privilege of transporting all persons and property across the stream where such a ferry is established, etc., applies and is confined to a ferry landing—that is, the place where such ferry is established—and does not extend on each side, so as to prevent the licensing of conductors of rival ferries. *Hackett v. Wilson*, 6 Pac. 652, 653, 12 Or. 25.

Act April 29, 1874, ch. 93, § 34, providing for the incorporation of water companies, and enacting that the right to have and enjoy the franchises and privileges of such incorporation within the district or locality covered by its charter should be an exclusive one, and providing that no company should be incorporated for the purpose of furnishing

water until such corporation should have, from its earnings, realized and divided among its stockholders during five years a dividend equal to 8 per cent. per annum on its capital stock, means an exclusive right only as against other water companies, and not as against the city or borough in which it exists. It does not prohibit a city or borough from providing its citizens with pure water by means of works constructed by itself from money in its own treasury. Appeal of Lehigh Water Co., 102 Pa. 515, 527.

Laws 1892, c. 340, authorizing an existing street railroad company to consolidate with other street railroads, though granting an exceptional privilege, does not grant "an exclusive privilege, immunity, or franchise," within the meaning of Const. art. 3, § 18, prohibiting the passage of local bills granting to any corporation, etc., any exclusive privilege, immunity, or franchise whatever. *Bohmer v. Haffen*, 55 N. E. 1047, 1052, 161 N. Y. 390.

An exclusive immunity is one that, either from the terms of the grant, or as a result of the provisions of the grant, excludes all others from a like enjoyment. It may be a special immunity enjoyed by no other street surface railway in the state, yet it is not an exclusive immunity. Every immunity is exclusive, in the sense that all others are necessarily excluded from enjoying the same immunity. So, also, is the grant of every franchise or privilege an exclusive one, in the sense that all others are excluded from the enjoyment of that particular franchise or privilege. The true test is not, are all others excluded from the enjoyment of the particular grant? but are all others excluded from the enjoyment of a like grant? The fact that no others enjoy a like immunity does not render the immunity exclusive. *Weed v. Common Council of Binghamton*, 26 Misc. Rep. 208, 216, 56 N. Y. Supp. 105, 110.

#### EXCLUSIVE USE.

"Exclusive," as used in Acts 1891, p. 817, providing that any firm, person, corporation, or voluntary association that is a citizen of the state, entitled to the exclusive use of any lawful label, may obtain protection by filing a statement and fac simile thereof with the Secretary of State, means, according to the Century Dictionary, when applied to a right, undivided; sole. Hence a label adopted by the Cigar Makers' International Union of America, a voluntary, unincorporated association for the mutual benefit of its members, to be placed on boxes containing cigars made by members of the union in all parts of the United States—several branches being established in Indiana—cannot be protected by filing a statement provided by the statute, since the right of citizens of the state to the use of such label was not exclusive.

*State v. Hagen*, 33 N. E. 223, 226, 6 Ind. App. 167.

"Exclusive," as used with reference to the acquiring of a private right of way by exclusive use, does not mean that the right of way must be used by one person only, but simply that the right should not depend for its enjoyment on a similar right in others, and that the party claiming it exercises it under some claim existing in his favor, independent of all others. It must be exclusive as against the right of the community at large. *Cox v. Forrest*, 60 Md. 74, 80.

#### EXCLUSIVELY.

The adverb "exclusively" is defined by lexicographers to mean to the exclusion of all others; without admission of others to participation. As used in Tax Laws 1896, c. 908, as amended by Laws 1897, c. 371, exempting the real property of a corporation organized exclusively for moral or mental improvement or for literary purposes, it deprives a college fraternity chapter house, used chiefly as a place of abode for members of the fraternity, from such exemption. *People v. Lawler*, 77 N. Y. Supp. 840, 842, 74 App. Div. 553.

A corporation chartered to do manufacturing only, but which engages in other business as well, is not entirely exempted from taxation as a corporation "organized exclusively for manufacturing purposes," within the meaning of Act June 18, 1889, § 21, exempting such corporations from taxation, but it is only exempt to the amount of its capital employed in the manufacturing business. *Commonwealth v. Wm. Mann Co.*, 24 Atl. 601, 602, 150 Pa. 64; *Commonwealth v. Thackara Mfg. Co.*, 27 Atl. 13, 156 Pa. 510.

The word "exclusively," in 17 Stat. 238, authorizing the importation in bond of certain materials necessary for the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, and the use thereof free of duty, and providing that all articles of foreign production needed for the repair of American vessels engaged exclusively in foreign trade may be drawn from bonded warehouses, free of duty, under such regulations as the Secretary of the Treasury may prescribe, does not operate to prevent vessels engaged in trade between the Atlantic and Pacific ports of the United States from being considered as engaged in foreign trade, within the meaning of the act. "A vessel is engaged exclusively in the foreign trade when she is trading between a port of the United States and a foreign port, or between two foreign ports, or between the Atlantic and Pacific ports of the United States. The

word 'exclusively' was not used to limit the definition already given to 'foreign trade,' but to limit the benefits of the section to vessels exclusively engaged in that trade, as already defined." *United States v. Patten* (U. S.) 27 Fed. Cas. 460, 461.

The words "exclusively to her and the heirs of her body forever," as used in a bequest of slaves by a father to his daughter, then a married woman, exclude the marital rights of the husband in such slaves. *Gould v. Hill*, 18 Ala. 84, 85.

"Exclusively," as used in St. 1885, conferring on the city of Denver power by ordinance exclusively to prohibit and suppress disorderly houses, means that the matter is placed entirely under the control and within the sole jurisdiction of the city council. *Rogers v. People*, 12 Pac. 843, 844, 9 Colo. 450, 59 Am. Rep. 146.

### EXCLUSIVELY USED.

#### Church.

Under a statute exempting from taxation all buildings exclusively occupied as churches, etc., the fact that a building occupied by a church for church services at stated times is rented for lectures, concerts, readings, and other such entertainments, where the rent is used to defray the expenses of the church and society, does not prevent the use of the building by the church from being an exclusive occupation. *First Unitarian Soc. of Hartford v. Town of Hartford*, 34 Atl. 80, 90, 66 Conn. 368.

Gen. St. p. 154, § 12, exempting from taxation buildings exclusively occupied as churches, means buildings wherein no kind of business is transacted except that conducive to religious worship. Thus a pavilion used by a Spiritualist camp meeting association for religious services on Sunday, which on week days was partly used for services, and partly for the sale of refreshments and for dancing and parlor skating, for which an admission fee was charged, was not a building exclusively used for religious purposes, within the statute. *Connecticut Spiritualist Camp Meeting Ass'n v. Town of East Lyme*, 5 Atl. 849, 54 Conn. 152.

A pavilion used by a Spiritualist camp meeting association for religious services on Sunday, and on week days partly for such services, and partly for the sale of refreshments and for dancing and parlor skating, charging an admission fee, does not come within the meaning of Gen. St. p. 154, § 12, exempting "buildings exclusively occupied as churches" from taxation. *Connecticut Spiritualist Camp Meeting Ass'n v. Town of East Lyme*, 5 Atl. 849, 54 Conn. 152.

#### Charitable purposes.

Const. art. 9, § 3, provides that property, both real and personal, used exclusively for

certain charitable purposes enumerated, may be exempted from taxation. Held, that the phrase "exclusively used" means occupied by, or used for the interest of, and that land owned by a charitable institution, but not occupied by or used in any manner by the institution, would not be exempt from taxation under such provision. *Theological Seminary v. People*, 101 Ill. 578, 582.

"Exclusively" is defined as in a manner to exclude, as enjoying a privilege exclusively, and "exclusive" means possessed and enjoyed to the exclusion of others; and hence, as used in Const. art. 9, § 2, exempting from taxation such property as may be used exclusively for schools, religious and charitable purposes, and a Y. M. C. A. building, part of which is rented for use as stores, is not exclusively used for religious and charitable purposes. *Young Men's Christian Ass'n v. Douglas County*, 83 N. W. 924, 926, 60 Neb. 642 (citing *Stahl v. Kansas Educational Ass'n*, 54 Kan. 549, 38 Pac. 797; *Cincinnati College v. State*, 19 Ohio, 110; *Gerke v. Purcell*, 25 Ohio St. 229; *State ex rel. Board of Education Fund v. Board of Assessors*, 35 La. Ann. 668; *People v. Collison*, 22 Abb. N. C. 52, 6 N. Y. Supp. 711; *Salem Lyceum v. City of Salem*, 154 Mass. 15, 27 N. E. 672).

#### Colleges.

"Exclusively for colleges," as used in Const. art. 207, exempting from taxation buildings and property used exclusively for colleges, refers to such buildings as are used for the habitation of a college, and such property as is used in and for college purposes, such as chemical or philosophical apparatus and the like. *State ex rel. Board of Education v. Board of Assessors*, 35 La. Ann. 668, 671.

#### Farming purposes.

A city charter provided that no city tax exceeding 2 cents on a dollar of the grand list should be assessed or levied on any lands within the territory added to the city by virtue of the act, so long as the land shall be "used exclusively for farming purposes." Held, that the term "used exclusively for farming purposes" meant the exclusive beneficial use, or the exclusive use for a practical purpose from which an income is derived; and hence, where land was used for farming only, the fact that it was also laid out in city lots and blocks by the owner, intended by him to be kept and sold for building purposes in the future, did not the less render it used exclusively for farming purposes, within the charter provision. *Gillette v. City of Hartford*, 31 Conn. 351, 359.

#### Graveyard.

"Exclusively as graveyards or grounds for burying the dead," as used in 2 Starr & C. Ann. St. c. 120, § 2, declaring that all lands used exclusively as graveyards or

grounds for burying the dead shall be exempt from taxation, cannot be held to extend to an adjacent lot belonging to a cemetery, whose charter provides that grounds held and platted by it as burial places shall be exempt from taxation, where such land, though not intended for burial purposes, afforded an entrance to the cemetery from the street, and was partly occupied by a dwelling house for the use of the superintendent and as the office of the association, and also by a well for the benefit of the cemetery grounds. *Bloomington Cemetery Ass'n v. People*, 48 N. E. 905, 170 Ill. 377.

#### **Moral and mental improvement.**

A building erected by a voluntary corporation with no capital stock, nor any provision for the declaration of dividends, and used for libraries, reading rooms, rooms for literary and scientific lectures, etc., and including an auditorium, which is rented from time to time to outsiders as a theater and public hall—the rent being applied exclusively to the maintenance of the building—is used exclusively for moral and mental improvement of its members, and for educational, scientific, literary, and library purposes, within Laws 1897, c. 371, so as to prevent taxation of the real or personal property represented by the building and its contents. *People v. Sayles*, 50 N. Y. Supp. 8, 10, 23 Misc. Rep. 1 (approved in *Re McCusker*, 51 N. Y. Supp. 281, 283, 23 Misc. Rep. 446).

Gen. Tax Law 1896, c. 907, § 4, subd. 7, as amended by Laws 1897, c. 371, providing that real property of a corporation or association organized for the moral or mental improvement of men or women, or for religious or charitable work, and used exclusively for one or more of such purposes, should be exempt from taxation, means exclusive business for which the corporation or association was incorporated, and hence a rectory will not be exempt. *People v. Feltner*, 61 N. E. 762, 763, 168 N. Y. 494.

#### **Public or religious worship.**

The exemption of church property actually and exclusively used for public worship does not apply to a building belonging to a Young Men's Christian Association, used partly for the purposes of the association, and partly rented for business purposes. *People v. Young Men's Christian Ass'n*, 41 N. E. 557, 558, 157 Ill. 403.

The phrase "exclusively used for religious purposes," in a constitutional provision exempting buildings exclusively used for religious purposes, does not characterize a dwelling house owned by a church, and occupied by the pastor of the church exclusively as a residence. *Vail v. Beach*, 10 Kan. 214, 215.

Land owned by a religious society, which is not occupied by its church or school

buildings, or necessary for the purposes of such buildings, is not exempt from taxation under a statute exempting property exclusively used by such societies. *United Brethren v. Forsyth Co. Com'rs*, 20 S. E. 626, 115 N. C. 489.

A chapel, used in part for religious worship and in part for the residence of teachers in a free parochial school located on an adjoining lot, is not exempt from taxation, under Gen. Laws, c. 44, § 2, exempting buildings used exclusively for religious worship, so far as said buildings are used for religious and educational purposes. *In re City of Pawtucket*, 52 Atl. 679, 24 R. I. 88.

#### **Railroad.**

"Exclusively used," as used in Sess. Laws 1885, p. 222, requiring the State Board of Equalization to assess property exclusively used in operating a railroad, does not mean exclusively used within the state, but includes cars which, in performing their regular journeys, pass out of the state, and become temporarily useful in operating other railroads. *Denver & R. G. R. Co. v. Church*, 28 Pac. 468, 17 Colo. 1, 31 Am. St. Rep. 252.

#### **School purposes.**

A schoolhouse used and occupied for a boarding school, but in which the owner resides with his family, is not a building used exclusively for school purposes, under Const. art. 13, § 2, exempting buildings used exclusively for school purposes from taxation. *Red v. Johnson*, 53 Tex. 284, 288.

Const. art. 8, § 2, authorizing the Legislature to exempt from taxation all buildings used exclusively and owned by persons, or associations of persons, for school purposes, means not only the buildings, but land necessary and used for the proper and economical conduct of the schools. *Cassiano v. Ursuline Academy*, 64 Tex. 673. A house owned by a practicing attorney, in which he lives with his wife—she conducting therein a day and boarding school—is not within such Constitution. *Edmonds v. City of San Antonio*, 36 S. W. 495, 14 Tex. Civ. App. 155.

The term "building occupied exclusively as a schoolhouse," within the meaning of a statute prohibiting the licensing of a saloon within a certain distance of a building occupied exclusively as a schoolhouse, includes a building erected for the purpose of a parochial school, and used for such purpose; and its character is not changed by the fact that the Sisters of Charity who conduct the school also reside in the building. *People v. Murray*, 42 N. E. 584, 585, 148 N. Y. 171.

#### **State purposes.**

Agricultural College lands under contract of purchase are not used exclusively for state purposes, as required by the Constitution, so as to make them exempt from

taxation; nor do they belong to the state exclusively, as the purchaser has the entire use and the entire equitable title, subject only to a lien on the same for the unpaid purchase money. *Oswalt v. Hallowell*, 15 Kan. 154.

Lands belonging to the Agricultural College, sold under a time contract—part of the purchase money being paid before any right of forfeiture accrues—do not belong exclusively to the state, so as to be exempt from taxation, within a statute exempting such land, as by the use of such word it is apparent that the Legislature intended to exempt only that property which belongs to the state, and belongs to it free from any contract or interest on the part of any individual. *Dixon County Com'rs v. Baldwin*, 29 Kan. 538, 540.

## EXCOMMUNICATION.

See "Writ de Communicato Capiendo."

## EX-CONVICT.

An ex-convict is a person who has been found guilty by a proper tribunal of a crime against the laws of the state, whether it be a misdemeanor or a felony. *Cameron v. Tribune Association*, 7 N. Y. Supp. 739, 742, 55 Hun. 607.

The prefix "ex" to the word "convict" denotes that the convict has served out a sentence for crime, or been pardoned, but it does not take away the libelous effect of charging a man with being an ex-convict. *Morrissey v. Providence Telegram Pub. Co.*, 32 Atl. 19, 19 R. I. 124.

## EXCUSE.

See "Just Excuse"; "Legal Excuse."

The word "excused," as used in reference to a juror, means that a person is relieved from jury duty on his own application, for his own convenience, or for reasons personal to himself, or upon the court's own motion, because the person's services are not necessary, or because it seems fit to excuse him for the reason that it finds him an unfit or incompetent person to serve, and is not synonymous with "set aside," which is done because of objections raised to his serving by one or the other of the parties to the action, so that a juror who was objected to by one of the parties could not be said to have been excused. *Santee v. Standard Pub. Co.*, 55 N. Y. Supp. 361, 362, 36 App. Div. 555.

## EXCUSABLE ASSAULT.

An assault is excusable when committed by accident and misfortune in doing any

lawful act by lawful means, with ordinary caution, and without any unlawful intent. *People v. O'Connor*, 81 N. Y. Supp. 555, 561, 82 App. Div. 55.

## EXCUSABLE HOMICIDE.

Involuntary manslaughter distinguished, see "Involuntary Manslaughter."

Excusable homicide is homicide in self-defense. *United States v. King* (U. S.) 34 Fed. 302, 306.

Excusable homicide is that which is committed either by misadventure or in self-defense. *State v. Lodge* (Del.) 33 Atl. 312, 314, 9 Houst. 542; *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564.

Homicide by misadventure is the accidental killing of another where the slayer is doing a lawful act unaccompanied by any criminally careless or reckless conduct. Homicide in self-defense is where one is assaulted upon sudden affray, and, in defense of his person, where certain and immediate suffering would be the consequence of waiting for the assistance of the law, and there is no other probable means of escape, he kills his assailant. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 Houst. 564; *State v. Miller*, 1 Del. Term R. 183, 186.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means with usual and ordinary caution, and without unlawful intent. *State v. Reynolds*, 22 Pac. 410, 411, 42 Kan. 320, 16 Am. Rep. 483; *Pen. Code N. Y. § 203*; *People v. Fitzsimmons*, 34 N. Y. Supp. 1102, 1105.

"Excusable homicide" is the unfortunate or accidental killing of another without intention, and in doing a lawful act with ordinary circumspection. *Hopkinson v. People*, 18 Ill. (8 Peck) 264, 265.

"Excusable homicide" is that which takes place under such circumstances of accident or necessity that the party cannot be strictly said to have committed the act willfully and intentionally. *Williamson v. State*, 2 Ohio Cir. Ct. R. 292, 1 O. C. D. 492.

"Excusable homicides" are those not properly justifiable, but allowable under certain circumstances; for example, defense of one's own person, or that of some member of his household, as wife, children, servant. *State v. Walker* (Del.) 33 Atl. 227, 9 Houst. 464.

Homicide is excusable when committed by accident and misfortune in lawfully correcting a child or servant, or when doing any other lawful act by lawful means with usual, ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion upon any sudden and suffi-



cient provocation, or upon a sudden combat without any dangerous weapon being used, and not done in a cruel or unusual manner. *Richard v. State*, 29 South. 413, 417, 42 Fla. 528.

"Excusable homicide" is defined in Rev. St. § 2379, as when committed by accident and misfortune in lawfully correcting a child, or any other lawful act by lawful means, with ordinary caution, and without unlawful intent, or by accident and misfortune in the heat of passion or a sudden combat. *Bassett v. State* (Fla.) 33 South. 262, 264.

"Excusable homicide by misadventure" is the accidental killing of another when the slayer is doing a lawful act unaccompanied by any cruelly careless or reckless conduct. "Excusable homicide" may arise either from misadventure or in self-defense, and, when proved, entitles the accused to a verdict of not guilty. *State v. Brown* (Del.) 36 Atl. 458, 464, 2 Marv. 380.

If an assault is made upon a man with an attempt to commit a felony upon him, he may resist so far as it is necessary to resist the assault, even if he must take the assailant's life. But this has a limitation. If he can resist the assault, and free himself without taking life, and kills the assailant without necessity, he is not excusable. If mere heat of blood impels him to take life, in such a case he is guilty of manslaughter. *State v. Zeigler*, 21 S. E. 763, 767, 40 W. Va. 593.

#### EXCUSABLE NEGLIGENCE.

Excusable neglect is the omission or forbearance to do a thing that can be done or that is required to be done under circumstances admitting of an excuse. *Davis v. Steuben School Tp.*, 50 N. E. 1, 5, 19 Ind. App. 664.

"Excusable neglect" does not mean gross negligence. It does not mean a willful disregard of the process of the court, but refers to cases where there is a reasonable excuse for failure to answer. *Deering Harvester Co. v. Thompson*, 42 S. E. 772, 773, 116 Ga. 388 (citing *Brucker v. O'Connor*, 115 Ga. 95, 41 S. E. 245).

"Excusable neglect" does not mean any neglect, but is confined to a reasonable neglect, occasioned by some fact or something that has or has not been done by which the complaining party ought to have knowledge, and which, if he had had such knowledge, might have prevented the judgment, order, or other proceedings of which he complains. *Skinner v. Terry*, 12 S. E. 118, 119, 107 N. C. 103.

The neglect of a party or his attorneys to inform himself of the recitals in a deed of conveyance by which he claims title, and

which he offers in evidence, is not such "excusable neglect" as will warrant the court to open the judgment. *Hicklin v. McClear*, 24 Pac. 992, 19 Or. 508.

In cases construing Code, § 274, providing that a party may be relieved from a judgment, verdict, or the proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, the words "inadvertence" and "surprise" seem to have been ignored with singular unanimity, and the phrase "excusable neglect" is taken as embodying the meaning of the section. *Marsh v. Griffin*, 31 S. E. 840, 842, 123 N. C. 660.

Where it appeared that the applicant for a writ of certiorari as a substitute for an appeal which had been lost by failure to perfect it within the time limited was absent upon official business on the day of the trial; that he returned the following night, intending to perfect the appeal if the case had gone against him; that he was then informed by his counsel, in the presence of the adverse counsel, whom he understood to assent thereto, that the time for taking the appeal had been extended, and he thereupon returned to his official business without further action, and first learned when he came back that the time had not been extended—there was such excusable neglect as would authorize the granting of the writ. *Graves v. Hines*, 11 S. E. 362, 363, 106 N. C. 323.

The term "excusable neglect" in a statute authorizing the opening of a default judgment for excusable neglect does not mean gross negligence. It does not mean a willful disregard of the process of the court, but refers to cases where there is a reasonable excuse for failing to answer. Such an excuse might be shown by one who had negligently waited until the time had nearly expired for answering, and was then unavoidably prevented from filing his defense; but where a party neglected to answer because he believed that plaintiff had sued the wrong party, and would discover it, he could not be relieved on the ground of "excusable neglect." *Brucker v. O'Connor*, 41 S. E. 245, 246, 115 Ga. 95.

#### Negligence of attorney.

A party is only guilty of "excusable neglect" when he employs counsel to enter his plea, and the counsel neglects it, and therefore a judgment given against the party by reason thereof may be vacated. *Bradford v. Colt*, 77 N. C. 72, 75.

An affidavit that after service of summons defendants employed counsel to represent them at the return term, that the attorney assured them he would do so, whereupon he gave the matter no further attention, and that it was currently reported that the plaintiff had abandoned the action,

did not bring the case within Code, § 274, providing that a judgment may be set aside for excusable neglect on motion made within one year after its rendition. *Roberts v. Allman*, 11 S. E. 424, 425, 106 N. C. 391.

The term "excusable neglect" in Code Civ. Proc. § 133, authorizing the setting aside of a judgment taken against a party through his "excusable neglect," includes the omission of a client to examine the records in order to ascertain what has been done in a case after he has employed an attorney to look after it. Therefore a judgment taken against him through the negligence of the attorney may be set aside. *Griel v. Vernon*, 65 N. C. 76, 78.

A judgment rendered in defendant's absence will be set aside for his "excusable neglect" on a showing that he employed counsel for his defense, and attended a previous term of the court and on the day appointed for the hearing, but left before the session had ended on being assured by his counsel that the latter had given the necessary attention for the protection of the defendant. *Francks v. Sutton*, 86 N. C. 78, 79.

The term "excusable neglect" in a statute authorizing a new trial in a cause where judgment is obtained through "excusable neglect" of a party covers a case in which one member of a law firm, having the sole management of the case, is prevented from reaching the place of trial during the term by reason of a disarrangement of trains, and his partner, who is not familiar with the facts and evidence, after objecting to the hearing of the case because the term is ended, takes no part in the trial; and therefore it is error to refuse a new trial. *Stoppel-feldt v. Milwaukee, M. & G. B. R. Co.*, 29 Wis. 688, 690.

The fact that a plaintiff had been prevented from resisting a motion for discharge of a judgment through the neglect of his attorney, on whom notice of the motion was served, to inform him of it, was construed to be "excusable neglect" within the meaning of Rev. St. c. 125, § 88, providing for the granting of relief against orders obtained against a party by reason of his excusable neglect. *Flanders v. Sherman*, 18 Wis. 575.

"Excusable neglect," as used in Code Civ. Proc. § 473, providing that the court may relieve a party from a judgment rendered against him through his excusable neglect, would include a case where an attorney was called away to the bedside of a wounded brother, by reason of which he was unable to put in an answer in the time required by statute. *Burns v. Scooffy*, 83 Pac. 86, 87, 98 Cal. 271.

The terms "mistake, inadvertence, surprise, or excusable neglect," in Code, § 274,

providing that the court may, in its discretion, within one year, without notice thereof, relieve a party from a judgment taken against him through such neglect, was construed to apply to the case of the judgment taken against a defendant who attended court for four days during the return term, and then left his case in charge of counsel, who failed to look after the case, thinking the action had been brought in another county, where properly it should have been brought, thus permitting a default judgment to go against his client. *Taylor v. Pope*, 11 S. E. 257, 258, 106 N. C. 267, 19 Am. St. Rep. 530.

An affidavit by an attorney does not show "excusable neglect" when it sets out that he had notice of the judgment on October 5th, but was too busy to make the memorandum; that the 6th was Sunday; that the 7th he was unable to obtain the witness; that on the 8th he partly prepared, and then forgot about it until the 11th, when it came to his attention, when he immediately prepared, served, and filed the same. *Dow v. Ross*, 27 Pac. 409, 90 Cal. 562.

#### Negligence of clerk.

A judgment may be set aside for the "excusable neglect" of the defendant, as authorized by Code, § 133, when it is shown that the defendant called on the clerk twice to have him enter on the docket the name of defendant's attorney, and the attorney himself applied to the clerk to see the plaintiff's complaint, but was unable to see it, and during the balance of the term was absent in obedience to a summons as a witness. *Wynne v. Prairie*, 86 N. C. 73, 74.

#### Reliance on promise of adverse party.

Where defendants neglected to answer in season, relying on plaintiff's promise to call at their office and fix the matter up, such failure to answer was an excusable neglect, within the provisions of Rev. St. c. 125, § 88, permitting the opening of a default judgment to let in an answer not timely, made because of excusable neglect. *Stafford v. McMillan*, 25 Wis. 566, 568.

The words "excusable neglect, mistake, inadvertence, or surprise," in Hill's Ann. Laws, § 102, authorizing a court to set aside its judgment at any time within a year if the judgment has been procured against a party asking such relief, through his mistake, inadvertence, surprise, or excusable neglect, included a judgment procured in violation of an agreement to extend the time to answer. "Mr. Black says it is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case shall be continued, or not pressed, or not brought to trial, though

that is also a kind of fraud." *Thompson v. Connell*, 48 Pac. 467, 468, 31 Or. 231, 65 Am. St. Rep. 818 (quoting 1 Black, Judgm. 336).

## EXECUTE.

See "Duly Executed"; "Not Executed."

The words "to execute" sometimes mean to fulfill, to complete. *Den v. Young*, 12 N. J. Law (7 Halst.) 300, 303.

The execution of a writing is the subscribing and delivering it, with or without affixing a seal. *Ann. Codes & St. Or.* 1901, § 766; *Code Civ. Proc. Cal.* 1903, § 1933.

The officer of a corporation affixing its seal to a deed is "the party executing the deed," within the meaning of the statute requiring the party executing the deed to acknowledge it. *Killingsworth v. Portland Trust Co.*, 23 Pac. 66, 68, 18 Or. 351, 7 L. B. A. 638, 17 Am. St. Rep. 737.

### Acknowledgment imported.

The term "execution," in speaking of the execution of a mortgage, does not include its acknowledgment, which is only evidence of the execution. *Benninghoff v. Stephenson*, 29 Atl. 87, 88, 161 Pa. 440.

Where, in an action to foreclose a mortgage, the complaint alleged and the court found that defendant made, executed, and delivered the instrument, the word "executed" imported that it was acknowledged. *Joseph v. Dougherty*, 60 Cal. 358, 360.

An admission in an answer that a contract for the sale of land was "executed," in the absence of anything to restrict the meaning of that term, admits that it was duly acknowledged when acknowledgment was necessary to make the contract valid and enforceable; but the meaning may be restricted by the context, and will then cover such acts as the pleader obviously intended to refer to. *Solt v. Anderson (Neb.)* 93 N. W. 205, 207.

### Delivery imported.

The word "execution," as used in speaking of the execution of a deed, means not only signing and sealing the instrument, but also includes the delivery thereof. *State v. Young*, 23 Minn. 551, 560; *Hill v. Nelms*, 5 South. 796, 797, 86 Ala. 442; *Farrior v. Mortgage Security Co.*, 7 South. 200, 88 Ala. 275; *Keenan v. Keenan*, 12 N. Y. Supp. 747, 749, 58 Hun. 605; *Collins v. Cornwell*, 30 N. E. 796, 797, 131 Ind. 20; *Smith v. James*, 131 Ind. 131, 132, 30 N. E. 902, 903; *Gaskill v. King*, 84 N. C. 211, 221; *Smith v. Williams*, 38 Miss. 48; *Einstein's Sons v. Shouse*, 5 South. 390, 382, 24 Fla. 490; *Koppelman v. Koppelman*, 57 S. W. 570, 572, 94 Tex. 40; *Watkins v. Nugen*, 45 S. E. 262, 263, 118 Ga.

372; *Brown v. Westerfield*, 66 N. W. 439, 47 Neb. 399, 53 Am. St. Rep. 532.

The execution of a written instrument, within the meaning of Code, providing that the execution of an instrument will be admitted unless specifically denied, includes its delivery. *Clark v. Childs*, 4 Pac. 1058, 68 Cal. 87.

Execution of a note requires both a signing and delivery. In a legal sense, the word "execute" includes delivery, and implies a complete contract. *Nicholson v. Combs*, 90 Ind. 515, 516, 46 Am. Rep. 229; *Bagley v. McMickle's Adm'rs*, 9 Cal. 430, 452.

The word "execute" is used in an answer denying that defendant executed the mortgage including the delivery of such instrument, and therefore the answer is not defective in failing to deny the delivery alleged in the complaint. *Le Mesnager v. Hamilton*, 35 Pac. 1054, 1056, 101 Cal. 532, 40 Am. St. Rep. 81.

If the certificate of the acknowledgment of a married woman to a deed states that on the private examination she acknowledged that she executed the deed freely, it is sufficient, though she does not state that she had signed, sealed, and delivered said deed. *Smith v. Williams*, 38 Miss. 48, 56.

"Execution," as used in the phrase "after the execution by the defendant of the indenture as aforesaid," means "executed with all the formalities necessary to the completion of the deed." It is a sufficient allegation to show that the deed was sealed and delivered. *Sutherland v. Wills*, 5 Exch. 715, 718.

Every act essential to the complete making and delivery of the instrument is included in the word "execute," so that an allegation that a bond was executed would be sufficient to cover every essential to the making and approving of the bond. *Fire Ass'n of Philadelphia v. Ruby*, 82 N. W. 629, 630, 60 Neb. 216.

The phrase "after execution by any of the obligors," in an instruction in an action on an appeal bond, in common parlance means after the signing of the bond. In a legal sense the word "execution" implies signing, sealing, and delivering. It is the delivery which completes the execution and gives validity to a bond. *Tiernan v. Fenimore*, 17 Ohio 545, 552.

Laws relating to the conveyance of land by married women, and providing that a married woman shall appear before the proper court or officer in the absence of her husband, and declare that she, of her own free will, executed the deed or instrument in question, the word "execute" is equivalent to "sign, seal, and deliver," and the use of the latter words in the certificate by the officer

is a substantial compliance with the statute. *Little v. Dodge*, 32 Ark. 453, 460.

In construing a statute relative to the issue of bonds by a township in aid of a railroad company, which provided that the bonds should be executed by the supervisor and clerk, and delivered to the state treasurer, who should receipt therefor, it was said that the bonds were to be executed—that is to say, written or printed, signed and sealed—by the supervisor and clerk of the township. The word “executed,” used in the statute, manifestly does not import the final delivery, for that is necessarily directed by the statute to be done by the treasurer. Such delivery as they could make was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event. *Young v. Clarendon Tp.*, 10 Sup. Ct. 107, 110, 132 U. S. 340, 33 L. Ed. 356.

Comp. St. c. 6, § 6, requiring an assignment of property for the benefit of creditors to be recorded within twenty-four hours after its execution, cannot be construed as meaning merely the signing of the assignment, but includes the delivery of the assignment and the surrender of control over it. There is no fixed meaning to the word “execution” as applied to the making and completion of written instruments, and it is often used as including all acts that may be necessary to make it a complete transaction. *Wells v. Lamb*, 27 N. W. 229, 19 Neb. 355.

The word “executed,” when used with reference to a conveyance, technically comprehended not only signing and sealing, but delivery also; but in a popular sense it means signing and sealing, so that, as used in an allegation that plaintiff's husband executed to her a deed of conveyance, which is followed by an allegation that she knew nothing of it, and never accepted it, the word “executed” will not be held to imply a delivery. *Stallings v. Newton*, 36 S. E. 227, 229, 110 Ga. 875.

Technically, the word “executed,” when used in reference to a conveyance, comprehends not only signing and sealing, but delivery. In a popular sense, however, it means signing and sealing, and as used in a plea admitting that a certain deed had been executed, but alleging that the grantee had never accepted it, such plea shows that the word “executed” does not include the delivery, since acceptance is part of the delivery. *Buffington v. Thompson*, 25 S. E. 516, 517, 98 Ga. 416.

#### Make synonymous.

It is said in *Black's Law Dictionary* that execute means to make—as to execute a deed, which includes signing, sealing, and

delivery; and therefore an allegation in a pleading that defendants made the deed is equivalent to an allegation that they executed it. *Hazelet v. Holt County*, 51 Neb. 716, 718, 71 N. W. 717.

#### Sign synonymous.

“Executed,” as used in Rev. St. § 4192, the sole object of which is to dispense with proof of the signature to a written instrument, where such signature has not been denied under oath, is employed as strictly synonymous with “signed.” *Nielson v. Schuckman*, 11 N. W. 44, 46, 53 Wis. 638.

“Signed,” as used in a certificate to a deed stating that the grantor's wife had been examined privily and apart from her husband, and had the deed fully explained to her, and that she acknowledged the same to be her act and deed, and declared that she had “willingly signed the same,” and did not wish to retract it, is equivalent to the word “executed,” and the certificate was not vitiated by the use of such word instead of the word “executed.” *Bensimer v. Fell*, 12 S. E. 1078, 1079, 35 W. Va. 15, 29 Am. St. Rep. 774.

In an action on a note, where the answer avers that the notes were executed, but not delivered, though the word “executed” implies delivery, as the answer expressly averred that the notes were not delivered, the word as used was synonymous with the word “signed.” *Ricketts v. Harvey*, 78 Ind. 152.

“Signed,” as used in an acknowledgment of a wife to a deed, stating that she signed the deed, is not equivalent with the word “executed,” which has a more extended meaning, and includes not only the signing, but sealing and delivery of the deed; and hence the acknowledgment is insufficient. *Stuart v. Dutton*, 89 Ill. 91, 93.

In an action on the bond of a county officer, the general allegation in the answer that the bond was executed cannot be taken in the technical sense of the word “executed”—that is, that an instrument was both signed and delivered—except as it may refer to the provisional acceptance, where there is a specific allegation in the answer that the bond was presented to a certain court for approval, and was by it rejected. *Wood v. State*, 40 S. W. 87, 88, 63 Ark. 337.

The expression in a charge in an action against a tenant that the execution of the lease was admitted could not have misled the jury, since the signing of the lease was admitted, and their signatures to it, when offered in evidence, were not disputed; the issue being whether this signing was voluntary or induced by fraud. While the execution of an instrument includes more in legal contemplation than merely signing, these terms are often used interchangeably.

Knowles v. Murphy, 40 Pac. 111, 113, 107 Cal. 107.

To say that a person signs a note and that he executes a note, as usually understood, may mean very different things. The former conveys the idea that the act of signing was performed personally by the maker, while the latter imports that the maker either signed it himself, or authorized another to sign it for him. The terms are by no means equivalent. *Brems v. Sherman*, 63 N. E. 571, 572, 158 Ind. 300.

#### **Subscribe synonymous.**

An allegation that an agreement for the sale of lands was "executed" is equivalent to "subscribed," as used in Rev. St. c. 75, § 8, requiring every contract for the sale of lands to be in writing and subscribed by the party purchasing. *Cheney v. Cook*, 7 Wis. 413, 423.

#### **Duties of office.**

Where a sheriff's bond was conditioned that he should execute the duties of his office without "fraud, deceit, or oppression," it was held that there was a breach of the condition if the sheriff failed to execute the office, though he was not guilty of any positive act of fraud, deceit, or oppression; in other words, that a default by the sheriff in his office was a breach of the condition of the bond. *People v. Brush* (N. Y.) 6 Wend. 454.

#### **Hypothecation.**

The execution of an hypothecation means the seizure which the creditor makes of the thing hypothecated and the judicial sale which is ordered thereof. *The Young Mechanic* (U. S.) 30 Fed. Cas. 873, 876 (citing *Poth De L'Hypothèque*, c. 2, § 3).

#### **Power of appointment.**

Whether or not the testator has executed a power of appointment vested in him is a question of intention to be arrived at by the same rules of construction which apply in other cases in the interpretation of wills; but if he used general words, such as "all my estate," or "all the balance of my estate," which in themselves are sufficient to cover an execution of the power, it will be sufficient, though reference is expressly made in the will to the power of the appointment or the subject-matter on which it may exercise; and especially is this so where it appears that these general words would be inoperative unless construed to be an execution of the power. *Andrews v. Brumfield*, 32 Miss. 107, 117.

#### **Process.**

To "execute process" is to perform its mandate. *Andrews v. Keep*, 38 Ala. 315, 317.

"Executed," as indorsed on back of a capias, meant that the officer had complied

with the mandate of the writ. *Wilson v. Jackson*, 10 Mo. 329, 330, 338; *State v. Williamsen*, 57 Mo. 192, 198, 199.

"Execute," as used in act relating to sheriffs (section 22), providing that if a sheriff fails to "execute" a writ, as therein provided, he shall be liable in damages, etc., means to do all that the writ commands to be done. *Waterman v. Merrill*, 33 N. J. Law (4 Vroom) 378, 381; *Kemble v. Harris*, 36 N. J. Law (7 Vroom) 528, 528.

When a sheriff makes his return generally as executed, a legal service is understood; that is, that it has been served according to law. *Kennedy v. Baker*, 28 Atl. 252, 254, 159 Pa. 146.

In an action on a judgment of another state, which recites that "the defendants, being duly summoned," did not appear, etc., and the return on the writ of summons is that it was "executed in full," such return is prima facie evidence of due service, and that the court had jurisdiction to enter the judgment. *Blackburn v. Jackson*, 26 Mo. 308, 310.

It is not necessary for a sheriff, in order to execute a writ of execution, to have the writ in his hands at the time he makes the sale under it. *Kimmouth v. White*, 48 Atl. 952, 954, 61 N. J. Eq. 358.

A capias is executed when defendants have been arrested, though the return day has not yet arrived. *State v. Hamilton*, 16 N. J. Law (1 Har.) 158, 154.

Within the provision that on the expiration of a sheriff's term of office all process wholly or partly unexecuted shall be executed by his successor, the question arose as to whether a writ was unexecuted or not. Thus, where an officer returns with an attachment, and certifies that he has executed the within writ by seizing the property and taking it into custody, when the writ of attachment requires the officer not only to attach, but to safely keep the property attached, the word "executed" will not be construed in the narrow sense of seizing the property, but include the safe-keeping also. *Wood v. Lowden*, 49 Pac. 132, 133, 117 Cal. 232.

#### **Same—As levy.**

A statute provided that the purchaser of land at sheriff's sale should hold it clear of all other judgments, by authority of which "no execution had been taken out and executed on the lands \* \* \* so purchased," held that the word "executed," as used in the act, did not mean a complete execution, but, as is more frequently the case when applied to writs of *f. fa.*, had reference only to the first part of the execution of the writ, to wit, the levy. *Smith v. Young*, 12 N. J. Law (7 Halst.) 300, 306.

A fl. fa. is executed when the sheriff has made a levy under it, though he has neither sold the property nor returned the writ. *State v. Hamilton*, 16 N. J. Law (1 Har.) 158, 154.

Where a statute provided that the purchaser of lands under junior executions should hold them free of all judgments on which no execution had been executed, the word "executed" meant "levied." *Wills v. McKinney*, 41 N. J. Law (12 Vroom) 120, 123.

### Will.

"Executed," as used in reference to a will, signifies those acts required by the testator. *Lewis v. Lewis* (N. Y.) 13 Barb. 17, 23.

The word "executed" in a statute requiring that a will by a married woman shall be executed in the presence of two witnesses, refers to the formality of making the will, with the additional requisite that it was to be done in the presence of witnesses, and it is not necessary that the subscribing witnesses should testify affirmatively that testatrix knew that the instrument was her will, or that she formally published it as such. *Appeal of Linton*, 104 Pa. 228, 239; *Id.* (Pa.) 14 Wkly. Notes Cas. 473; *Id.* (Pa.) 41 Leg. Int. 490.

The word "executed" in a statute providing that a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage, means the acts and transactions of the testator in doing the things which the statute declares are necessary for the execution of the will. The statute prescribes four distinct requirements that must be observed, all of which must coexist, and together form one concrete whole, essential to the due execution of the will. In *re Burton's Will*, 25 N. Y. Supp. 824, 828, 4 Misc. Rep. 512.

By "the execution of the will" is meant the times of the testator's forming his judgments and intents as to what to do with his property, the times of directing and having them put upon paper, and the final settling of or determining what they shall be, the signing of his name thereto, and the delivery of the instrument as and for his last will and testament. *Delaney v. City of Salina*, 9 Pac. 271, 275, 84 Kan. 532.

"Execution of a testamentary writing consists in the act of signing it in the mode prescribed by law, with the intention and for the purpose of rendering it valid and operative as the will of the person so signing it. *Appeal of Linton*, 104 Pa. 228, 239.

The words "executed and delivered" in a finding that an executor executed and delivered his will on the day of its date, are appropriate to the allegation of the exercise

of a power by appointment *inter vivos*, and are quite variant from that which would recite the exercise of a power by last will which would have alleged the instrument to have been published and declared. *Wooster v. Cooper*, 45 Atl. 381, 387, 59 N. J. Eq. 204.

### Same—As carry into effect.

"Execution," as used in a will providing that in case of the death of any legatees previous to the probating or execution of the will does not apply to the act of signing and publishing her will, but of carrying it into effect, and is not synonymous with probating it, which involved only a determination that the will was duly signed and published, and that the testator was competent to make it. *Lamb's Estate v. Hall*, 80 N. W. 1081, 1082, 122 Mich. 239.

A will provided for the conversion of all of testator's property into money on the death of his widow, and its division among his two daughters, but directed that if his daughter B. should not be living "at the time this will shall be executed" her share should be given to her daughter. Held, that the phrase, "at the time this will shall be executed," referred to the time of converting the estate into money and distributing the same under the will. *Lambert v. Harvey*, 100 Ill. 838, 841.

A will devising certain premises to the testator's daughter during her natural life, and that it should then be equally divided among her children or the heirs of any that may be dead "at the time of executing this, my last will," means the time when the provisions of the will should be carried into effect or executed, and cannot be construed as meaning the signing and publishing of the will. *Scott v. Guernsey* (N. Y.) 60 Barb. 163, 175.

### EXECUTE (In Criminal Law).

"Executed," as used in Rev. St. 1845, art. 2, § 16, providing, if a slave be convicted of any capital offense and executed, the costs shall be paid by the state, means executed under the process of the court as a punishment of the offense, and does not include an execution after conviction by a mob. *Calhoun v. Buffington*, 25 Mo. 443, 444.

### EXECUTED BY DELIVERING A COPY.

Where a sheriff's return on a notice addressed to several defendants, requiring them to produce certain writings, was "executed by delivering a copy. —, Sheriff," the phrase "executed by delivering a copy" imported a delivery to each of those to whom the notice was addressed. *McDonald v. Carson*, 94 N. C. 497, 502.

**EXECUTED CONTRACT.**

An executed contract is one where nothing remains to be done by either party. *Fox v. Kitton*, 19 Ill. (9 Peck.) 519, 532; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 136, 3 L. Ed. 162; *Cincinnati, H. & D. R. Co. v. McKeen* (U. S.) 64 Fed. 36, 46, 12 C. C. A. 14; *Adams v. Reed*, 40 Pac. 720, 724, 11 Utah, 480; *State v. Jersey City*, 31 N. J. Law (2 Vroom) 575, 581, 86 Am. Dec. 240; *City of Keokuk v. Ft. Wayne Electric Co.*, 57 N. W. 689, 690, 90 Iowa, 67. And "this," says Blackstone, "differs in nothing from a grant." A "contract executed, as well as one that is executory, contains obligations binding on the party." *State v. Jersey City*, 31 N. J. Law (2 Vroom) 573, 581, 86 Am. Dec. 240.

An executed contract is one in which all the parties thereto have performed all the obligations which they have originally assumed. *Watkins v. Nugen*, 45 S. E. 262, 263, 118 Ga. 372.

An executed contract is one the object of which is fully performed. *Rev. St. Okl.* 1903, § 812; *Civ. Code Cal.* 1903, § 1661; *Rev. Codes N. D.* 1899, § 3919.

A contract is executed when nothing remains to be done by either party, and when the transaction is complete, the moment the agreement is made. *Kynoch v. The S. C. Ives* (U. S.) 14 Fed. Cas. 888, 890 (quoting *Story*, Cont. § 18); *McNett v. Cooper* (U. S.) 13 Fed. 586, 590; *Mettel v. Gales*, 82 N. W. 181, 183, 12 S. D. 632. Under this definition a mortgage was executed when, after maturity of the debt, the premises were sold under foreclosure decree, and deeded to defendants. *McNett v. Cooper* (U. S.) 13 Fed. 588, 590.

Executed contracts are not properly contracts at all. The term is used to signify rights in property which have been acquired by means of contract. The parties are no longer bound by a contractual tie. *Mettel v. Gales*, 82 N. W. 181, 183, 12 S. D. 632.

On an appeal in an action relating to a contract to sell and convey lands it was contended that the answer of the vendee was so indefinite that it was difficult to say whether he claimed the contract was executed and passed title, or merely executory, but that in no point of view can it be regarded as an executed contract; but the court held that that depends upon the sense in which we take the word "executed." If in the sense of "made," then it is an executed contract. If in the sense that it has not been carried out by payment and transfer of title, or that it does not pass legal title, it is not an executed, but an executory, contract. *Watson v. Coast*, 14 S. E. 249, 253, 35 W. Va. 463.

A contract between a municipal corporation and an electric light company for the furnishing of electric lights is not an executed contract. *City of Keokuk v. Ft. Wayne Electric Co.*, 57 N. W. 689, 690, 90 Iowa, 67.

Where parties in the sale of stock agreed to pay a certain sum on one day and on a later day to pay another sum, and to execute a note for a third sum, and on such later day such payment was made and the note executed, the contract was an executed contract. *Cincinnati, H. & D. R. Co. v. McKeen* (U. S.) 64 Fed. 36, 46, 12 C. C. A. 14.

One who has begun to do what he promised, but has not finished, has executed his undertaking in part. *Adams v. Reed*, 40 Pac. 720, 724, 11 Utah, 480.

A grant actually made is an "executed contract," and such a contract requires no consideration to support it. *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558.

A present conveyance of land is an "executed contract." *Fulenwider v. Rowan*, 34 South. 975, 979, 136 Ala. 287.

**EXECUTED LICENSE.**

An executed license exists when the licensed act has been done. *Wiseman v. Eastman*, 57 Pac. 398, 404, 21 Wash. 163.

Where, under a parol agreement between plaintiff and defendant, by which the latter gave to the former a right of way over a ditch over his land, the former to survey, excavate, and keep in repair the ditch, which should be used by both in irrigating their lands, and plaintiff constructed and kept in repair the ditch, both parties thereafter using it, the agreement became an executed license, which defendant could not revoke. *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, 11 L. R. A. 184, 22 Am. St. Rep. 234.

**EXECUTED REMAINDER.**

"The term 'remainder' is a relative expression, and implies that some part of the thing is previously disposed of; vested remainders or remainders executed, whereby a present interest passed to a party, or where the estate is invariably fixed to remain to a determinate person after the particular estate is spent; and contingent or executory remainders, whereby no present interest passes, or where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. *Hudson v. Wadsworth*, 8 Conn. 348, 359.

**EXECUTED SALE.**

An "executed sale of personal property" is one in which the articles are ordinarily

sold on inspection, and the sale is completed by a delivery of the property made at the time of the sale. To this class of sales the rule of caveat emptor is properly applicable. If a warranty is desired by the purchaser, he must stipulate for it before the sale is completed, otherwise he will be said to have bought on his own judgment of the quality and value of the thing purchased. *Fogel v. Brubaker*, 15 Atl. 692, 122 Pa. 7.

An executed sale is where nothing remains to be done by either party to effect a complete transfer of the subject-matter of the sale; and where one purchased all the tax certificates belonging to a county, paying a certain amount down, and agreed to pay the remainder when the amount should be definitely ascertained, the contract was not an executed sale, but merely an executory one for the sale of the certificates. *Smith v. Barron County Sup'rs*, 44 Wis. 686, 691.

The general rule for determining whether a contract of sale is executed or executory is, if anything remains to be done by either party to the transaction before delivery—as, for example, to determine the price, quantity, or identity of the thing sold—the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price. *Foley v. Felrath*, 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39. Thus, where a contract for the sale of cotton out of a certain number of bales, nothing to be taken below middlings, the number of bales not being ascertained, the sale was executory, and not executed. *McFadden v. Henderson*, 29 South. 640, 643, 128 Ala. 221.

#### EXECUTED TRUST.

An "executed trust" is one in which the limitations and trusts are fully and perfectly declared. *Martling v. Martling*, 39 Atl. 203, 204, 55 N. J. Eq. 771; *In re Smith's Estate*, 22 Atl. 916, 144 Pa. 423, 27 Am. St. Rep. 641 (citing *Egerton v. Brownlow*, 4 H. L. Cas. 210).

A trust created by a deed or will so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an "executed trust." *In re Fair's Estate*, 60 Pac. 442, 446, 132 Cal. 523, 84 Am. St. Rep. 70.

An executed trust is one where the limitations of an equitable interest are complete and final, while an executory trust is one where the limitations of the equitable interest are intended to serve merely as instructions for perfecting the settlement in some future period. The words "executed" and

"executory" refer rather to the manner and perfection of the creation of the trust fund than to the action of the trustee in administering the property. A trust created by a will or deed so clear and certain in all its terms and limitations that the trustee has nothing to do but to carry out the provisions of the instruction according to its letter, is called an "executed trust." *Cushing v. Blake*, 29 N. J. Eq. (2 Stew.) 399, 403.

A trust is never executed by the statute when its preservation is necessary either for the protection of a feme covert, spendthrift, child, or to support the contingent remainder, or to serve some other lawful or useful purpose. Whenever it is necessary for the accomplishment of any object of the creator of the trust that the legal estate should remain in the trustee, then the trust is a special, active one. The test is whether a court of equity would decree a conveyance of the legal title. Under this principle, an agreement in which S. declares that certain land then owned by him is held in trust for R., his son, "during his life, and for his heirs after his decease, upon the said R. complying with and fulfilling" certain conditions therein contained for the support of S., and declaring further that at R.'s death the land "shall go and be held by the heirs of said R., and their assigns, forever, in the same manner as if title had passed, subject to a lien for the performance of the covenants hereinbefore contained," creates a special active trust as to R. and an executed trust as to his heirs, which latter was, in effect, if not in form, a legal estate, so that the two estates could not coalesce, under the rule in *Shelley's Case*, in such a manner as to vest in R. an estate tail. *Little v. Wilcox*, 13 Atl. 468, 475, 119 Pa. 439.

#### Executory trust distinguished.

The difference between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and acts are fully and perfectly declared, the trust is regarded as an executed trust. Where, on the contrary, the creator of the trust, instead of fully declaring its limitations, expresses in general terms his intent, leaving the manner in which this intent is to be carried into effect substantially undeclared, the trust is regarded as executory. In practice the chief distinction between an executed and an executory trust lies in the fact that the former executes itself by converting its limitations into corresponding legal estates, whereas in the latter the court may direct that form of settlement or conveyance which will best give effect to the settlor's intention, and for this purpose may even disregard the construction the instrument would receive at law. In the executory trust the language of the settlor is considered mainly as a guide to aid



the court in carrying into effect his imperfectly declared purposes. In the executed trust the grantor has been his own conveyancer, and the equitable interests created by the language he has employed are treated as estates. *Pillot v. Landon*, 19 Atl. 25, 26, 46 N. J. Eq. (1 Dick.) 310.

There is a substantial distinction between an executed and an executory trust. Says Mr. Lewin, in his excellent treatise on Trusts, c. 5, p. 48: "An executed trust is when the limitations of the equitable interest are complete and final. In an executory trust the limitations of the equitable interest are not intended to be complete and final, but merely to serve as instruments for proving the settlement." These trusts arise out of marriage articles and wills as descriptions of the estates to be created, when a court of equity comes to settle them and model the trusts according to the intention of the trustor. *Dennison v. Goehring*, 7 Pa. (7 Barr) 175, 177, 47 Am. Dec. 505.

#### EXECUTION.

See "Execute"; "Due Execution"; "Free Execution"; "In Execution Of"; "Place of Execution."

#### EXECUTION (Writ of).

See "Attachment Execution"; "Charged in Execution"; "Equitable Execution"; "General Execution"; "Special Execution"; "Stay of Execution."

An execution is defined to be the putting one in possession of that which he has already acquired by judgment of law. *Griffith v. Fowler*, 18 Vt. 390, 394.

Execution is defined thus: "Putting the sentence of the law in force; the act of carrying into effect the final decree or judgment of a court." *Shields v. Stark* (Tex.) 51 S. W. 540.

An execution is simply a writ by which the judgment of the court is enforced. *Mayer v. Morgan*, 66 Pac. 128, 130, 26 Wash. 71.

The term "execution" applies to a process used to carry into effect the final judgment of a court. Any writ which authorizes the officer to carry into effect such judgment is an execution. *Pierson v. Hammond*, 22 Tex. 585, 587.

An execution is a process of the court, issued by the clerk, and directed to the sheriff of the county. *Bates' Ann. St. Ohio* 1904, § 5372.

A writ of execution is defined to be a process authorizing seizure or appropriation of the property of the defendant for the satisfaction of a judgment against him.

*Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 94 Cal. 217, 221, 29 Pac. 627, 28 Am. St. Rep. 115.

Execution, in practice, is the putting of the sentence of the law in force. 3 Bl. Comm. 412. It is the act of carrying into effect the final judgment and decree of the court. An execution at law is a writ issuing out of a court direct to an officer thereof, and running against the body or goods of a party. *Brown v. United States* (U. S.) 6 Ct. Cl. 171, 178. Writ of execution is a written command or precept to the sheriff or ministerial officer directing him to execute a judgment of the court. It is a command of the court, addressed to the ministerial officer in writing, and under the seal of the court, containing with more certainty the command of the court, and expressed with more solemnity than if uttered verbally by the court. *Kelly v. Vincent*, 8 Ohio St. 415, 420. Execution is process authorizing the seizure and appropriation of the defendant for a satisfaction of judgment against him. *Lambert v. Powers*, 36 Iowa, 18, 20. An execution is properly defined to be the obtaining of actual possession of anything acquired by judgment of law, and necessarily goes on all final judgments. *Darby's Lessee v. Carson*, 9 Ohio (9 Ham.) 149, 150. An execution is the end of law. It gives the successful party the fruits of his judgment. *United States v. Nourse*, 34 U. S. (9 Pet.) 8, 28, 9 L. Ed. 31. An order of sale issued for a disposition of property attached in an action before him comes within the meaning of the term "execution," so as to prevent the judgment from becoming dormant. *Webber v. Harshbarger*, 47 Pac. 166, 167, 5 Kan. App. 185.

The purpose of a writ of execution is to authorize the officer to whom it is directed and delivered to seize and hold the property of the debtor for the satisfaction of the amount ordered to be paid by such writ. *Habersham v. Sears*, 5 Pac. 208, 209, 11 Or. 431, 50 Am. Rep. 481.

Execution, in law, is a writ issued out of a court directed to an officer, and running against the body or goods of a party. In equity the decree often takes the place of the writ, but it contains the same ingredients. It is directed to an officer of the court; it runs against the property or person of a party to the suit. *Brown v. United States* (U. S.) 6 Ct. Cl. 171, 178.

"Executions" are defined by Gen. St. 1901, §§ 4891, 4892, as follows: "Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county. They may be directed to different counties at the same time. Executions are of four kinds: First, against the property of the judgment debtor; second, against his person; third, for the delivery of the possession of real or personal

property, with damages for withholding the same, and costs; fourth, executions in special cases." *Norton v. Reardon*, 72 Pac. 861, 862, 67 Kan. 802.

An execution is final process, and the end of the law; and the settled doctrine is that a seizure or levy upon it before the commencement of insolvency or bankruptcy proceedings against the debtor under statutes providing that proceedings in insolvency shall dissolve all attachments of the debtor's property made within three months before the beginning thereof, although not completed until afterwards, is not dissolved or impaired by the proceedings. *Hurlbutt v. Currier*, 88 Atl. 502, 503, 68 N. H. 94.

A sale under judgment and order of a court of law in a suit in which an attachment issues is a "sale under execution," within the meaning of section 3067, Mansf. Dig., providing for a redemption when any real estate is "sold under execution," rather than a judicial sale, from which there can be no redemption. *Beard v. Wilson*, 12 S. W. 567, 569, 52 Ark. 290.

Code Civ. Proc. §§ 681, 683, provides that a person in whose favor judgment is given may have a writ of execution for its enforcement, returnable at any time within not less than 10 nor more than 60 days. Section 684 provides that when a judgment requires the sale of property the same may be enforced by a writ reciting such judgment and directing the sale. Held, that a writ issued under section 684 is not an execution, and the sale thereof is not invalidated by being made after the time limited for the return. *Southern California Lumber Co. v. Ocean Beach Hotel Co.*, 29 Pac. 627, 628, 94 Cal. 217, 28 Am. St. Rep. 115.

Under the statutes relating to bastardy proceedings, and providing that, "if the jury shall find the defendant guilty, he shall be judged the putative father of said child, and shall stand charged with the maintenance thereof, in such sum or sums as the court shall order and direct, with the payment of costs of prosecution, and the court shall require the reputed father to give security to perform the aforesaid order," etc., such an order of maintenance is a judgment, which may be properly enforced by execution, and it is not necessary that resort be first had to the bond. An execution is defined as "the obtaining of actual possession of anything acquired by judgment of law; and necessarily goes on all final judgments." Co. Litt. 154, 289. There may be special cases requiring special executions, but in ordinary cases the right to have the usual execution follows every final judgment of course. The bond and security are only intended as a resort after an ineffectual attempt to obtain satisfaction by execution. *Darby's Lessee v. Carson*, 9 Ohio (9 Ham.) 149-151.

An ordinary execution upon a judgment at law commands the officer to whom it is addressed to perform a series of acts to levy on goods and chattels, lands and tenements, of the judgment debtor; and, if on the latter, to appraise their value, to advertise the same for sale, to make sale of the same at the time and place and in the manner prescribed by law, and apply the proceeds to the payment of the judgment; and these acts are to be performed successively. *La-bette County Com'rs v. United States*, 5 Sup. Ct. 108, 111, 112 U. S. 217, 28 L. Ed. 698.

The word "execution" in Comp. Laws, § 5300, providing that all issues of fact or of law that shall be joined between the parties shall be tried and determined in the Supreme Court or in the circuit court of such county as the Supreme Court may by special rule direct, and execution may issue on any judgment recovered on the same trial as in other cases, "must be understood to refer to the writ by which damages or costs, or both, are collected." *People v. Cicott*, 15 Mich. 326, 328.

As used in a statute providing "that it shall be lawful for any person of Ohio, being the head of a family, and not the owner of a homestead, to hold, exempt from execution or sale, personal property, to be selected by such person, not exceeding three hundred dollars in value, in addition to the amount of chattel property now by law exempt," the term "exempt from execution or sale" should be construed to mean exempt by law from being applied to the payment of the plaintiff's claim. *Chilcote v. Conley*, 36 Ohio St. 545, 548.

The words "upon execution," as used in Pub. St. c. 227, § 7, relating to the release of poor tort debtors upon petition to any justice of the Supreme Court, and providing that any person who shall have been imprisoned as aforesaid upon a writ issued out of a justice court, or upon execution wherein the debt of damages and costs shall not exceed \$100, may petition as aforesaid after 90 days' imprisonment, are general in their application, and are not confined to an execution issued from a justice court. *In re Millard*, 13 R. I. 178, 179.

The term "execution," as employed in a decision under the Pennsylvania law that where there can be no execution there can be no action (*Williams v. Comptrollers*, 18 Pa. [6 Har.] 275), is employed in a broad sense, and comprehends all means by which judgments or decrees of court are enforced, since in Pennsylvania there exists no separate equity jurisprudence. *National Foundry & Pipe Works v. Oconto Water Co.* (U. S.) 52 Fed. 43, 55.

"Execution," as used in Rev. St. 1880, § 2249, with reference to a stay during pro-

ceedings on appeal, has been held to comprehend not merely the ordinary writ of execution to collect money, but also any and all process to enforce any affirmative command of a judgment, whatever its nature. *State ex rel. Heckel v. Klein*, 39 S. W. 272, 274, 137 Mo. 673.

"Execution," as used in the treaty with the Miamis June 15, 1854, providing for the issuing of patents, and that land so patented shall not be liable to execution, means the writ whereby the officer is authorized to carry into effect the judgment of the court; the process by which seizure is made to satisfy by sale the judgment. While at common law there were various kinds of executions, there were none that touched the title of land so as to pass it. It is a creature of modern legislation. It is the life of the law in this country; the effective instrument whereby the finding and judgment of the court is consummated. *Miami County Com'rs v. Wanzoppeche*, 3 Kan. 364, 365.

#### **Attachment on warrant.**

"An attachment on warrant against goods is, in the main, the proceedings to compel an appearance, and is not an execution." *Johnson v. Foran*, 58 Md. 148, 150.

#### **Fieri facias.**

The term "writ of execution," in the act concerning sheriffs, which provides that if any sheriff or coroner shall neglect or refuse to execute any "writ of execution" to him directed, etc., he shall be liable in damages, etc., embraces writs of fieri facias as well as writs of capias ad satisfaciendum. *Kemble v. Harris*, 36 N. J. Law (7 Vroom) 526, 528.

#### **Final judgment necessary.**

"Execution is defined by Wait as a judicial writ founded on a judgment obtained in a civil action and issued in behalf of the party recovering the judgment for the purpose of carrying it into effect. 4 Wait's Prac. p. 1. The same authority (page 2) says that it is only actual, final judgments that may be enforced by execution. A mere order for judgment, although judgment may afterwards be perfected thereon, will not authorize the issuance of an execution." *Seaman v. Clarke*, 69 N. Y. Supp. 1002, 1005, 60 App. Div. 416.

The term "execution" in Code, § 779, providing that "where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for that purpose by the order, an execution against personal property only of the party required to pay them may be issued by any party or person to whom the said costs or sum of money is made payable by said order," is used in a technical sense, and

refers to the process provided by law for enforcing a final judgment as distinguished from an order. *Devlin v. Hinman*, 40 App. Div. 101, 105, 57 N. Y. Supp. 683, 687 (citing *Strowbridge v. Strowbridge* [N. Y.] 21 Hun, 288).

#### **Garnishment distinguished.**

Execution is defined as putting the sentence of the law in force; the act of carrying into effect the final judgment or decree of a court. And the issuance of a writ of garnishment by a judgment creditor is not equivalent to an execution, so as to prevent the judgment being barred by limitations. Garnishment is in the nature of pleading, and not of final process to enforce collection of a judgment. Indeed, without a further judgment and execution in the garnishment suit, it avails nothing in the collection of the original judgment. *Shields v. Stark* (Tex.) 51 S. W. 540.

#### **Levy and sale equivalent.**

When used with reference to judicial proceedings in civil matters, the words "levy and sale" are equivalent to the word "execution." Each expression means the subjecting of property to the satisfaction of the judgment. An exemption of land granted to an Indian tribe from levy and sale is held to render the lands exempt from execution for satisfaction of any judgment. *Miami County Com'rs v. Wanzoppeche*, 3 Kan. 364, 365.

#### **Order of sale synonymous.**

See "Order of Sale."

#### **As process or writ.**

See "Process"; "Writ."

#### **As record.**

See "Record."

#### **Special execution.**

Execution, within the meaning of the statute providing that shares of corporate stock may be taken on execution, is broad enough to include a special execution under the attachment act. *Union Nat. Bank v. Byram*, 22 N. E. 842, 844, 131 Ill. 92.

#### **As suit.**

See "Suit (noun)."

### **EXECUTION OF OFFICE.**

Pennsylvania statutes giving a certain remedy to a person for a wrong suffered from an act done by a justice in the "execution of his office" refer to acts performed by the justice as a magistrate, which are within his general jurisdiction. *Jones v. Hughes* (Pa.) 5 Serg. & R. 290, 302.

## EXECUTION SALE.

As transfer, see "Transfer."

Forced sale synonymous, see "Forced Sale."

In most states the distinction has been consistently maintained between judicial sales and execution sales. In those states in which execution sales are not required to be reported to the courts for approval, the sheriff sells by the naked authority of the writ, and, if his sale is not void, the title passes at once by his deed without the approval of the court; whereas, if the sale is a technical judicial sale, as it is now understood—that is to say, a sale under a decree or order of the court, and which must be reported to the court for its approval—no title passes until its approval. *Noland v. Barrett*, 26 S. W. 692, 694, 122 Mo. 181, 43 Am. St. Rep. 572.

A sale by a sheriff under a general execution which he has levied on real or personal property is not a judicial sale, strictly speaking. Such a sale is a ministerial act, and at common law, if the officer conformed to the established regulations, the sale was final and valid as soon as made. Confirmation was required only in chancery sales. In *Freeman on Void Judicial Sales*, § 1, the distinction between "judicial" and "execution" sales is pointed out. It is said: "Execution sales are not judicial. They must, it is true, be supported by a judgment, decree, or order. But the judgment is not for the sale of any specific property. It is only for the recovery of a designated sum of money. The court gives no directions, and can give none, concerning what property can be levied on. It usually has no control over the sale beyond setting it aside for noncompliance with the statute. The chief differences between execution and judicial sales are these: The former are based on a general judgment for so much money, and the latter on an order to sell specific property. The former are conducted by an officer of the law in pursuance of the directions of a statute; the latter are made by the agent of the court in pursuance of the directions of the court. In the former the sheriff is the vendor; in the latter the court. In the former the sale is usually complete when the property is struck off to the highest bidder; in the latter it must be reported to and approved by the court." *Norton v. Beardon*, 72 Pac. 861, 863, 67 Kan. 302.

A sale under a decree on foreclosure is a "sale on execution" within Rev. St. 1894, § 294, providing that an action by an execution debtor to recover land sold on execution must be brought within ten years from the sale. *Moore v. Ross*, 88 N. E. 817, 818, 139 Ind. 200.

## EXECUTIVE.

Webster defines "executive" as "qualifying for, or pertaining to, the execution of the laws; as executive power or authority; executive duties." In government "executive" is distinguished from "legislative" and "judicial"; "legislative" being applied to the order, or organs, or government, which makes the law; "judicial" to that which interprets and applies the laws; "executive" to that which carries them into effect. Generally the appointment to an office is an "executive function." It must be conceded, however, that it is not every appointment to office which involves the exercise of "executive functions"; as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointments made by a general assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body; but the appointment to an office where it is in no manner connected with the discharge of legislative duties involves the exercise of executive functions. *State v. Denny*, 21 N. E. 252, 254, 118 Ind. 882, 4 L. R. A. 79.

Generally the appointment to an office is an executive function. If the General Assembly should create an office by statute duly passed by it, providing that it should be filled by appointment, the act of filling such office is a partial execution of the law. It is not, however, every appointment to office which involves the exercise of executive functions; as, for instance, the appointments made by judicial officers in the discharge of their official duties, or the appointment made by the general assembly of officers necessary to enable it to properly discharge its duties as an independent legislative body and the like. Such appointments by the several departments of the state government are necessary to enable them to maintain their independent existence, and do not involve an encroachment upon the functions of any other branch. The appointment to an office where it is in no manner connected with the discharge of legislative duties involves the exercise of executive functions, which cannot be exercised by the legislative or judicial departments. *State v. Hyde*, 22 N. E. 644, 648, 121 Ind. 20.

"Executive," as used in Act June 20, 1820, by which the Governor, by and with the advice of the council, is empowered to appoint a reporter, who is removable at the pleasure of the executive, means "the Governor, with the consent of the council." *Opinion of the Justices*, 72 Me. 542, 551.

Const. art. 2, § 15, providing that the Governor may remove for incompetency or misconduct all civil officers who received appointments from the executive for a term of

years, is not to be understood as meaning the Governor alone. *Harman v. Harwood*, 58 Md. 1, 12.

#### EXECUTIVE APPOINTMENT.

The term "executive appointment" includes appointments made by the Governor by and with the advice and consent of the Senate. *Harman v. Harwood*, 58 Md. 1, 12.

#### EXECUTIVE AUTHORITY.

Act Cong. Feb. 12, 1793, authorizing the "executive authority" of a state to demand the surrender of a fugitive from justice, means the executive authority as distinguished from the judicial and legislative branches of the government, and merely describes the department of the government to which application should be made for the surrender of fugitives; and the fact that the executive authority of a state was not vested in the Governor alone, but in the Governor aided by the advice and consent of the council, constituted no objection to the right of the Governor to issue a warrant for the arrest of a fugitive without the consent of the council. *Commonwealth v. Hall*, 75 Mass. (9 Gray) 262, 267.

#### EXECUTIVE BUSINESS.

The charter of a city declared that the executive power of the city should be vested in the mayor, and that neither the common council nor any member should perform any executive business. Held, that executive business included all acts which the mayor was directed to perform by legislative authority, and which he was bound to obey. *Altamus v. City of New York*, 13 N. Y. Super. Ct. (6 Duer) 446, 455.

#### EXECUTIVE DEPARTMENT.

The "executive department" of government is that department of government which carries the laws into effect. In re Railroad Com'rs, 50 N. W. 276, 277, 15 Neb. 679 (citing Webst. Dict.).

The "executive department" of a free government is that department which executes the laws made in the legislative department. It is the second department of the government, and is free and independent of the other departments, and confined to its own functions. In re Davies, 61 N. E. 118, 121, 168 N. Y. 89, 56 L. R. A. 855.

#### EXECUTIVE DUTIES.

The use of the phrase "executive duties" in Rev. St. § 453 [U. S. Comp. St. 1901, p. 257], imposing on the Commissioner of the General Land Office the duty of performing

under the direction of the Secretary of the Interior all executive duties pertaining to the certifying and sale of public lands, does not exclude from its operation the action of the register and receiver in passing on the evidence offered in proofs of settlement and right under the pre-emption laws, for that action is as much administrative as judicial, and is only one step in the procedure by which, through the executive department, an individual obtains title to public lands. *Orchard v. Alexander*, 157 U. S. 372, 381, 384, 15 Sup. Ct. 635, 39 L. Ed. 737, 741.

As used in the Florida Constitution, making it the duty of the Supreme Court to interpret the Constitution at the request of the Governor on any question affecting his executive powers and duties, the word "executive" means a duty appertaining to the execution of the laws as they exist. Any duty imposed by the Constitution on the Governor with reference to a bill before it becomes a law is not an executive duty. *State v. Deal*, 4 South. 899, 907, 40 La. Ann. 744.

#### EXECUTIVE OFFICER.

An "executive officer" is defined to be one whose duties are mainly to cause the laws to be executed and obeyed. *Petterson v. State (Tex.)* 58 S. W. 100, 101 (citing Bouv. Law Dict.).

An executive officer is one in whom resides the power to execute the laws. The term "executive officer" is held to be a comprehensive one, not limited to the officer in whom the Constitution vests the executive power, but including the executive department. *People v. Salisbury (Mich.)* 96 N. W. 936, 939.

Every officer of this state, or of any county, town, or other municipal or public corporation therein, not included in the definition of judicial and legislative officers, from the time of his election or appointment shall be held and deemed to be an executive officer within the meaning of certain provisions in the Penal Code punishing the bribing, etc., of officers. Ann. Codes & St. Or. 1901, § 1882.

#### Attorney at law.

The term "executive and judicial officer" of the United States, in the United States Constitution, requiring all "executive and judicial officers" of the United States and of the several states to be required by oath or affirmation to support the Constitution, has been construed by the Supreme Court of the United States to include attorneys at law, as is shown by the rule of the court requiring attorneys to take such an oath. Therefore, as the term "executive and judicial officers" is also the language of the state Consti-

tution, it is to be given the same meaning. In re Wood (N. Y.) Hopk. Ch. 6, 7.

#### Corporate directors.

A contract stipulating that the family, private, and social messages of the "executive officers" of a railroad company should be transmitted by a telegraph company without charge between all telegraph stations on the line of such railway, should be construed to include the directors, and is not limited to the president, superintendent, general manager, and other officers of that class. Western Union Tel. Co. v. Union Pac. Ry. Co. (U. S.) 3 Fed. 721, 732.

#### Members of school board.

An "executive officer" is one whose duties are mainly to cause the laws to be executed, and should be construed to include members of a school board, whose duties are to administer the common school system. State v. Womack, 29 Pac. 939, 941, 4 Wash. 19.

#### Municipal officers.

How. Ann. St. §§ 9241, 9242, providing for the punishment for bribery of any "executive, legislative, or judicial officer," applies to local as well as state functionaries, the character of whose duties falls within any of those definitions; and the officers of a municipal corporation may be prosecuted under the statute. People v. Swift, 26 N. W. 694, 696, 59 Mich. 529.

#### Officer of college of physicians.

"Executive or ministerial officer," as used in Civ. Code Prac. § 526, providing that the writ of mandamus is an order of a court of competent and original jurisdiction, commanding an "executive or ministerial officer" to perform or omit to do an act the performance or omission of which is enjoined by law, cannot be construed to include an officer of a college of physicians and surgeons, which was a private corporation. Cook v. College of Physicians & Surgeons, 72 Ky. (9 Bush) 541, 544.

#### Pilot.

A branch pilot, appointed by the Governor, and who had the exclusive right to pilot vessels in and out of sea ports, is not an executive officer within Pen. Code, art. 293, making it an offense to falsely assume to be an executive officer of the state, they having no law of the state to execute, but being simply appointed to exercise their employment of skill as pilots, and whose duties are prescribed by the laws of navigation, and who are merely expected, on account of their familiarity with the harbor, to steer the vessel safely into or out of port. Petterson v. State (Tex.) 58 S. W. 100, 101.

#### Police officer.

A police officer of a municipality is an executive officer, within Gen. St. 1894, § 6327, providing for the punishment of any executive officer who asks, receives, or agrees to receive any bribe. State v. Gardner, 92 N. W. 529, 534, 88 Minn. 130.

#### EXECUTIVE POWER.

"Executive power" is the power to execute the laws, and is vested in the Governor of the state, the administrative officers of the state, counties, townships, towns, and cities. People v. Salsbury (Mich.) 96 N. W. 936, 939; State v. Denney, 21 N. E. 252, 254, 118 Ind. 382, 4 L. R. A. 79; State v. Hyde, 22 N. E. 644, 648, 121 Ind. 20.

#### EXECUTOR.

See "Acting Executor"; "Foreign Executors and Administrators"; "Independent Executor."

An executor is one who is appointed by a testator in his last will and testament to see and take care that it is executed or carried into effect after his decease. Scott v. Guernsey (N. Y.) 60 Barb. 163, 175; Conklin v. Agerton's Adm'r (N. Y.) 21 Wend. 430, 436 (citing 2 Bl. Comm. 503); Lafferty v. People's Sav. Bank, 43 N. W. 34, 38, 76 Mich. 35; In re Lamb's Estate, 80 N. W. 1081, 1082, 122 Mich. 239; Holladay v. Holladay, 19 Pac. 81, 82, 16 Or. 147; State v. Watson (S. C.) 2 Speers, 97, 106.

An executor, as the term is at present accepted, may be defined to be the person to whom the execution of the last will and testament and personal estate is by the testator's appointment confided. Compton v. McMahon, 19 Mo. App. 494, 505.

The word "executor" is descriptio personæ, and the trust or power does not vest in the office, but in the person who is described by the word "executor." Simpson v. Cook, 24 Minn. 180, 187.

In the well-considered case of Roy v. Whitaker, 92 Tex. 346, 48 S. W. 892, it was held that, except in those articles which relate to acts to be done in the settlement of an estate, the term "executor," as used in the statutes, includes independent as well as other executors. Farmers' & Merchants' Nat. Bank v. Bell, 71 S. W. 570, 572, 31 Tex. Civ. App. 124.

Although no executor is expressly nominated in the will by the word "executor," yet if, by any word or circumlocution, the testator recommend or commit to any one the charge and office or the rights which pertain to an executor, it amounts to as much as the ordaining and constituting him or

them to be executors; but where a will provides that S. and another should be testamentary guardians of testator's children, and directs that one of the sons should go to school, and then embark in business with the concurrence of S., and also directs that the son should have a good education, and any balance to be divided among the daughters, "this to be carried into effect according to the judgment of" S., these last provisions do not make S. an executor. *State v. Watson* (S. C.) 2 Speers, 97, 106.

The terms "executor" or "administrator," within Gen. St. c. 97, § 5, providing that an action against them must be brought within two years, includes one who, being also residuary legatee, has given bond to pay debts and legacies, as well as one who has given bond in the ordinary form. *Jenkins v. Wood*, 134 Mass. 115, 117.

The words "executors, administrators, and assigns," as used in a fire policy issued to the insured, his executors, his administrators, or assigns, operates to vest the right of action upon the policy on the death of insured in his personal representatives. *Wyman v. Wyman*, 26 N. Y. 253, 255.

#### **Administrator.**

The word "executor" includes administrator. *Rev. St. Utah* 1898, § 2498.

The term "executor," when used in statutes, includes an administrator, where the subject-matter applies to an administrator. *Gen. St. Kan.* 1901, § 7342, subd. 21; *Rev. St. Mo.* 1899, § 4160; *Shannon's Code Tenn.* 1896, § 68; *Code Iowa* 1897, § 48, subd. 21.

Whenever the word "administrator" is used in the Code, it shall include "executor," and so vice versa, unless such an application of the term would be unreasonable. *Pub. Gen. Laws Md.* 1888, p. 2, art. 1, § 4.

Although in name there is a difference between executor and administrator, yet in fact and in law they are really the same, for each has control over the personal estate and the distribution thereof. *In re Murphy*, 39 N. E. 691, 692, 144 N. Y. 557.

An executor is in one sense an administrator. He gives bond to "administer according to law and the will of the testator." In *Cook v. Griffin*, 1 Dane, Abr. 581, it was held that the deed of one who sells as executor is good, although the power from the court was to him as administrator. In *Cooper v. Robinson*, 56 Mass. (2 Oush.) 184, an executrix, under a license to sell real estate, sold as administratrix, and the sale was held good. The court in that case say: "But we are of opinion that this is not such a misnomer or misdescription of the capacity in which the executrix acted as to invalidate the sale. By law she was bound to administer the testator's estate, and to

render a true account of her administration, and might, therefore, be described as administratrix as well as executrix, although the latter would be the more appropriate description." And where an executor in a writ of entry to foreclose a mortgage described himself as administrator, such description constitutes no defense. *Sheldon v. Smith*, 97 Mass. 34, 35, 36.

Acts 1883, c. 168, providing that the Union Bank & Trust Company shall have the right and power to accept and execute all trusts which may be imposed on it, with its consent, by any person or corporation, whether the trust be that of guardian, executor, trustee, the committee of an estate of a non compos mentis, or any other trust, should be construed to include the term "administrator." An executor performs all the duties of an administrator, with regard to personalty, as to its care and collection, and as to turning it into money, and as to the payment of debts. Other duties may be imposed upon the executor by the will as to distribution of the personalty and as to the sale and management of the real estate. In other words, the term "executor" is a larger one than the term "administrator." The general thought on which they unite is the custody, care, and disposition of the estates of deceased persons. *Union Bank & Trust Co. v. Wright* (Tenn.) 58 S. W. 755, 758, 52 L. R. A. 469.

#### **Administrator with the will annexed.**

The word "executor" shall be construed to include an administrator with the will annexed. *Gen. St. Minn.* 1894, § 4453; *Comp. Laws Mich.* 1897, § 9299; *Green v. Russell*, 61 N. W. 885, 886, 103 Mich. 638.

*Pub. St. c.* 181, § 9, providing that pending an appeal from a decree granting letters testamentary the executor having given bond, may bring suit in his name for the possession of any real or personal estate of the testator, should not be construed in its strict technical sense, but includes an administrator with a will annexed, who, for the purpose of administration, is appointed to perform the official duties of an executor. *Scott v. Monks*, 14 Atl. 860, 861, 16 R. I. 225.

#### **As assigns.**

See "Assigns."

#### **As estate.**

The words "executors and administrators," used in an insurance policy, making the policy payable to the person's executors or administrators, was evidently understood to mean his estate. *Pietri v. Seguenot*, 69 S. W. 1055, 1058, 96 Mo. App. 258.

#### **As executor qualifying.**

A will authorizing the executors to sell and convey land should be construed to in-

clude one executor who has qualified, where his co-executors have failed to so qualify. *Phillips v. Stewart*, 59 Mo. 491, 494; *Taylor v. Galloway*, 1 Ohio, 232, 13 Am. Dec. 605.

#### **Guardian.**

"Executors," as used in a will giving a legatee a monthly allowance during her life, and directing the executors to spend such further sums for her care and comfort as they should deem necessary, should be construed to have been used as a designation of the persons who were to exercise the discretion, and not as a limitation of the time in which it was to be exercised. And hence the executors, on being appointed guardian of the legatee after the distribution of the estate, could continue to exercise the discretion. *Elmer v. Gray*, 14 Pac. 862, 73 Cal. 283.

#### **As next of kin.**

Executors and administrators are not, by their nature, calculated to describe next of kin, but, on the contrary, executors are persons selected by the testator, and administrators are those named by the ecclesiastical court, and, generally speaking, the expressions "executor" and "administrator" cannot be intended to mean next of kin. *Bulmer v. Jay*, 3 Mylne & K. 196, 199.

#### **As officer of court or law.**

Executors receiving their appointment from the court are officers of the courts whose appointment they bear. *Rothschild v. Hasbrouck* (U. S.) 65 Fed. 283, 285.

In England an executor was not an officer of the court, but was regarded as a trustee for the purposes declared by the testator; but in this country, for the purposes of administering the estate, an executor is charged with the same duties as an administrator, although quite frequently he is in addition a trustee for certain purposes expressed by the testator, but these purposes are always subordinated to the paramount rights of the creditors. Contrary to the English doctrine, he is an officer of the court, and cannot act without the sanction of his appointment by the probate court. *Fidelity & Casualty Co. v. Freeman* (U. S.) 109 Fed. 847, 851, 48 C. C. A. 692, 54 L. R. A. 680.

In ancient times an executor was looked upon as a creation of the testator, his powers resting upon the will as an instrument inter partes, and not upon authority derived from the ecclesiastical court. The tendency of more modern decisions and statutes is to contemplate the executor as dependent upon the court for his official position. Mr. Schouler says: "The full appointment, according to modern English and American practice, comes from the court of probate jurisdiction, which recognizes and confirms the testator's selection, clothes the executor with plenary

authority by issuing letters testamentary to him. \* \* \* Hence, according to our present probate procedure, an executor derives his office (1) from a testamentary appointment, which (2) is confirmed by a decree of the probate court, and issuance of letters testamentary to him accordingly." In *Millay v. Wiley*, 46 Me. 230, it was said that the following prerequisites seem to be necessary to constitute a person an executor: (1) The probate of the will; (2) competency in the opinion of the probate judge; (3) acceptance of the trust; (4) delivery of a bond to discharge the same; and (5) reception of letters testamentary. In *Hatheway v. Weeks*, 84 Mich. 237, 243, it is said: "The executor or administrator is a mere officer of the law." So that under Rev. St. § 4032, which provides that a person appearing other than an executor, etc., shall file an undertaking, a person is not an executor, though nominated as such in a will, unless he has been confirmed in his office by the county, held by the issuance of letters, and has qualified and given bond. In re *Somervail's Will*, 80 N. W. 65, 66, 104 Wis. 72.

An executor or administrator is to a certain extent an officer of the law, clothed with a trust to be performed under prescribed regulations. *Shewel v. Keen* (Pa.) 2 Whart. 332, 339, 30 Am. Dec. 266; *Pace v. Smith*, 57 Tex. 555, 558.

#### **As representative.**

See "Legal Representative"; "Personal Representative"; "Representative."

#### **As trustee.**

See "Trustee."

### **EXECUTOR DE SON TORT.**

An "executor de son tort" is one who intermeddles with the personal property of a deceased's estate before an administrator has been appointed. *Ela v. Ela*, 47 Atl. 414, 415, 70 N. H. 163; *Pryor v. Downey*, 50 Cal. 388, 400, 19 Am. Rep. 656 (citing *Bouv. Law Dict.*); *Hubble v. Fogartie* (S. C.) 3 Rich. Law, 413, 415, 45 Am. Dec. 775; *Davega v. Henry*, 10 S. E. 72, 74, 81 S. C. 413.

An executor de son tort "is one who, being neither executor nor administrator, interferes with the goods of deceased, or, in other words, takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, in the absence of such constitution, substituted by the court to administer. Such an intermeddler was at common law held subject to all the liabilities of an executor, and is estopped by his own acts from denying that he was executor in fact. At common law, when a person had so intermeddled with the personal authority of the deceased as to become executor de son tort, he thereby became liable not only to



an action by the rightful executor, but also to be sued by any creditor or legatee. The judgment rendered against him in such action was that plaintiff do recover his debt and costs, to be levied out of the assets of the testator if the defendant had so much, but, if not, out of the defendant's own goods." *Noon v. Finnegan*, 13 N. W. 197, 198, 29 Minn. 418.

Any person, without just authority, who takes upon himself to act as an executor by intermeddling with the goods of deceased, is called an executor of his own wrong, or more usually executor de son tort, and is liable to all the troubles of an executorship without any of the profits or advantages, and cannot, as against a creditor of the deceased, retain for his own debts, as an original executor may do at common law, even though of a higher degree, and the original executor and administrator has assented to such retainer. *Brown v. Leavitt*, 26 N. H. (6 Fost.) 493, 495.

An executor de son tort is one who derives no authority from the testator, but who assumes the office by virtue of his own interference with the estate of one deceased. He intrudes himself into the office without lawful authority. *Hinds v. Jones*, 48 Me. 348, 349.

Under the General Statutes, providing that one who, not having been appointed executor, nor obtained administration, possesses himself of the property of the deceased, shall be considered executor de son tort, the attorney of a certain person who held a mortgage of the entire property of a deceased person to secure a debt is liable as executor de son tort for the excess of the property over the debt, when he has possessed himself of it, sold it, and distributed the proceeds. *Davega v. Henry*, 31 S. C. 413, 418, 10 S. E. 72, 74.

## EXECUTORY.

That which is yet to be performed or executed; that which remains to be carried into operation or effect; incomplete; depending upon a future performance or event; the opposite of executed. *Black Law Dict.*

### EXECUTORY BEQUEST.

An executory bequest is such a disposition of personalty or money by will that thereby no estate vests at the death of the testator, but only on some future contingency. A bequest to A. for life, and after her death to the testator's surviving children, is an executory bequest. *Crawford v. Clark*, 36 S. E. 404, 408, 110 Ga. 729.

### EXECUTORY CONTRACT.

An executory contract is one in which a party binds himself to do or not to do a

particular thing in the future. *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 136, 3 L. Ed. 162; *Kynoch v. Ives* (U. S.) 14 Fed. Cas. 888, 899; *Farrington v. Tennessee*, 95 U. S. 679, 683, 24 L. Ed. 558; *Cincinnati, H. & D. R. Co. v. McKeen* (U. S.) 64 Fed. 36, 46, 12 C. C. A. 14; *Jersey City & B. R. Co. v. Jersey City*, 81 N. J. Law (2 Vroom) 575, 581, 86 Am. Dec. 240; *Justice v. Lang*, 42 N. Y. 493, 496, 1 Am. Rep. 576; *Wickham v. Well*, 17 N. Y. Supp. 518, 519; *Mettel v. Gales*, 82 N. W. 181, 183, 12 S. D. 632; *Adams v. Reed*, 40 Pac. 720, 724, 11 Utah, 480.

Whilst any act remains to be done, a contract is said to be executory. *Fox v. Kitton*, 19 Ill. (9 Peck) 519, 532.

An executory contract is one in which something remains to be done by one or more parties. *Watkins v. Nugen*, 45 S. E. 262, 263, 118 Ga. 372.

All contracts other than those the object of which is fully performed are executory contracts. *Civ. Code Cal.* 1903, § 1661; *Rev. Codes N. D.* 1899, § 8919; *Rev. St. Okl.* 1903, § 812.

An agreement to sell is an executory contract. *Fulenwider v. Rowan*, 34 South. 975, 979, 136 Ala. 287.

A defective deed, being only a contract to convey, is therefore an executory contract to convey. *Adams v. Reed*, 40 Pac. 720, 724, 11 Utah, 480.

An agreement to sell and convey lands, but which is not a conveyance operating as a present transfer of legal estate in seisin, is at law wholly executory, and produces no effect upon the estates and parties, and creates no lien or charge on the land itself, yet it confers an estate and right in equity. *Watson v. Coast*, 14 S. E. 249, 253, 35 W. Va. 463.

An "executory contract" is one in which some future act is to be done; as where an agreement is made to build a house in six months, or to do any act at a future day. Thus a contract between a city and an electric light company by which the company is to furnish lights for a certain number of years at a fixed price, is an executory, and not an executed, contract. *City of Keokuk v. Ft. Wayne Electric Co.*, 57 N. W. 689, 690, 90 Iowa, 67.

"Executory agreement," as used in the law of sales, means agreement for the sale of a thing where it is not specified, or the article is not manufactured, or the agreement is relative to a certain quantity of goods in general without any identification or appropriation of the same to the contract, or when something remains to be done to put the goods in a deliverable state, or to ascertain the price to be paid by the buy-

er. *Hatch v. Standard Oil Co.*, 100 U. S. 124, 130, 132, 25 L. Ed. 554.

Where parties in the sale of stock agreed to pay a certain sum of money upon one day, and on a subsequent day a certain other sum, and at some time to execute a note for a third sum, and such acts were done on such day, the contract cannot be said to be executory merely because the note given was unpaid. *Cincinnati, H. & D. R. Co. v. McKeen* (U. S.) 64 Fed. 86, 46, 12 C. C. A. 14.

"The distinction between executory and executed contracts is well defined. The former conveys a chose in action; the latter a chose in possession." *McDonald v. Hewett* (N. Y.) 15 Johns. 349, 351, 8 Am. Dec. 241 (citing 2 Bl. Comm. 443; 1 Com. on Con. 3).

Mr. Story says that an executory contract of sale is absolutely to sell at a future time, while a conditional contract of sale is conditionally to sell. In the one case, he says, the performance of the contract is suspended and deferred to a future time; in the other the very existence and performance of the contract depends upon a contingency. *French v. Osmer*, 32 Atl. 254, 255, 67 Vt. 427.

An executory sale of personal property is one made by sample or by description, the goods not being seen by the purchaser until they have been selected and forwarded by the seller in pursuance of the previous contract or order. The seller warrants that the articles shall be of the kind ordered, and merchantable in quality. *Fogel v. Brubaker*, 15 Atl. 692, 122 Pa. 7.

The general rule for determining whether a contract of sale is executed or executory is if anything remains to be done by either party to the transaction before delivery—as, for example, to determine the price, quantity, or identity of the thing sold—the title does not vest in the purchaser, and the contract is merely executory. If the sale is complete, and the goods perish without the fault of the seller, the purchaser is bound to pay the agreed price. *Foley v. Felrath*, 98 Ala. 176, 13 South. 485, 39 Am. St. Rep. 39. Thus, a contract for the sale of cotton out of a certain number of bales, nothing to be taken below middlings, the number of bales not being ascertained, was executory, and not executed. *McFadden v. Henderson*, 29 South. 640, 643, 128 Ala. 221.

### EXECUTORY DEVISE.

An "executory devise" of lands is such a disposition of them by will that thereby no estate vests at the death of the deviser, but only on some future contingency. *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869; *Bristol v. Atwater*, 50 Conn. 402, 406; *Burleigh v. Clough*, 52 N. H. 267, 273,

13 Am. Rep. 23; *Wardell v. Allaire*, 20 N. J. Law (Spencer) 6, 26; *Holden v. Wells*, 81 Atl. 265, 266, 18 R. I. 802; *Crawford v. Clark*, 36 S. E. 404, 408, 110 Ga. 729; *Pater-son v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259; *McKinstry v. Sanders* (N. Y.) 2 Thomp. & C. 181, 193.

An executory devise is "such a limitation of a future estate or interest in lands or chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." *Mangum v. Plester*, 16 S. C. 316, 325; *Rutledge v. Fishburne* (S. C.) 44 S. E. 564, 565; *Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23; *Wood v. Griffin*, 46 N. H. 230, 234; *Pater-son v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259; *Leslie v. Marshall* (N. Y.) 31 Barb. 560, 566; *Holden v. Wells*, 81 Atl. 265, 266, 18 R. I. 802; *Glover v. Condell*, 45 N. H. 173, 179, 163 Ill. 566, 35 L. R. A. 360; *Ryan v. Monaghan*, 42 S. W. 144, 99 Tenn. 338.

An executory devise is such a future disposition of property as would fail as a remainder by reason of some technical defect, but which, if not violative of a policy of the law, will be sustained when found in a will. Civ. Code Ga. 1895, § 3339.

An executory devise is admitted only in last wills and testaments. It respects personal estates as well as real; it requires no preceding estate to support it; and if there be any preceding estate it is not necessary that the devise should vest when the preceding estate determines. *St. Amour v. Rivard*, 2 Mich. 294, 305.

Executory devises are not mere possibilities, but certain and substantial interests and estates, and are put under such restraints only as may prevent the mischiefs of perpetuity. *Graves v. Spurr*, 31 S. W. 483, 485, 97 Ky. 651, 17 Ky. Law Rep. 411, 413 (citing 4 Kent, Comm. Lecture 59, p. 262).

The law permits, under certain restrictions, a fee or other estate to be substituted as an alternative in the place of a fee previously limited, provided the substitution take place within a reasonable period of time; and a devise of this nature is called executory because the estates thereby limited have no present existence, but merely a capacity of existence and being executed. *Richardson v. Noyes*, 2 Mass. 56, 66, 3 Am. Dec. 24.

"A distinguished elementary writer defines an 'executory devise' to be every devise of a future interest, which is not preceded by an estate of freehold, created by the same will, or which, being so preceded, is limited to take effect before or after, and not at, the expiration of such prior estate of freehold." *Thompsons' Lessee v. Hoop*, 6 Ohio St. 480, 487 (citing 1 Jarm. Wills, 778).

An executory devise is a devise of a future estate, and, if the executory devisee dies before the event happens, the estate goes to the heir at the time of the event, and not to the heir at the time of the death of the devisee. The happening of the contingency determines who is to take the estate, and until that time no one has an interest to transmit. *De Wolf v. Middleton*, 31 Atl. 271, 18 R. I. 810.

An executory devise is a future interest, such as the rules of law do not permit to be created in conveyances, but allows in the case of wills, like an interest given after an estate in fee simple, or to a rise in futuro, without a particular estate to support it. Such estates came into use after the Statute of Wills, 32 Hen. VIII, and were allowed out of indulgence to testators, that they might, without the intervention of trustees, preserve remainders, establish future interests, place settlements beyond the reach of those who had the prior estates; and, such being the object, it was held to be essential to a good executory devise that the first takers should have no power to dispose of the interest devised. Every good executory devise is inalienable, though all mankind join in the conveyance. *Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23.

An executory devise is a limitation by a will of a future estate or interest in lands or chattels, and hence is created by a declaration copied from a previous will that "the particular property hereby devised" shall not be subject to the debts of the devisee and children. In *re Brown's Estate*, 38 Pa. (2 Wright) 289, 294.

Among the rules governing contingent remainders is one which forbids an estate to be limited over to another after a fee already granted. In such case there can be no such thing as defeating the fee already granted and transferring it to another by way of remainder, because a remainder implies something left, which cannot be the case after the whole has once been disposed of. Yet, while this cannot be done by way of contingent remainder, it may be done by way of an executory devise, which, according to the definition above, allows a departure from the rules of law governing contingent remainders. And this, being an effort to create a fee after a fee, is a case of departure denied by contingent remainders, but allowed by executory devise. So, too, under the common-law conveyances, a freehold interest in real property could not be limited to commence in futuro, because such interests were established under the feudal system, and under that system livery of seisin was necessary to the creation of a freehold, and, as livery could not be given in futuro, a future freehold could not be created at common law. Neither at common law could a fee be mounted on a fee. In

conveyances at law, it is true, a provision may be made for the defeasance of a fee, but not then for its transfer to another at some future period and upon some specified contingency. These, and some others, being difficulties which our legal ancestors found surrounding conveyances at common law, which, in their opinion, demanded remedy, the executory devise was intended for that purpose. Hence it allows a freehold to be created in futuro, without a particular precedent estate to support it, and by a fee may be created after a fee. But at the same time the common law abhorred a perpetuity; and to prevent perpetuities in executory devises, to which they would have inevitably led if left unguarded, it was established as a part of the machinery of executory devises that the contingency upon which the limitation intended was to take effect should not be postponed longer than a life or lives in being and twenty-one years and a fraction of another year thereafter. So that in all these cases involving the validity of an executory devise the main point to be considered is, has the contingency upon which the limitation is to take effect been fixed within the period of a life or lives in being and twenty-one years and a fraction after? If so, the executory devise is good, and the limitation valid; if not, it is bad, and the limitation void for remoteness. *Mangum v. Piester*, 16 S. C. 316, 325 (citing 4 Kent, Comm. 265).

All future limitations, even in wills, which are consistent with the rules of the common law respecting contingent remainders in a deed, are in a will construed contingent remainders. 2 *Fearne*, 1, 2. One peculiarity belonging to this estate is that it cannot be barred by fine or a common recovery, and therefore, to prevent a perpetuity, it became necessary to prescribe bounds and limits beyond which it could not extend, and it has accordingly been determined that it must vest within the compass of a life or lives in being and twenty-one years and nine months afterwards. But where the executory devise is limited on the event which may not happen within the period last mentioned—as on a general failure of heirs or issue—it is void. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 279 (citing 6 Cruise, tit. 32, Devise, c. 17).

One species of executory devise as applied to lands is where a fee simple is devised to one, but is to determine upon some future event, and the estate thereupon to go over to another. Or, stated more generally, one species of executory devise, relative to real estate, is where the deviser parts with his whole estate, but upon some contingency qualifies the disposition of it, and limits an estate on that contingency. Limitations over upon the death of the first taker without issue are construed as executory devises on definite failure of issue after an

estate in fee simple. Substantially the same rule applies to personal property. It has been said that all future interests in personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory, and fall under the rules by which that species of limitation is regulated. *Glover v. Condell*, 45 N. E. 173, 179, 163 Ill. 566, 35 L. R. A. 360.

Where testator devised real estate to his wife for life, remainder to the heirs of his son, with the provision that, if the son died without issue and unmarried, the property should pass to testator's brother and sister, the devise over to testator's brother and sister was a valid executory devise. *Ryan v. Monaghan*, 42 S. W. 144, 99 Tenn. 338.

Where the rights of certain devisees were wholly dependent upon the life tenant dying, which was upon an uncertain event, and had not yet happened, the devise was an executory devise. *Crawford v. Clark*, 36 S. E. 404, 408, 110 Ga. 729.

If a will reads, "And my will further is that if either of my said sons die without issue, then the share and part given to such deceased son shall go and vest in his surviving brethren, or those that legally represent them," the surviving brothers or their representatives take the estate as by an executory devise. *Couch v. Gorham*, 1 Conn. 86, 39.

A proper executory devise is where a testator devises a fee, but upon the happening of a particular event limits the inheritance over to another description of heirs. Such a limitation cannot take effect as a contingent remainder, because a fee cannot be limited after a fee. *Bristol v. Atwater*, 50 Conn. 402, 406, 407 (quoting Kent, Comm.).

#### **Remainder distinguished.**

Contingent remainder distinguished, see "Contingent Remainder."

An executory devise differs from a remainder in that by the former a fee simple or other less estate may be limited after a fee. *Bristol v. Atwater*, 50 Conn. 402, 406, 407 (citing Bouv. Law Dict.; 4 Kent, Comm. 269; 2 Bl. Comm. 172).

An executory devise differs from a remainder in three materials points: First, it needs no particular estate to support it; second, a fee simple or other less estate may be limited by it after a fee simple; third, a remainder may be limited by a chattel interest after a particular estate for life in the same property. *Poor v. Considine*, 78 U. S. (6 Wall.) 453, 474, 18 L. Ed. 869.

An executory devise needs no particular estate to support it, and is therefore distinguished from an estate in remainder,

which is one limited to take effect and be enjoyed after another is determined. No remainder can be limited after the grant of a fee simple, because the tenant in fee has the whole. Another elementary principle applies in cases where it may be doubtful whether an estate is an executory devise or a remainder, namely, that a gift shall not be deemed an executory devise if it can take effect as a remainder; and that no remainder shall be considered contingent if it may, consistently with intention, be deemed vested. *Burleigh v. Clough*, 52 N. H. 267, 273, 13 Am. Rep. 23 (citing *Jackson v. Robins* [N. Y.] 16 Johns. 537; *Blanchard v. Blanchard*, 83 Mass. [1 Allen] 223, 225, 4 Kent, Comm. 202).

A devise is executory when made to a person, whether in being or not, to take effect at a given period after the death of the testator, or at the death of a stranger. If, however, it is to take effect upon the death of the person having an immediate precedent estate, it will not be an executory devise, but a remainder. *Lealie v. Marshall* (N. Y.) 81 Barb. 560, 566.

#### **Time when contingency must occur.**

To constitute a valid executory devise the contingency upon which it is to take effect must occur within the life or lives in being and twenty-one years and a fraction of a year afterwards. *Brown v. Brown*, 6 S. W. 869, 874, 86 Tenn. (2 Pickle) 277; *Mangum v. Piester*, 16 S. C. 316, 325.

The contingency must not be too remote, but must happen within a life or lives in being and one and twenty years thereafter, and by it a fee simple or other less estate may be limited after a fee simple. *Wardell v. Allaire*, 20 N. J. Law (Spencer) 6, 26 (2 Bl. Comm. p. 173).

Though by the common law an estate in fee cannot be created by deed after an estate in fee is granted by the same conveyance, yet in the construction of wills executory devises have been admitted by which an estate in fee may be created to commence in fact or to take effect after a fee simple. The contingency, however, must happen within a life or lives in being and twenty-one years and a few months thereafter. But where a limitation over after a devise in fee was construed as contingent on the devisee's dying without children living at the time of his death, a good executory devise was created. *Morgan v. Morgan* (Conn.) 5 Day, 517, 524, 526.

#### **EXECUTORY INTEREST.**

An "executory interest," as used in the rule of law providing that all executory interests are assignable in equity, does not include a right of reverter in case of the

breach of a condition subsequent. *Nicoll v. New York & E. R. Co.*, 12 N. Y. (2 Kern.) 121, 132.

### EXECUTORY PROCESS.

The order of seizure and sale called "executory process," made in Louisiana when the mortgage imports a confession of judgment, is, in substance, a decree of foreclosure and sale, and therefore a final decree. *Marin v. Lalley* 84 U. S. (17 Wall.) 14, 21 L. Ed. 596.

### EXECUTORY REMAINDER.

Executory remainders are where the estate is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. An executory remainder is a contingent remainder. *Temple v. Scott*, 32 N. E. 366, 367, 143 Ill. 290.

"The term 'remainder' is a relative expression, and implies that some part of the thing is previously disposed of. Vested remainders (or remainders executed, whereby a present interest passed to a party) are where the estate is invariably fixed to remain to a determinate person after the particular estate is spent; and contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event." *Hudson v. Wadsworth*, 8 Conn. 348, 359.

### EXECUTORY TRUST.

An "executory trust" is where the limitations are imperfectly declared, and the intent of the grantor is expressed in general terms. In an executory trust the manner in which the intent of the grantor is to be carried into effect is left substantially in the discretion of the trustee. *Martling v. Martling*, 39 Atl. 203, 204, 55 N. J. Eq. 771.

A trust is executory when the objects of the trust take not immediately under it, but by means of some further act to be done by a third person, usually him in whom the legal estate is vested. Mr. Fearn thus defines executed and executory trusts, drawing the distinction between them which runs through the several cases affording subject-matter for its application; executed trusts being those where the trusts are directly and wholly declared by the testator, or attach immediately on the lands under the will itself, and executory trusts being those which are only directory, or prescribe the intended limitations of some future conveyance or settlement directed by the will to be made for effectuating them. *Carradine v. Carradine*, 33 Miss. 698, 729.

By the term "executory trust," when used in its proper sense, is meant a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes: One in which, though something is required to be done (for example, a settlement to be executed), yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow it, and execute the intention of the party as appearing in the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending on the same words. The other species of executory trusts is where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves. "All trusts," says Lord St. Leonards, in *Egerton v. Earl Brownlow*, 4 H. L. Cas. 1210, "are in a sense executory, because a trust cannot be executed except by a conveyance; but this is not the sense which a court of equity puts upon the term 'executory trusts.'" *Cornwell v. Wulff*, 50 S. W. 439, 442, 148 Mo. 542, 45 L. R. A. 58.

Almost all trusts are, in a certain sense, executory. Ordinarily, a trust cannot be executed except by conveyance. There is in most cases something to be done, but this is not the sense in which a trust is said to be executory. An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done in order to complete and perfect the trust and to give it effect. In *re Smith's Estate*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641.

An executory trust is where an estate is conveyed to the trustee upon trust, to be by him settled or conveyed upon other trusts in certain contingencies, or upon other events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the directions thus given. *Cushing v. Blake*, 29 N. J. Eq. (2 Stew.) 399, 403.

All trusts are executory in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee. But such is not the meaning of judges when they

speak of executed trusts and executory trusts. In this sense an executory trust is where an estate is conveyed to the trustee in trust to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in the form or manner, and are to be carried into effect according to the final form which the details and limitations shall take under the directions thus given. They are called executory trusts not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator. A mere direction to convey will not render the trust executory, if the directions are so clear and the limitations so certainly defined that there is nothing to do but convey in accordance with it; but in order that the trust may be executory there must be some room for construction in order to determine the intention of the settlor. In *re Fair's Estate*, 60 Pac. 442, 446, 132 Cal. 523, 84 Am. St. Rep. 70.

The test of an executory trust is that the trustee has some duty to perform for the performance of which it is necessary that the title be regarded as abiding in him. *Porter v. Doby*, 2 Rich. Eq. 49, 53; *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339. Thus a trust empowering the trustee to collect the rents and profits and take and maintain the beneficiaries and keep the estate in repair during the life of A. and her children, with power to sell and reinvest, is an executory trust so long as A. and any of her children live. *Reynolds v. Reynolds*, 39 S. E. 391, 393, 61 S. C. 243.

The difference between executed and executory trusts depends upon the manner in which the trust is declared. When the limitations and acts are fully and perfectly declared, the trust is regarded as an executed trust. Where, on the contrary, the creator of the trust, instead of fully declaring its limitations, expresses in general terms his intent, leaving the manner in which this intent is to be carried into effect substantially undeclared, the trust is regarded as executory. In practice the chief distinction between an executed and an executory trust lies in the fact that the former executes itself by converting its limitations into corresponding legal estates, whereas in the latter the court may direct that form of settlement or conveyance which will best give effect to the settlor's intention, and for this purpose may even disregard the construction the instrument would receive at law. In the executory trust the language of the settlor is considered mainly as a guide to aid the court in carrying into effect his imperfectly declared purposes. In the executed trust

the grantor has been his own conveyancer, and the equitable interests created by the language he has employed are treated as estates. *Pillot v. Landon*, 19 Atl. 25, 26, 46 N. J. Eq. (1 Dick.) 310.

## EXEMPLARY DAMAGES.

Exemplary damages are those given, in addition to compensation for a loss sustained, in order to punish and make an example of the wrongdoer. *Reid v. Terwilliger*, 22 N. E. 1091, 1092, 116 N. Y. 530; *Monongahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 626, 148 U. S. 312, 37 L. Ed. 463; *Roza v. Smith* (U. S.) 65 Fed. 592, 596; *Bank of Palo Alto v. Pacific Postal Telegraph Cable Co.* (U. S.) 103 Fed. 841, 847; *Goldsmith's Adm'r v. Joy*, 17 Atl. 1010, 1011, 61 Vt. 488, 4 L. R. A. 500, 15 Am. St. Rep. 923; *Haver v. Central R. Co. of New Jersey*, 45 Atl. 593, 64 N. J. Law, 312; *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156; *Hendle v. Geiler* (Del.) 50 Atl. 632, 633; *Armstrong v. Rhoades* (Del.) 53 Atl. 435; *Smith v. Bagwell*, 19 Fla. 117, 121, 45 Am. Rep. 12; *Consolidated Coal Co. v. Haenni*, 35 N. E. 162, 165, 146 Ill. 614; *Freidenheit v. Edmundson*, 36 Mo. 226, 230, 88 Am. Dec. 141; *Fay v. Parker*, 53 N. H. 342, 343, 16 Am. Rep. 270; *Larzelere v. Kirchgasser*, 41 N. W. 488, 489, 73 Mich. 276; *Haberman v. Gasser*, 80 N. W. 105, 107, 104 Wis. 98; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25, 28; *Rawlins v. Vidvard* (N. Y.) 84 Hun, 205, 209; *Fry v. Bennett*, 1 Abb. Prac. 289-307; *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 104, 15 Misc. Rep. 663; *Miller v. Donovan*, 39 N. Y. Supp. 820, 824, 16 Misc. Rep. 453; *Eddy v. Syracuse Rapid Transit Ry. Co.*, 63 N. Y. Supp. 645, 648, 50 App. Div. 109; *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366; *French v. Deane*, 36 Pac. 609, 612, 19 Colo. 504, 24 L. R. A. 387; *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 773; *Warner v. Southern Pac. Co.*, 45 Pac. 187, 189, 113 Cal. 105, 54 Am. St. Rep. 327; *Louisville, N. & G. S. R. Co. v. Guinan*, 79 Tenn. (11 Lea) 98, 103, 47 Am. Rep. 279; *Louisville & N. R. Co. v. Ray*, 46 S. W. 554, 555, 101 Tenn. 1; *Flanagan v. Womack*, 54 Tex. 45, 47; *Mayer v. Frobe*, 22 S. E. 58, 40 W. Va. 246; *McMaster v. Dyer*, 29 S. E. 1016, 1017, 44 W. Va. 644; *Garrick v. Florida Cent. & P. R. Co.*, 31 S. E. 334, 337, 53 S. C. 448, 69 Am. St. Rep. 874.

Exemplary, punitive, or vindictive damages are such damages as are in excess of the actual loss, and are allowed where a tort is aggravated by evil motive, actual malice, deliberate violence, oppression, or fraud. *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 P. 156; *Hendle v. Geiler* (Del.) 50 Atl. 632, 633; *Scott v. Donald*, 17 Sup. Ct. 265, 267, 165 U. S. 58, 41 L. Ed. 632; *Bank of Palo Alto v. Pacific Postal Telegraph Ca-*

ble Co. (U. S.) 103 Fed. 841, 847; Bixby v. Dunlap, 56 N. H. 456, 462, 22 Am. Rep. 475; Consolidated Coal Co. v. Haenni, 35 N. E. 162, 165, 146 Ill. 614; Limbeck v. Gerry, 39 N. Y. Supp. 96, 104, 15 Misc. Rep. 663; Haberman v. Gasser, 80 N. W. 105, 107, 104 Wis. 98; Atchison, T. & S. F. R. Co. v. Watson, 15 Pac. 877, 880, 37 Kan. 773; Louisville, N. & G. S. R. Co. v. Guinan, 79 Tenn. (11 Lea) 98, 103, 47 Am. Rep. 279; Louisville & N. R. Co. v. Ray, 46 S. W. 554, 555, 101 Tenn. 1; Flanagan v. Womack, 54 Tex. 45, 47; Smith v. Chamberlain, 17 S. E. 371, 378, 38 S. C. 529, 19 L. R. A. 710; Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155, 161, 28 Am. Rep. 442; Quigley v. Central Pac. R. Co., 11 Nev. 350, 365, 21 Am. Rep. 757; Ruth v. St. Louis Transit Co., 71 S. W. 1055, 1060, 98 Mo. App. 1; Brandt v. Morning Journal Ass'n, 80 N. Y. Supp. 1002, 1004, 81 App. Div. 183. Or where the defendant acts willfully or with such gross negligence as to indicate a wanton disregard of the rights of others. Consolidated Coal Co. v. Haenni, 35 N. E. 162, 165, 146 Ill. 614; Lake Shore & M. S. R. Co. v. Prentice, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97; Eddy v. Syracuse Rapid Transit Ry. Co., 63 N. Y. Supp. 645, 648, 50 App. Div. 109; Larzelere v. Kirchgessner, 41 N. W. 488, 489, 78 Mich. 276; Louisville, N. & G. S. R. Co. v. Guinan, 79 Tenn. (11 Lea) 98, 103, 47 Am. Rep. 279; Claiborne v. Chesapeake & O. Ry. Co., 33 S. E. 262, 263, 46 W. Va. 363.

"Exemplary damages" means the money given to the plaintiff by the jury as compensation for the injury inflicted by the defendant on the mental feelings of the injured person, such as his shame, degradation, loss of social position, and the like, resulting from the tort for which the action is brought. Gillingham v. Ohio River R. Co., 14 S. E. 243, 247, 35 W. Va. 588, 14 L. R. A. 798, 29 Am. St. Rep. 827.

"Exemplary damages," as used in Pub. Acts 1883, No. 191, providing that every wife, child, parent, guardian, husband, or other person injured by any intoxicated person, or by reason of the intoxication of any person, or by reason of selling, giving, or furnishing any intoxicating liquors to any person, shall have a right of action against the person selling or giving away the liquor causing or contributing to the intoxication of the person, and may recover therefor actual and exemplary damages, means damages which are punitive in their character and designed to punish the defendant for some positive wrong he has willfully inflicted on or caused the plaintiff, or for some very gross neglect of the plaintiff's right in furnishing liquor to the person, causing the injury. Larzelere v. Kirchgessner, 41 N. W. 488, 489, 78 Mich. 276.

"Exemplary damages," as the term has been employed in Michigan, is generally un-

derstood to mean an increased award of damages in view of the supposed aggravation of the injury to the feelings by the wanton or reckless act of the defendant. As was said in Ford v. Cheever, 105 Mich. 679, 685, 63 N. W. 975, 976, it has never been the policy of the court to permit juries to award capiously any sum that may appear just to them by way of punishment to the offender, but rather to award a sum in addition to the actual proven damages as would in their judgment constitute a just measure of compensation for injury to the feelings, in view of the circumstances of each particular case. Hence an instruction that exemplary damages mean damages given by way of punishment for the commission of a wrong willfully and wantonly done, and done with some element of aggravation, and that they are not the extent of the injury actually received, but are given as smart money, by way of pecuniary punishment, to make an example for the public good, and to teach other persons not to offend in like manner, is erroneous. Boydan v. Haberstumpf, 88 N. W. 386, 387, 129 Mich. 137.

The expression "exemplary damages," as used in Acts 1877, c. 107, § 16, providing that an action may be maintained under specified circumstances by the wife against the person selling or furnishing spirituous liquors, as well as for all such damages as the plaintiff has sustained by reason of the selling or giving of such liquors, as for exemplary damages, means, not additional damages given as a punishment of defendant for selling intoxicating liquors to plaintiff's husband illegally, but damages which shall not only compensate her for injury to her means of support, but also, in a proper case, damages which shall compensate her for her mental anguish. Pegram v. Stortz, 31 W. Va. 220, 234, 6 S. E. 485.

#### Compensatory damages distinguished.

Compensatory damages, and exemplary or punitive damages, are of entirely different nature and rest upon different principles. The former is intended to provide a recompense for injuries sustained, while the latter is intended only as a punishment to the wrongdoer, and to furnish an example to him and other wrongdoers of the dangers attending such wrong doing. Thus, where the Legislature in the title of an act declared their intention to provide for such damages against railway companies as may be proportionate to the injury resulting from death to the parties for whom and for whose benefit such action is brought, this implies that the damages are to be compensatory damages. Garrick v. Florida Cent. & P. R. Co., 31 S. E. 334, 337, 53 S. C. 448, 69 Am. St. Rep. 874. See, also, Hamilton v. Third Ave. R. Co., 35 N. Y. Super. Ct. (3 Jones & S.) 118, 13 Abb. Prac. (N. S.) 318.

**As indeterminate actual damages.**

Within the provisions of the statute authorizing a recovery of exemplary damages for the wrongful issuance of an attachment, the term "exemplary damages" does not comprehend damages by way of punishment, but only indeterminate actual damages, such as damages to reputation, pride, and feeling. *Levy v. Fleischner*, 40 Pac. 384, 385, 12 Wash. 15.

**Persons liable.**

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment to the offender and as a warning to others, can be awarded only against one who has participated in the offense. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97. Exemplary or punitive can only be awarded against one who has participated in the offense. *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.* (U. S.) 108 Fed. 841, 847. Thus a sheriff, liable for injuries done by his deputy, cannot be charged in exemplary damages for the misconduct of such deputy. *Nixon v. Rauer* (Cal.) 66 Pac. 221, 222. And therefore a master, though liable to make compensation for injuries done by his servant within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive, or malicious intent on the part of the servant. *Haver v. Central R. Co. of New Jersey*, 45 Atl. 593, 64 N. J. Law, 312.

**Punitive or vindictive synonyms.**

Punitive, vindictive, and exemplary damages are all synonymous terms. *Louisville & N. R. Co. v. Kelly's Adm'x*, 38 S. W. 852, 854, 100 Ky. 421 (citing *Chiles v. Drake*, 59 Ky. [2 Metc.] 146, 74 Am. Dec. 406); *Roth v. Eppy*, 80 Ill. 283, 287; *Chiles v. Drake*, 59 Ky. (2 Metc.) 146, 147, 74 Am. Dec. 406; *Fay v. Parker*, 53 N. H. 342, 343, 16 Am. Rep. 270; *Fry v. Bennett*, 1 Abb. Prac. 189, 307; *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366; *Claiborne v. Chesapeake & O. Ry. Co.*, 33 S. E. 262, 263, 46 W. Va. 363; *Green v. Craig*, 47 Mo. 90, 92; *Oliver v. Columbia, N. & L. R. Co.*, 43 S. E. 307, 320, 65 S. C. 1.

**Smart money synonyms.**

Exemplary damages are sometimes called "smart money." *Springer v. J. H. Somers Fuel Co.*, 46 Atl. 370, 371, 196 Pa. 156; *Lake Shore & M. S. R. Co. v. Prentice*, 13 Sup. Ct. 261, 263, 147 U. S. 101, 37 L. Ed. 97; *Consolidated Coal Co. v. Haenni*, 85 N. E. 162, 165, 146 Ill. 614; *Hendle v. Geiler* (Del.) 50 Atl. 632, 633.

**Special damages distinguished.**

There is a difference between special damages and exemplary or punitive damages;

special damages being the natural, but not necessary, result of the injury complained of. *Louisville & N. R. Co. v. Ray*, 46 S. W. 554, 555, 101 Tenn. 1

**EXEMPLIFIED COPY.**

An exemplified copy of a public document, which was the way judicial records were proved at common law, was obtained by removing the record into the court of chancery by certiorari. The great seal was attached to a copy, which was transmitted by a mittimus to the court in which it was to be used as evidence. In this country, says Professor Greenleaf, the great seal being usually, if not always, kept by the Secretary of State, a different course prevails; and an exemplified copy under a seal of the court is usually admitted, even upon a plea of nul tiel record, as sufficient evidence. *West Jersey Traction Co. v. Board of Public Works*, 30 Atl. 581, 582, 57 N. J. Law (28 Vroom) 313.

**EXEMPT—EXEMPTION.**

See, also, "Privilege"; "Privileges and Immunities."

As vested right, see "Vested Right."

An exemption is defined as "an immunity; a privilege; as an exemption from military or jury service." *Green v. State*, 59 Md. 123, 128, 43 Am. Rep. 542; *People v. Rawn*, 51 N. W. 522, 523, 90 Mich. 377; *Florer v. Sheridan*, 36 N. E. 365, 369, 137 Ind. 23, 23 L. R. A. 278; *State v. Smith*, 63 N. E. 25, 29, 158 Ind. 543; *Bartholomew v. City of Austin*, 85 Fed. 359, 368, 29 C. C. A. 568.

An exemption is defined to be an immunity and freedom from any service, charge, burden, tax, etc., to which others are subject. *Koenig v. Omaha & N. W. R. Co.*, 8 Neb. 373, 380.

"Exempted" means to take out of or from, to free from any service or burden to which others are subject; as to exempt from military service, or exempt from taxation. *In re Sowers*, 60 N. C. 384, 386.

The term "exemption" implies a release from some burden, duty, or obligation. *Maine Water Co. v. City of Waterville*, 45 Atl. 830, 833, 93 Me. 586, 49 L. R. A. 294.

*How. Ann. St. § 7571*, providing that the court may excuse a juror from service who is exempt from serving on juries by reason of the provisions of law, means one freed or released from some duty. *People v. Rawn*, 51 N. W. 522, 523, 90 Mich. 377.

"Exempted," as used in a statute providing that all state officers whom the Governor of any state might claim as necessary for the due administration of the gov-



ernment, etc., should be exempted from military service, applies to officers who are in actual military service, as well as those who are not; the word exempted being equivalent in this connection to "discharged" or "relieved from." In *re Bradshaw*, 60 N. C. 379, 381.

Within the meaning of Sess. Acts 1863, p. 13, providing that all overseers who are or shall be exempted or detailed under acts of the Confederate Congress shall be excused from military duty so long as they may be exempted or detailed as such, an "exempt" is one who is free from any charge, burden, or duty; not liable to. A "detail," on the contrary, is one who belongs to the army, but is only detached or set apart for the time to some particular duty or service, and who is liable at any time to be recalled to his place in the ranks. In *re Strawbridge*, 39 Ala. 367, 375.

"Exemption," as used in the judiciary act of 1789, authorizing the Supreme Court of the United States to re-examine the decision of the highest court of a state in certain cases where any title, right, privilege, or exemption is claimed under any statute of the United States, is synonymous with "immunity" as used in Judiciary Act Feb. 5, 1867, authorizing the review by the Supreme Court of the United States of the decisions of the highest court of a state in certain cases where any right, title, privilege, or immunity is claimed under any statute of the United States. *Long v. Converse*, 91 U. S. 105, 113, 23 L. Ed. 233.

A person exempted from jury service is not thereby disqualified to serve on a jury. *State v. Forshner*, 43 N. H. 89, 90, 80 Am. Dec. 132; *People v. Rawn*, 51 N. W. 522, 523, 90 Mich. 377; *Glassinger v. State*, 24 Ohio St. 206, 208; *State v. Stunkle*, 21 Pac. 675, 676, 41 Kan. 456; *Green v. State*, 59 Md. 123, 131, 43 Am. Rep. 542.

#### EXEMPTION (From Execution).

See "Homestead Exemption"; "Pension Money Exemptions"; "Waiver of Exemption."

Statutes of, as contract, see "Contract."

The phrase "exempt from execution," as used in Code 1873, tit. 14, c. 7, requiring a debtor, in an assignment for the benefit of creditors, to recite in the body of the instrument that the conveyance is made of all property of every kind, except such as is by law exempt from execution, covers property given by law to the debtor individually through methods of public policy, and not property which is merely protected while in his official custody. Property exempt from execution is such as the law means to give the debtor as against his creditors. It is something which he is protected in holding

for his own benefit, and not merely for the advantage of the business in which he is engaged. Hence the furniture and equipments belonging to an assignor in his capacity of postmaster are not reserved though they are protected in so far as execution thereon would prevent delivery of the mail. *Turrill v. McCarthy*, 87 N. W. 667, 668, 114 Iowa, 681.

A voluntary assignment for the benefit of creditors, which excepted so much of the debtor's property as is by law exempt from attachment, includes not only the property which is exempt from attachment by statutory enactment, but includes all property which is exempt by the policy of the law, and which is protected from attachment as a matter of public policy, as the property of a municipal corporation which it used to enable it to discharge its public duties. *Rhode Island Nat. Bank v. Chase*, 12 Atl. 233, 234, 18 R. I. 37.

The constitutional provision that a homestead shall be exempt from attachment means absolute exemption, and was clearly intended to perpetuate in the judgment debtor or his family, under certain conditions, the ownership, as well as the use, of the family homestead. *McKeown v. Carroll*, 5 S. C. (5 Rich.) 75, 86.

Where, in a note, the maker waives "any and all homestead and exemption rights" to which he may be entitled under the Constitution or laws, it refers to exemptions of property, and not to the wages of a daily laborer. *Smith v. Johnston*, 71 Ga. 748, 749.

The words "not exempt from execution," in the statute authorizing application to the judgment of any property of the judgment debtor in the hands either of himself or any other person, or due to the judgment debtor, not exempt from execution, are equivalent to "not exempted by express statute from execution." *Williams v. Smith*, 93 N. W. 464, 466, 117 Wis. 142.

The words "exempt from execution" merely state a legal conclusion, and an allegation to such effect in an affidavit by a debtor whose property is levied on in proceedings supplementary to execution is insufficient as not alleging the facts. *Abell v. Riddle*, 75 Ind. 345, 347.

#### Incumbrance distinguished.

An incumbrance is a legal claim in favor of one person on the estate of another. An exemption of property from execution sale is a favor to the owner of the property, and to no other person, although designed for the benefit of his family, as well as for himself. One cannot have an incumbrance upon land to which he has a complete title, including the possession, as the latter com-

prehends and merges the former. So a representation by the owner of property, for the purpose of obtaining credit, that his house and lot were unincumbered, when at the same time he knew it was exempt from sale on execution, was not a false or fraudulent representation. The exemption constituted an impeachment or bar to the right of the creditor to resort to the land to obtain satisfaction of his judgment, but in no sense of the term was an incumbrance on the land. *Robinson v. Wiley*, 15 N. Y. 489, 492.

#### EXEMPTION (From Taxation).

The very term "exemption" presupposes a liability, unless the right assumed is established. There can be no constructive or implied exemptions from taxation, unless the subject is a mere incident of the property excepted. *Matiack v. Jones* (Ohio) 2 Disney, 2, 8.

"Exempt property," as used in a statute providing that the shareholders of a corporation are entitled to have the pro rata of all property owned by the corporation and exempt from taxation at the time of the assessment of their shares deducted from the amount so assessed, means all exempt property which does not form part of the capital represented by shares; and it is a matter of no significance whether the capital is or is not invested, or how it was invested, as the assessment complained of is neither of the bonds nor the capital, but simply of the shares by which the capital is represented. *Parker v. Sun Ins. Co.*, 8 South. 618, 619, 42 La. Ann. 1172; *First Nat. Bank v. Board of Reviewers*, 5 South. 408, 409, 41 La. Ann. 181.

The provision of the act of 1866 that stockholders shall not be taxed with the stock of the corporation is not an exemption in any sense, but merely a declaration of the intention of the Legislature that the property of the corporation, being taxable in the hands of the company, shall not be again taxed in the hands of the stockholders. *Jersey City Gaslight Co. v. Jersey City*, 46 N. J. Law (17 Vroom) 194, 196.

#### Abatement distinguished.

The terms "exemption" and "abatement," in their literal sense, have different shades of meaning, and this is so, to a certain extent, in the meaning of these terms as employed in the Constitution and statutes; for an exemption prevents any assessment in the first instance, and in that way relieves the property of the burden of taxation, while in the case of an abatement the property is relieved of its share of the burden of taxation after the assessment has been made and the tax levied. The difference in the sense of these terms, therefore, relates to the method, rather than to the effect; for the ultimate result, whether by ex-

emption or abatement, is precisely the same. In either case the property is relieved from the burden of taxation. Hence a statute providing that the board of county commissioners may abate the taxes of certain persons is in conflict with the Constitution, forbidding exemptions of property except such as arise "under the laws of the United States or under this Constitution." *State v. Armstrong*, 53 Pac. 981, 982, 17 Utah, 166, 41 L. R. A. 407.

#### Deduction distinguished.

"It is said in *Florer v. Sheridan*, 86 N. E. 365, 369, 137 Ind. 28, 23 L. R. A. 278, that deductions and exemptions are two separate and distinct things, having no connection. A deduction is the taking of the subtrahend from the minuend. It is a subtraction. Exemption is an immunity or privilege. It is a freedom from a charge or burden to which others are subjected. Upon the subject of an allowance for debts, Judge Cooley says: 'Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. Sometimes the deductions are from credits only, sometimes from mortgages, sometimes from the aggregate of personal estate. The allowance is not in any proper sense an exemption, but is made by way of reaching the just amount of taxable property.' *Cooley Tax'n*, 174." Therefore Acts 1899, p. 422, § 1, providing for the deduction of mortgage debts from the assessed value of real estate, is not an exemption law. *State v. Smith*, 63 N. E. 25, 29, 158 Ind. 543, 63 L. R. A. 116.

#### As declared exempt.

Acts 1882, No. 2, § 12, providing that listers, in determining the grand list of a taxpayer, shall deduct from any set-off claimed by the taxpayer on account of his indebtedness the aggregate amount of his United States government bonds, and other stocks and bonds "exempt from taxation by the laws of this state," means declared by the laws of this state to be exempt from taxation, and not "exempt from the operation of the tax laws of this state." *Smalley v. City of Burlington*, 22 Atl. 611, 63 Vt. 446.

The words "exempted by law from taxation," in the statute exempting from taxation legacies to societies, corporations, and institutions now exempted by law from taxation, implies an immunity from taxation expressly granted by statute, and not a mere omission to tax. *Church Charity Foundation v. People* (N. Y.) 6 Dem. Sur. 154, 156.

The word "exempt," as used in *Hurd's Rev. St.* 1899, c. 120, par. 329, cl. 4, restricting the right of appeal from the decision of a board of review to cases in which it is claimed the property in question is exempt from taxation and the board decides it is liable, applies to property which is not with-

in the state and property from which the burden of taxation has been relinquished by an express statute, or by a failure to enumerate it in the statute declaring what property shall be taxed, and it does not mean property which for any reason is not liable to assessment in the jurisdiction of the particular board of review. *Dutton v. Board of Review of Pike County*, 58 N. E. 953, 954, 188 Ill. 386.

**As franchise or right.**

See "Franchise"; "Right—Rights."

**As immunity.**

See "Immunity."

**Want of consideration implied.**

"The term 'exemption' implies a release from some burden, duty, or obligation. It is a grace, a favor, an immunity; taken out from under the general rule; not to be like others, who are not exempt; to receive and not to make a return." *Bartholomew v. City of Austin* (U. S.) 85 Fed. 359, 368, 29 C. C. A. 568; *Maine Water Co. v. City of Waterville*, 45 Atl. 830, 833, 93 Me. 586, 49 L. R. A. 294. Thus exempting from municipal taxation the property of a water company, in consideration of the free use of water for municipal purposes, is not an exemption from taxation within the true meaning of the term, since a consideration is rendered. *Bartholomew v. City of Austin* (U. S.) 85 Fed. 359, 368, 29 C. C. A. 568. And it cannot be said that a corporation, which for a valuable and adequate consideration obtains the agreement of another to reimburse it for the amount of taxes that it is obliged to pay, is thereby exempted or released from the burden of paying its just proportion of taxes. *Maine Water Co. v. City of Waterville*, 45 Atl. 830, 833, 93 Me. 586, 49 L. R. A. 294.

## EXERCISE.

Under Laws 1855, p. 159, making the exercise of one's usual vocation on Sunday a crime, any single act in such usual vocation is prohibited. *Voglesong v. State*, 9 Ind. 112.

Within the statute authorizing quo warranto where a person shall unlawfully exercise any county or township office, the word "exercise" is equivalent to "usurp," except that it includes the idea of actually executing the office thus usurped. *Cleaver v. Commonwealth*, 84 Pa. (10 Casey) 284.

**Corporate powers.**

Gen. St. p. 710, provides that the personal property of certain corporations should be assessed and set in the list of the towns in which such corporations have their principal place of business or "exercise their corporate powers." Held, that corporations may

be said to exercise their corporate powers where the governing power of the corporation is exercised—where those meet in council who have a right to control its affairs and prescribe what policy of the corporation shall be pursued, and not where the labor is performed in executing the requirements of the corporation in transacting its business. It may be true that a corporation may be said to exercise its corporate powers wherever its business is being transacted, but in this statute the expression is used in a stricter sense. It has reference to what is done directly by the corporation itself in the management of its affairs, and not to what is done by others in obedience to its requirements. *Middletown Ferry Co. v. Town of Middletown*, 40 Conn. 65, 69.

The phrase "to exercise the privileges conferred by the charter," as used in Code, § 1676, par. 3, providing that no corporation created under the provisions of that section shall commence "to exercise the privileges conferred by the charter" until 10 per cent. of its capital stock has been paid in, necessarily refers to the right of the corporation to transact the business for which it was chartered, and it does not mean that it will be unlawful for the corporation to organize and collect subscriptions to its capital stock. Before beginning the transaction of the business intended to be performed by its organization, it must organize and be in a position to deal with third persons, and one of the essential elements of organization is the collection of at least a portion of the capital stock in available funds. It simply means that the corporation shall not be legally entitled to do business under its charter with outside parties until it has in hand at least one-tenth of its capital stock. *Branch v. Augusta Glass Works*, 23 S. E. 128, 129, 95 Ga. 573.

**Discretion.**

See, also, "Discretion."

To exercise discretion is to choose between doing and not doing a thing, the doing of which cannot be demanded as an absolute right of the party asking it to be done. The proposition for the exercise of judicial discretion is always based on a given state of facts and addresses itself to the favor of the judge. It is not based on the right of the party seeking to have the thing done, founded in the law applicable to the facts involved, but is always an appeal *ex gratia*. *Alden v. Hinton*, 6 D. C. 217, 223.

**Lawmaking power.**

To exercise the lawmaking power means "to make rules for the government of men's actions, and to make rules to define what shall be yours and what shall be mine; to make rules what shall be the consequences

of doing and not doing particular acts." State, to Use of Gentry, v. Fry, 4 Mo. 120, 199.

### Right of suffrage.

"Exercising the right of suffrage" means "voting," within Act Cong. May 31, 1870, 16 Stat. 144, enacted to enforce the rights of citizens of the United States to exercise the right of suffrage in the several states. United States v. Souders (U. S.) 27 Fed. Cas. 1267, 1269.

It would seem there ought not to be any difficulty in arriving at the signification of the words in the act of Congress providing that "if, at any election for representative," etc., "any person shall, by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," etc. When a man is spoken of as "exercising a right," it is commonly understood that he is doing something. When a voter casts his ballot into the box, do we not say that he is "exercising the right of suffrage"? Can any words be used that better define the act of voting? And, when he exercises this right "freely," does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must not be controlled, and his physical opportunity for doing the act must not be interfered with. Any control over the one or interference with the other encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure. And what is it to prevent a voter from exercising this right? It is to put such a restraint upon his volition, or his body, that he cannot perform the act: producing by threats or otherwise such apprehension of personal loss or injury as to induce him not to vote or to vote contrary to his wishes, being a restraint upon his will, and an intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being the restraint upon his body. United States v. Souders (U. S.) 27 Fed. Cas. 1267, 1269.

### EXERCITOR.

An exercitor is a person who receives the earnings of a vessel. It does not include an owner who has divested himself of all right of control with respect to the employment of a vessel, and receives for the hire of the vessel a certain proportion of the freight and earnings. The Phebe (U. S.) 19 Fed. Cas. 418, 419.

### EXHAUSTED.

Const. art. 12, § 4, declaring that, in all cases of claims against corporations and

joint-stock companies, the exact amount due shall be first ascertained, and after the corporate property shall have been exhausted the original subscribers shall be individually liable to the extent of their unpaid subscription, etc., means exhausted by judicial proceedings; that is, that executions issued on judgments or decrees rendered against corporations shall be returned unsatisfied. Therefore creditors of a de jure corporation have no right of action against the stockholders thereof until they have reduced their claims against the corporation to judgment, and until an execution issued on such judgment has been returned wholly or partly unsatisfied. Globe Pub. Co. v. State Bank, 59 N. W. 683, 689, 41 Neb. 175, 27 L. R. A. 854.

### EXHIBIT.

#### Books of corporation.

"Exhibit the books," as used in 1 Rev. St. p. 601, § 1, fixing a penalty against any officer of a corporation who refuses to exhibit the books thereof to its stockholders previous to an election, will be construed to mean "showing the contents of the books, and not their outside merely." Brouwer v. Cotheal (N. Y.) 10 Barb. 216, 218.

#### Claim against decedent.

In 2 Rev. St. p. 88, § 34, providing that an executor may insert a notice in a county paper requiring all persons having claims to exhibit the same to such executor or administrator, "exhibiting" means the same as "presenting," and does not require the personal presentation of the claims. In re Wiltse, 25 N. Y. Supp. 733, 737, 5 Misc. Rep. 105.

A claim is not legally exhibited against the estate of a decedent, so as to authorize its allowance within Wag. St. p. 102, § 5, until it has been shown to the administrator with a view to procuring its allowance. Exhibition in the course of negotiation, and with a view solely to compromise, is not such an exhibition. Pfeiffer v. Suss, 73 Mo. 245, 252.

Under a statute providing that a claimant against an estate must "present or exhibit" his claim or demand to the court or commissioners, a formal pleading is not required in the first instance. Fitzgerald's Estate v. Union Sav. Bank of Lincoln (Neb.) 90 N. W. 994, 995.

#### Complaint or indictment.

In a statute providing that an indictment must be exhibited within five years, the word "exhibited" means publicly presented to the court by the grand jury. This definition is sustained in Webster, who defines it as "to exhibit in a public or official

manner," and by Bouvier, who defines it as "to produce a thing publicly, so that it may be taken possession of or seized; to file of record." *Commonwealth v. Anspach*, 15 Wkly. Notes Cas. 414.

The exhibiting of a complaint or information in a criminal case means the presentation of the complaint, signed by some proper informing officer, to a court or public officer who has authority to receive the same and to issue a warrant to apprehend the offender and bring him to trial. *Newell v. State*, 2 Conn. 38, 40.

Within Act March 31, 1860 (P. L. 432), providing that indictments for certain crimes shall be brought or exhibited within two years after the commission of the crime, "exhibited" does not require the case to be prosecuted within the two years; but it is sufficient if the indictment be brought into court and exhibited to the notice of the defendant. *Commonwealth v. Alsop* (Pa.) 1 Brewst. 328, 345.

#### Gaming device.

The word "exhibited," as used in the chapter punishing gaming, is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors. *Pen. Code Tex.* 1895, art. 387; *Kain v. State*, 16 Tex. App. 282, 306; *Whitney v. State*, 10 Tex. App. 377, 379.

A Texas statute, making "exhibiting a faro bank for the purpose of gaming" a crime, etc., should not be construed to be synonymous with the words "exhibiting a faro bank"; and hence an indictment describing the offense as exhibiting a faro bank, and omitting the words "for the purpose of gaming," is fatally defective. *Kramer v. State*, 18 Tex. App. 18.

#### EXHIBITION.

See "Public Exhibition."

"Exhibition," as used in a city ordinance requiring the keepers of shooting galleries, exhibitions, etc., to be licensed, in its broad signification would include a large class of business who use various methods to attract custom and sell their goods. Every contrivance for automatic movement of dumb figures used in display windows to attract attention, every exhibition of paintings for sale, or to arouse attention and attract visitors to public marts of trade, every person exhibiting exercising apparatus through the medium of an automaton or human being, might be brought within the meaning of "exhibition"; but, as used in the ordinance, it will be held to relate only to entertainments where the exhibition itself is the principal thing, and from which the exhibitor derives or expects to derive profit, so that exhibi-

tions given for the purpose of effecting sales of a book are not within the provisions of the ordinance. *People v. Royal*, 48 N. Y. Supp. 742, 743, 23 App. Div. 258.

The playing of a piano in a saloon furnished with a stage does not constitute an "exhibition," within the meaning of New York City Charter, § 1472, prohibiting exhibitions unless licensed. "The word 'exhibition,' as so used, relates to the classes of public exhibitions usually conducted or produced upon a stage, at which the public attend for the purpose of seeing the exhibition, and not to a case where music is performed as a mere incident to any business, where no admission fee is charged, and where in fact there is no exhibition. Taking, for instance, the case of a hotel or any other business, where incidental music is performed to attract customers or to entertain them while upon the premises, it would seem to be quite clear that that was not an exhibition of minstrelsy or other entertainment of the stage." *People v. Campbell*, 65 N. Y. Supp. 114, 115, 51 App. Div. 565.

"Exhibitions for gain," as used in an ordinance providing for the licensing and taxing of all public exhibitions for gain, and declaring that a license fee should be paid by circuses, menageries, etc., and all other exhibitions, etc., not here enumerated, given in an inclosure, should be construed to include horse races given in a fenced inclosure, to which spectators were admitted for pay. *Webber v. City of Chicago*, 36 N. E. 70, 148 Ill. 813.

"Exhibitions of minstrelsy," as used in Laws 1872, c. 836, enacted to regulate places of amusement in New York City, include a performance consisting of songs, glees, recitations, selections from operas and oratorios, and solos, trios, and quartets of various musical instruments. *Society for the Reformation of Juvenile Delinquents v. Neusbach* (N. Y.) 16 Wkly. Dig. 349.

#### EXHIBITS.

An exhibit is a paper referred to in and filed with the bill or answer in a suit in equity. It is said in 1 Daniell, Ch. Prac. 475, 476, "that, in stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself in some such words as the following, viz.: 'As in and by the said indenture, reference being thereunto had when produced, will more fully and at large appear.' The effect of such a reference is to make the whole document referred to part of the record. It is to be observed that it does not make it evidence. In order to make a document evidence, it must, if not admitted, be proved in the usual way. But the effect of referring to it is to enable the plaintiff to rely

upon every part of the instrument, and to prevent his being precluded from availing himself at the hearing of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus it seems that a plaintiff may by his bill state simply the date and general purport of the deed under which he claims, and that such statement, provided it be accompanied by a reference to the deed itself, will be sufficient." It is this sort of a reference to a writing which makes this writing become an exhibit. The sole office, then, of an exhibit—of making a writing become an exhibit—is to help out a pleading; to help out allegations in a bill or answer, in case it should be found on the trial that such allegations do not give some needed particulars of the writing, or do not give the writing with accuracy. It is no part of that office to convert into evidence the writing made an exhibit of, or to be a prerequisite to the admission of the writing as evidence. If the writing is made an exhibit of, still it must (unless admitted) be proved; if proved, but not made an exhibit of, still, if in itself legal, and if adapted to the allegations, such as they may be, it is to be received as evidence. *Brown v. Redwyne*, 16 Ga. 67, 72.

A reference in a plea to a writing makes the writing become an exhibit. The sole office of an exhibit is to help out a pleading; to help out allegations in a bill or an answer. It is no part of that office to convert into evidence the writing made an exhibit of, or to be a prerequisite to the admission of the writing as evidence. An exhibit, therefore, is a thing belonging to pleadings, and not to the evidence. *Brown v. Redwyne*, 16 Ga. 67, 72.

The production and proof of a paper before an examiner makes it an exhibit, though the examiner may have failed to mark it as such. *Commercial Bank of Buffalo v. Bank of State of New York* (N. Y.) 4 Hill, 519.

Where a coupon for \$15, taken from a town bond for \$500, was a mere incident of the bond, so that, in an action on the bond, plaintiff could not make a prima facie case without showing that the bond was valid, certified copies of certain instruments by which the town proceeded in issuing the bonds were an "exhibit," within the meaning of St. 1876, No. 64, providing: "When neither the ad damnum in the plaintiff's writ . . . nor the specifications or exhibits of the plaintiff on trial shall exceed \$20, no appeal shall be allowed." *Town of Concord v. National Bank of Derby Line*, 51 Vt. 144, 147.

"Exhibits," as used in an order of the court transmitting on appeal of a suit to enjoin use of a patented article the original exhibits, patent, certificates, schedules, draw-

ings, and models on file along with and as part of the record and transcript, was not used in the sense that affidavits were exhibits, though attached as such to the bill of review and answer. The evident purpose of the court was not to send the original affidavits, or what was to be read simply, but what was to be looked at, for the impression it was to produce. The court ordered up what had been exhibited, as contradistinguished from what had been read, and, of course, such original affidavits were no part of the transcript in the cause. *Craig v. Smith*, 100 U. S. 226, 232, 25 L. Ed. 577.

When blood-stained garments have been introduced in evidence on a trial for murder, they, as well as documents, papers, etc., are included among exhibits. *People v. Hughson*, 47 N. E. 1092, 1096, 154 N. Y. 153.

## EXIST.

Under Code, § 3025, wherein it is enacted that but one execution shall be in "existence" at the same time, it was held that to "exist" means to live, to have life or animation, and an execution has existence until it is returned. *Merritt v. Grover*, 10 N. W. 879, 880, 57 Iowa, 493.

## EXISTENCE.

An instruction that "the existence of such theory must be established by the plaintiff conclusively" means that the correctness of the theory must be so established. *Silver Min. Co. v. Fall*, 6 Nev. 116, 121.

A question to the jury as to whether plaintiff knew of the "existence and location" of a cattle chute in question, referred to the exact location. If the question had been confined to the "location" with reference to the track, it might be held that the question called only for his knowledge of the general relation of the chute to the track. Both words being used in the question, each must be taken in a different sense from the other; both words implying a greater extent of knowledge than either alone. *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis. 583, 603.

## EXISTING APPRAISAL.

Act July 18, 1876 (Pub. St. c. 53, § 7), providing that the assessors shall in the month of April in each year reappraise all such real estate as has changed in value in the year next preceding, and correct all errors in the then existing appraisal, does not authorize them to disturb the valuation as established by a judgment of the appellate court; it being held that such judgment is not a then existing appraisal, within the

meaning of the act. *Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. City of Laconia*, 35 Atl. 252, 68 N. H. 284.

### EXISTING CONTRACT.

An "existing contract," within the provision that, whenever any payment of principal or interest has been made or shall be made upon an existing contract, etc., if such payment be made after the same becomes due, limitation shall commence from the time the last payment was made, is one which has not been barred by the statute of limitations. *Whitaker v. Rice*, 9 Minn. 13, 18 (Gil. 1, 8), 86 Am. Dec. 78.

### EXISTING CREDITOR.

Code, § 1923, providing that sales of personalty shall be void as against existing creditors, unless there be a change of possession, bill of sale recorded, or notice given, does not mean only those who were creditors when the sale was made, but applies equally to those who became such before possession was changed, the bill of sale recorded, or notice given. *Fox v. Edwards*, 38 Iowa, 215; *Goll & Frank Co. v. Miller*, 54 N. W. 443, 445, 87 Iowa, 426; *McAfee v. Busby*, 28 N. W. 623, 624, 69 Iowa, 328.

### EXISTING DEBT.

The term "existing debt," within the meaning of Pub. St. c. 155, §§ 11, 12, providing that, upon the failure of a manufacturing corporation to file a statement of its condition, the stockholders shall be liable for any debt then existing, does not include their liability under a contract for the purchase of goods to be delivered in the future, the price therefor to be paid on delivery. *Wing v. Slater*, 35 Atl. 302, 304, 19 R. I. 597, 33 L. R. A. 566.

"Existing debts," within the meaning of the rule of evidence that it will be presumed that, when one owing existing debts gives his property away, it is with the intention of defrauding his creditors, cannot be construed to include an accommodation indorser of a note before the maturity of the note. *Severs v. Dodson*, 34 Atl. 7, 8, 53 N. J. Eq. (8 Dick.) 633, 51 Am. St. Rep. 641.

### EXISTING ESTATE.

"Existing estates," as used in Wag. St. c. 698, § 7, providing that a homestead shall be subject to attachment and levy of execution upon all causes of action existing at the time of acquiring such homestead, except that in cases of existing estates such homestead shall not be subject to attachment or levy of execution upon any liability thereafter created, means estates existing at the time of the passage of the act, free from the

payment of debts contracted after the passage thereof, and estates acquired subsequent to the passage of the act, free from liability for debts contracted after the date of filing for record the deed creating the estate. *State ex rel. Meinzer v. Diveling*, 66 Mo. 375, 379.

### EXISTING LAWS.

"Existing laws," as used in 1 Rev. St. 1852, c. 92, providing that all crimes and misdemeanors committed under existing laws shall be punished in the same manner and to the same extent as if such laws had not been repealed, "refers to the laws in existence at the time of the passage of the act." *Lawrie v. State*, 5 Ind. 525, 526.

Act Ind. April 7, 1881, declaring that actions on contracts for the payment of money, hereafter executed, shall be brought within a certain time, provided that all such contracts as have been heretofore executed may be enforced within such time only as they have to run, before being barred under the "existing law," applies to laws existing when the contract was made, and not when the action was brought. *McKean v. Archer* (U. S.) 52 Fed. 791.

The term "existing laws," in Acts 1879, p. 145, declaring that, against intruders and tenants holding over, the officer who executes process under "existing laws" shall give three days' notice to the tenant before evicting him, includes a local law only applicable to a certain city. *Millen v. Guerrard*, 87 Ga. 284, 325, 44 Am. Rep. 720.

The clause of Const. 1870, declaring that no county, city, town, township, or other municipality shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to or loan its credit to such corporation, but providing that the clause shall not defeat the right of any municipality to make such subscriptions where the same have been authorized "under existing laws" by the vote of the people prior to the adoption of the constitutional provision, meant under laws existing at the time of the adoption of the Constitution, rather than to the time when the vote of the people was taken. *City of Jonesboro v. Cairo & St. L. R. Co.*, 4 Sup. Ct. 67, 70, 110 U. S. 192, 28 L. Ed. 116.

The words "existing laws," as used in the statutes of Georgia relating to attachment, and providing that a judge may grant an attachment in the usual form and direct it as usual, which shall be executed as existing laws provide, and subject to existing laws as to traverse, reply, demurrer, and other modes of defense, mean the laws existing at the time the attachment is sued out. *Curtis v. Wortsman* (U. S.) 26 Fed. 36, 37.

**EXISTING LIEN.**

"Existing lien," as used in a statute providing that no mechanic's lien shall take priority over any existing lien, relates to the time when the work is begun. *St. Louis & P. R. Co. v. Kerr*, 38 N. E. 638, 641, 153 Ill. 182.

**EXISTING PERSON.**

A child conceived, but not born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth. *Rev. Codes N. D. 1899*, § 2700.

**EXISTING RIGHT.**

"Existing," as used by a court in stating that the statute relating to the property and estate of a bankrupt which vests in his trustee refers only to "existing" rights, could only appropriately be employed in that connection to designate and restrict the character and quality of the right which alone could pass to the assignee. The meaning of the court is identical with the meaning of the language—a right in being. *Godwin v. Banks*, 40 Atl. 268, 273, 87 Md. 425.

The "existing rights of others" from prior occupation, which are not to be interfered with in operating mines found in lands belonging to the states, and claimed and worked, means prior rights by occupation under local rules, before any title has passed from the government. *Silver Bow Min. & Mill. Co. v. Clark*, 5 Pac. 570, 577, 5 Mont. 378.

**EXISTING SETTLEMENT.**

St. 1874, c. 274, § 3, relating to the settlement of paupers and providing that no "existing settlement" shall be changed by any provision of this act, unless the entire residence and taxation herein required accrues after its passage, means the settlement which existed at the time the statute took effect. *Worcester v. Great Barrington*, 5 N. E. 491, 492, 140 Mass. 243.

**EXITS.**

Where a complaint alleged that plaintiffs were entitled to "certain entrances and exits" on certain land, such phrase might mean doors, or gates, or passages, or a mere right of way; and hence an action of ejectment or forcible entry and detainer would not lie to enforce such a right, since, being incorporeal, it could not be delivered by the sheriff. *Roberts v. Trujillo*, 1 Pac. 855, 856, 8 N. M. (Johns.) 50.

**EXONERATE—EXONERATION.**

Exoneration is "the state of being disburdened or freed from a charge." It is

something that is supposed to take place after a charge has been made. *Louisville & N. R. Co. v. Commonwealth*, 71 S. W. 910, 916, 24 Ky. Law Rep. 1779.

In a statute ceding land to the United States, the provision that "the same shall be exonerated from all taxes, assessments, and other charges which may be levied or imposed under the authority of the state," the term "exonerated" was employed in its ordinary acceptation—"to be relieved of, as a charge; to be discharged or exempted." *Bannon v. Burnes* (U. S.) 39 Fed. 892, 898.

**EXPATRIATE.**

To expatriate is to leave one's country and renounce allegiance to it, with the purpose of making a home and becoming a citizen in another country. It includes more than a change of domicile, and it is not accurate to say that a man has expatriated himself with the design of changing his residence. A person left his native country in search of employment and fortune. He found employment in a South American country and established himself there in business. He married and had children, and after that he looked forward constantly to a return to his native country, the United States. The son, though born in the foreign country, was a citizen of the United States, entitled to inherit, in New York. *Ludlam v. Ludlam* (N. Y.) 31 Barb. 486, 489.

**EXPECT.**

The word "expect" is defined as follows: "To look for (mentally); to look forward to, as to something that is believed to be about to happen or come." *Atchison, T. & S. F. R. Co. v. Hamlin*, 73 Pac. 58, 60, 67 Kan. 476.

The word "expects," as used in a letter offering employment on board a boat in the process of construction, which is accepted, and which states that the writer "expects" the boat to be out by a certain time, cannot be construed to be a warranty that the boat would be out by that or any other time. *Johnson's Adm'r v. McCune*, 27 Mo. 171, 173.

Where a broker made the following bought and sold note: "We have this day bought for your use certain goods \* \* \* above, to be delivered from the Charlotte, expected to arrive about November or December"—the words "expected to arrive" were a representation, and no part of the contract, though, if they were false, the contract would be void. *Bold v. Raynor*, 1 Mees. & W. 343, 347.

In Code Civ. Proc. § 870, authorizing the taking of the deposition, before action, of a person whom the moving party expects to



make a party to an action, includes persons whom the moving party intends to make parties if the facts discovered will authorize him in so doing. *In re Darling*, 64 N. Y. Supp. 793, 794, 31 Misc. Rep. 543.

### EXPECTANCY.

An expectancy is a chance or hope unfounded in any limitation, provision, trust, or legal act whatever, such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility, and at other times less than a possibility. It is a possibility in the popular sense of the term; but it is less than a possibility in the specific sense of the term "possibility," because in the case of a near expectancy nothing has been done to create an obligation in any event, and where there is no obligation there can be no right, for "right" and "obligation" are correlative terms.—*Jeffers v. Lampson*, 10 Ohio St. 101, 106.

Expectancy is the bare hope of succession to the property of another, such as may be entertained by an heir apparent. Such a hope is inchoate. It has no attribute of property, is without appreciable value, and the interest to which it relates is nonexistent and may never exist. *In re Robbins' Estate*, 49 Atl. 233, 199 Pa. 500.

### EXPECTANCY OF A RENEWAL.

The term "expectancy of a renewal," in the law of landlord and tenant, "has been deemed a species of property in the lessee, and a copartner or one standing in any fiduciary capacity is not permitted to profit by taking a renewal in his own name while this expectancy exists. But the rule ceases to operate when such expectancy no longer exists. It will hardly be claimed that a landlord may not exercise his own discretion in the selection of a tenant. He may or may not renew, as he chooses. When once he has declared against renewal, the tenant then in occupation has no more an expectancy which can be dealt with. Whoever thereafter leases does the tenant no injury, and takes from him no property or property rights. I see no reason in law or equity in excluding a copartner or a director in a corporation from dealing with the landlord in that respect to the premises after a renewal to the occupying tenant has been refused by the landlord." *Crittenden & Cowles Co. v. Cowles*, 72 N. Y. Supp. 701, 702, 66 App. Div. 95.

### EXPECTANT ESTATE.

An estate in expectancy arises where the right to the possession is postponed to a future period. *Comp. Laws Mich.* 1897, § 8790; *Gen. St. Minn.* 1894, § 4369; *Fenton*

*v. Miller*, 108 Mich. 246, 247, 65 N. W. 966; *Sage v. Wheeler*, 37 N. Y. Supp. 1107, 1108, 3 App. Div. 38; *In re Seaman's Estate*, 41 N. E. 401, 403, 147 N. Y. 69.

Estates in expectancy are divided into two classes: Future estates, and reversions. *Rudd v. Cornell*, 68 N. Y. Supp. 757, 763, 58 App. Div. 207; *Hennessy v. Patterson*, 85 N. Y. 91, 100; *In re Mericio*, 63 How. Prac. 62, 66; *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468.

An estate in expectancy is an estate giving a present or vested contingent right of future enjoyment; one in which the right to permanency of the profits is postponed to some future period. Such are estates in remainder and reversion. *In re Mericio* (N. Y.) 63 How. Prac. 62, 66; *Ayers v. Chicago Title & Trust Co.*, 58 N. E. 318, 324, 187 Ill. 42.

The term "expectant estates" includes every personal right or interest, either vested or contingent, which may by possibility vest in possession at a future date. *Lawrence v. Bayard* (N. Y.) 7 Paige, 70, 76.

An "expectant estate" is a future estate, limited to commence in possession at a future day, on the determination by lapse of time or otherwise of a precedent estate, created at the same time. It is also a contingent future estate, if the event upon which it is limited to take effect remains uncertain and may never occur. *Greyston v. Clark* (N. Y.) 41 Hun, 125, 130.

Though "expectant estates," within the meaning of the statute providing that expectant estates are descendible, devisable, and alienable in the same manner as estates in possession, include every present right and interest, either vested or contingent, or which may by possibility vest at a future day, yet they do not include the mere possibility of a reverter which the grantor has after he has conveyed in fee on condition subsequent. *Uplington v. Corrigan*, 45 N. E. 359, 360, 151 N. Y. 143, 37 L. R. A. 794.

The term "estate in expectancy," within the meaning of Inheritance Tax Law 1895, § 1, includes remainders created by a will in which the testator leaves an estate to a trustee for the use of his wife and child for life, and directs that on their death the remainder shall go to such trustee, to be divided according to the inheritance laws. *Ayers v. Chicago Title & Trust Co.*, 58 N. E. 318, 324, 187 Ill. 42.

### EXPECTANT HEIR.

An expectant heir is an heir expecting an inheritance from intestacy or devise. *Whelan v. Phillips*, 25 Atl. 44, 47, 151 Pa. 312.

The phrase "expectant heir" is used, not in its literal meaning, but as including every

one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative. More than this, the doctrine as to expectant heirs has been extended to all reversioners or remaindermen. A legatee whose legacy is not to be paid for several years is not an expectant heir. *Wells v. Houston*, 57 S. W. 584, 598, 23 Tex. Civ. App. 629 (citing 5 Am. & Eng. Enc. Law [2d Ed.] 764).

### EXPECTANT RIGHT.

Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend on the continued existence of the present condition of things until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed, until some other event may prevent their vesting. *Pearsall v. Great Northern R. Co.*, 16 Sup. Ct. 705, 713, 161 U. S. 646, 40 L. Ed. 838.

### EXPECTATION.

See "Reasonable Expectation."  
As vested right, see "Vested Right."

The word "expectation," as used in a will wherein testator makes a devise and thereafter expresses a wish as to the disposition of the property or fund, is a precatory word, sufficient to create a trust in the property devised. *Curd v. Field*, 45 S. W. 92, 103 Ky. 293.

### EXPEDITION.

See "Military Expedition or Enterprise."

An expedition is a march or a voyage with martial intentions. *United States v. Burr*, 25 Fed. Cas. 187, 198.

### EXPEL

See, also, "Expulsion."

In the by-laws of an association of master plumbers, providing that members should be expelled if they should deal with a wholesale dealer or manufacturer selling directly to customers not dealers at a point where a

member of the association was doing business, "expelled" means simply that they cease to be members. *Macaulay v. Tierney*, 33 Atl. 1, 4, 19 R. I. 255, 87 L. R. A. 455, 61 Am. St. Rep. 770.

The words "ejected, expelled, put out, and removed," relating to trespass, may be satisfied under some circumstances by proof that the house was destroyed in the plaintiffs' absence, and by their being prevented from returning to it and re-entering it, because finding it existing no longer as a habitable house, but not so where the pulling down and expelling was contemporaneous. *Perry v. Fitzhowe*, 8 Q. B. 757, 779.

"Expel" ordinarily means to drive or force out, or eject, so that an allegation in a complaint that defendant "expelled" plaintiff from his dancing hall impliedly means that defendant not only deprived plaintiff of his right, but with indignity and disgrace put him out of the hall, where he had a right to be. *Smith v. Leo*, 36 N. Y. Supp. 949, 92 Hun, 242.

### EXPENDED.

Where defendant had given a bond to convey a tenth of a tract of land, and plaintiffs had agreed to build a dam on such tract, and that all moneys expended for defendant were to go toward the payment of such tenth, the term "moneys expended" did not embrace claims for services or moneys expended prior to the date of agreement. *Littelfield v. Winslow*, 19 Me. (1 App.) 394.

### EXPENDITURE.

See "Extraordinary Expenditures"; "Ordinary Expenditures."

Laws 1844, c. 128, § 10, providing that the state may at any time after 20 years resume the right and privilege of the corporation in a railroad on giving one year's notice and paying to the corporation all it may not have received of its expenditures, does not mean cost of construction, but means what had been expended by the stockholders. *State v. Manchester & L. R. R.*, 48 Atl. 1103, 1105, 70 N. H. 421.

In its ordinary meaning "expenditure" means payment. Such is its meaning in Greater New York Charter, § 419, providing that no expenditure for work or supplies, involving an amount for which no contract is required, shall be made, except the necessity therefor be certified to by the head of the appropriate department, and the expense has been duly authorized and appropriated. *People v. Kane*, 61 N. Y. Supp. 195, 198, 43 App. Div. 472.

**EXPENSES.**

See "Actual Expenses"; "Annual Expense"; "Family Expense"; "Joint Expense"; "Contingent Expense"; "Current Expenses"; "Funeral Charge or Expense"; "Incidental Expenses"; "Individual Expenses"; "Last Sickness Expenses"; "Necessary Expenses"; "Operating Expenses"; "Ordinary Current Expenses"; "Ordinary Expenses"; "Personal Expenses"; "Private Expenses"; "Reasonable Expenses"; "Township Expenses"; "On Expense."

The word "expense" may be defined as a disbursement of money; but it is as well "the employment and consumption of time and labor." *Matthews & Willard Mfg. Co. v. Trenton Lamp Co. (U. S.)* 73 Fed. 212, 215 (citing Cent. Dict.).

**Of administration.**

"Expenses," as used in the term "expenses of administration," which the temporary administrator is entitled to charge against the estate, do not include counsel fees against a proponent of a will on an issue of *devisavit vel non*. *Lester v. Mathews*, 58 Ga. 655, 656.

Services rendered and money advanced at the request of an administrator for the benefit of an estate are expenses of administration. *Gurnee v. Maloney*, 38 Cal. 85, 99 Am. Dec. 352.

"Expenses of administration," as used in a statute requiring an administrator to itemize the expenses of administration, does not include the expenses in carrying on an unauthorized business with the estate funds. In *re Rose's Estate*, 22 Pac. 86, 87, 80 Cal. 166.

**Of attorney.**

Under a contract with an attorney for a contingent fee, providing that, in the event of a recovery, the necessary expenses of the attorney are to be first paid, and his fee to be estimated on the balance, the fees of assistant counsel employed by the attorney cannot be deducted as expenses. *Whitlow's Adm'r v. Whitlow's Adm'r*, 60 S. W. 182, 184, 109 Ky. 573.

Where a power of attorney provided that the attorney was to account for one-half of the proceeds from the sale of the land authorized by the power, after deducting necessary expenses, the mention of the word "expenses" was not in the way of obligation on the attorney to incur any, but was in connection with his compensation, and in measuring that he was to have one-half of the net proceeds of sales after deducting necessary expenses therefrom. *Walker v. Denison*, 86 Ill. 142, 145.

**Of board of health.**

"Expenses," as used in an act appropriating money for salaries and expenses of the national board of health, means those expenses which are necessarily incident to the work directed to be done, including payment for clerk hire or office rent. *Dunwoody v. United States*, 22 Ct. Cl. 269, 278.

**Of bringing criminals to trial.**

"Expenses," as used in a statute authorizing the Commissioner of Internal Revenue to pay necessary "expenses" for bringing to trial persons violating the internal revenue law, indicates expenditure, outlay, the disbursement of money, and the payment of a price, and is broad enough to sustain an offer of a reward for information leading to the forfeiture of illicit distilleries. *Williams v. United States*, 12 Ct. Cl. 192, 199.

**Of business.**

"Expenses," as used in a partnership agreement between parties associated in trade, providing that one partner shall have a certain share of the profits arising from the sale of goods after deducting the actual "expenses that may appertain to the goods themselves," includes taxes, clerk hire, and advertising, as well as expenses for storage, commissions, or insurance. *Foster v. Goddard*, 66 U. S. (1 Black) 506, 17 L. Ed. 228.

A contract whereby H. was to permit S. to cut timber on a certain piece of land, S. to pay certain notes and indebtedness of H., and H. was to advance all moneys needed to pay the expenses of cutting and marketing such timber, and to apply the proceeds of the sale to the repayment to himself of the expenses advanced, is not to be construed to include moneys expended in discounts for loans obtained by H. for the purpose of advancing the money necessary to pay the expenses of cutting and marketing the timber. *Stocker v. Hutter*, 19 Atl. 427, 428, 134 Pa. 19.

**Of city.**

The fitting up of two small and inexpensive rooms for the city clerk and an engine house, necessary to the administration of the city affairs and incidental to the city government, are properly embraced within the ordinary and necessary "expenses" of the city, for which a tax may be levied. *City of Rome v. McWilliams*, 87 Ga. 106, 109.

**In commutation of tithes.**

"Expenses," as used in St. 6 & 7 Wm. IV, c. 71, § 75, relating to proceedings by landowners of the parish toward a commutation of the tithes, and enacting that all expenses incident to making any apportionment shall be paid by the landowners in ratable

proportions of their rent charge, means incidental expenses arising in the cost of the survey and valuation themselves, and would not include expenses incurred by the employment of an attorney. *Hinchliffe v. Armitstead*, 9 Mees. & W. 155, 160.

#### Of corporation.

In a statute providing that trustees of a corporation may collect assessments for the purpose of paying the proper and legal expenses of the corporation, the word "expenses" signifies not only the cost of contemplated services and material, but also the charges for such as have been performed or furnished, and where, if these charges were not paid, a debt was created. Whether paid or not, they are properly denominated as "expenses." The word includes debts which have been incurred as well as costs and charges of the contemplated business and operations of the corporation. *Sullivan v. Triunfo Gold & Silver Min. Co.*, 39 Cal. 459, 467.

In a resolution of a corporation that all reasonable expenses of a committee of the corporators should be paid, this was not limited to cash expenditures, but extended also to personal services. *Hall v. Vermont & M. R. Co.*, 28 Vt. (2 Williams) 401, 402.

#### Of courts.

The term "expenses of courts," in the constitutional provision relative to the payment of expenses of courts, does not include the publication of the general presentments of the grand jury. *Houston County v. Kersh*, 10 S. E. 199, 82 Ga. 252.

The term "expenses of court," in Const. art. 7, § 6, par. 2, providing that the Legislature shall not have power to delegate to a county the right to levy a tax for any purpose, except expenses of courts, etc., does not include insolvent costs due to a Solicitor General; and therefore the Legislature cannot authorize the county to levy such a tax. *Adair v. Ellis*, 10 S. E. 117, 83 Ga. 464.

"Expenses of courts," as used in Const. 1877, art. 7, § 6, par. 2, prohibiting counties from exercising the tax power, except, among other things, to raise funds for the payment of "expenses of courts," should be construed to include the insolvent costs due the Attorney General, which were recommended by the grand jury to be paid. *Adam v. Wright*, 11 S. E. 893, 895, 84 Ga. 720.

#### Of division fence.

The term "expense," in Rev. St. § 1397, requiring the fence viewers to examine a division fence and ascertain the expense thereof, is not synonymous with the word "value," and therefore a certificate certifying the value of building such fence is not a compliance with the statute. *Voelz v. Breitenfeld*, 32 N. W. 757, 759, 68 Wis. 491.

#### Of estate.

"Expenses," as used in a will, wherein testator directs that all his just debts and "expenses" be paid by his executors out of the property given them, means expenses incurred in the settling of the estate, and cannot signify expenses during the lifetime of the testator. In *re Haines' Ex'rs*, 8 N. J. Eq. (4 Halst. Ch.) 506, 510.

The word "expenses" in a disposition of testator's estate, after all expenses and funeral expenses be paid, is to be construed in connection with the associated words "funeral expenses," and means expenses of kindred character, such as expenses incurred for medical attendance, nursing, etc. In *re Shubart's Estate*, 26 Atl. 202, 205, 154 Pa. 230.

#### Of importation.

A contract to take one-half of a quantity of onions to be imported and to pay one-half of all actual expenses advanced by the importer should be construed to include money paid for a fine for undervaluation or for an additional duty, as well as the regular import duties. *Seggermann v. Valentine*, 19 N. Y. Supp. 711, 61 N. Y. Super. Ct. (29 Jones & S.) 248.

#### Of insurance company.

In a contract to run the entire business of an insurance company as sole manager, and to take 20 per cent. of the gross premiums received, pay all expenses of the company, and retain the balance thereof for his compensation, "expenses" means everything paid out in the course of the business for the purpose of running it, and all costs, outlays, and charges incident to its maintenance and prosecution. *Prima facie*, everything which the company would have had to pay out in the prosecution of the business in the ordinary way was a part of its expenses. Taxes are a part of such expenses, due annually as part of the price of doing the business, just as a license fee would be in the case of auctioneers or dealers, within the license tax statutes. *Kane v. Schuylkill Fire Ins. Co.*, 48 Atl. 989, 199 Pa. 205.

#### Of invention.

"Expense," as used in a statute authorizing the issuance of a design patent to any person who by his own genius, efforts, industry, and expense has invented, etc., is not limited to mere disbursements of money, and does not prevent the granting of a patent to one who, while in the employ of another, invents a design, especially where it does not appear that no expense was necessary in producing the design. *Matthews & Willard Mfg. Co. v. Trenton Lamp Co.* (U. S.) 73 Fed. 212, 215.

#### Of legal proceeding.

"Expenses," as used in an act authorizing the court in partition to tax all costs

and expenses, embrace those charges included in the proceeding to obtain partition which are not included in the word "costs." That includes the charges of officers and persons whose services are required, and whose fees therefor are fixed by law; and where no law has been passed specially fixing the fees either of the sheriff, the freeholders, or the surveyors for performing the services required of them in making partition of the real estate, they should be included, but attorney's fees should be excluded. *Swartzel v. Rogers*, 3 Kan. 380, 382.

Where a bill is filed by a debtor, as trustee for his children, to enjoin judgment debtors, some of whom have levied upon his property, and a fund is brought into court for equitable distribution, and an order is entered for the payment of "costs and expenses" out of such fund, fees of counsel are not included in the term. *Ball v. Vason*, 56 Ga. 264.

"Expenses," as used in a receipt given by plaintiff to defendant on payment of a less sum than was due and "all of the expenses, if any, in the case," may have at least two meanings; the one including the costs or taxable expenses, and the other the extraordinary costs also, such as agent's and attorney's fees. *Kohn v. Zimmerman*, 34 Iowa, 544, 545.

The word "expense" means expenditure, outlay, or disbursement of money. 12 Am. Eng. Enc. Law (2d Ed.) 394; Cent. Dict. The word is sufficiently broad, as used in a mortgage to secure the payment of all costs and expenses incurred in a certain action, to include attorney's charges, if the parties so intended at the time of giving of the mortgage; and parol evidence is admissible to show such intention. *Bowery Bank of New York v. Hart*, 75 N. Y. Supp. 781, 782, 37 Misc. Rep. 412.

#### **Of lighting street.**

Act 1867, providing that the common council of a city shall have the power to regulate the lighting of streets, etc., and to provide by ordinance what part, if any, of "the expense of lighting any street," shall be paid by the owners of lots fronting thereon, etc., refers only to the expense of lighting after the fixtures are up. *Nelson v. City of Laporte*, 33 Ind. 258, 261.

#### **Of maintaining minister and worship.**

A will which directed certain sums to be invested, and that "the interest thereon and income thereof should be applied towards defraying the expenses of maintaining a minister and public worship as herein expressed," includes not only the expenses incurred in paying for the services of the minister, but also in paying for the services of the sexton, who has care of the chapel, and for fuel

used therein. *Attorney General v. Union Society*, 116 Mass. 167, 168.

#### **Of mandatory.**

Rev. Civ. Code, art. 3022, requires a principal to reimburse the expenses and charges which his agent has incurred in the execution of a mandate, and pay his commission where one has been stipulated. Article 3023 provides that the mandatary has a right to retain out of the property of the principal in his hands a sufficient amount to satisfy his expenses and costs. Held, that the term "expenses and costs" cover the stipulated commissions, salaries, or fees of the mandatary. *Butchers' Union Slaughterhouse & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughterhouse Co.*, 6 South. 508, 512, 41 La. Ann. 355.

#### **Of merchant in charter party.**

"Expense of merchant," as used in a charter party providing that the cargo is to be brought to and taken from alongside at the merchant's risk and expense, free of lighterage to the ship, etc., "and being so loaded shall therewith proceed," includes the cost of lighterage at the ports of both departure and destination. *Carr v. Austin & N. W. R. Co.* (U. S.) 14 Fed. 419.

#### **Of mortgage sale.**

"Expenses for the sale," as used in a chattel mortgage providing for the payment out of the proceeds of the sale of mortgaged property of all expenses for the sale, includes only such expenses as are incurred in doing such things as form part of the proceedings of sale. They include the expense of a copy of the mortgage, of taking the mortgaged property, of giving notice of sale, and of conducting and completing the sale. They do not include the mortgagee's expenses incurred in placing the copy in a sheriff's hands or in attending the sale. *Ferguson v. Hogan*, 25 Minn. 135, 140.

"Expenses," as used in a mortgage containing a power of sale, and authorizing the mortgagee to pay out of the proceeds all "expenses" incident to such sale, cannot be construed to include commissions to the mortgagee on the sale. In making the sale the mortgagee is acting for his own interest. In making the sale he is entitled to all expenses which were reasonably necessary and proper to enable him to make an advantageous sale. For instance, he ought to be allowed the services of an auctioneer, and the cost of advertising, and of other reasonable methods of obtaining an adequate price for the property. Such expenses as these may be justly considered as incident to the sale. *Johnson v. Glenn*, 30 Atl. 993, 80 Md. 369.

"Expenses of sale," as used in a mortgage containing a power of sale, and which

provides for the payment of the expenses of sale, does not include attorney's fees. *Thomas v. Jones*, 4 South. 270, 84 Ala. 302.

#### Of obtaining patent.

In a contract, one of the provisions of which was: "It is further agreed that, should the entire cost of obtaining patents of Handford prove to be less than \$1,000, then in that event the said company shall return all excess over and above the actual amount of expense incurred by said R. in obtaining for said company said Handford patents," etc., "expense" includes not only the payments to the inventor, to the patent solicitor, and counsel fees, but would also include all other necessary expenses incurred in transacting the business relative to obtaining the patent. *Chemical Electric Light & Power Co. v. Howard*, 20 N. E. 92, 99, 148 Mass. 352, 2 L. R. A. 168.

#### Of preparing and printing burgess list.

In St. 5 & 6 Wm. IV, c. 76, § 92, by which the borough fund is chargeable with the salaries of the town clerk and with the payment of the expenses incurred in preparing and printing the burgess list, "expenses" means only the disbursements, and does not include any compensation to the town clerk for his trouble or loss of time. *Jones v. Borough of Carmarthen*, 8 Mees. & W. 605, 614.

#### Of road or street.

Expenses which a town, applying to the county commissioners to locate a new road within the town, is obliged to pay, include the damages occasioned to the owners of land by such location. *Damon v. Inhabitants of Reading*, 68 Mass. (2 Gray) 274, 276.

"Expense," as used in Pub. St. c. 49, § 13, wherein it is made the duty of commissioners, on the laying out of a street, to assess the expense upon the abutting owners, includes damage to them. *Brigham v. Worcester County*, 18 N. E. 220, 221, 147 Mass. 446.

Charges for establishing the grade, for advertising and surveying, and a reasonable commission for collecting the tax, are included within the term "expenses," as used in Act 1870, authorizing the assessment for the cost and expenses of certain paving done in the city. *Dashiell v. City of Baltimore*, 45 Md. 615, 631.

The Hoboken city charter (Laws 1855, p. 475) provides that, on the changing of the grade of a street, the expenses of such improvements, when completed, shall be ascertained and assessed by commissioners, who shall examine into the whole matter and report what real estate ought to be assessed. Held, that the phrase "expenses of such improvements" did not comprehend the as-

essment of damages to the land owner, but means the actual working on the street in grading. *Vorrath v. City of Hoboken*, 8 Atl. 125, 127, 49 N. J. Law (20 Vroom) 265.

#### Of selectmen.

The word "expenses," as used in a city charter providing that the selectmen shall receive a certain sum per hour for the time spent in their duties and their necessary expenses, means something due to the selectman for money paid by him or debt incurred by him necessarily in the performance of his duty. *Heublein v. City of New Haven*, 54 Atl. 298, 299, 75 Conn. 545.

#### Of supporting prisoners.

"Expense" means that which is spent, money expended, and, as used in Laws 1892, c. 686, providing that the expense necessarily incurred in support of persons charged with or convicted of crime will be a county charge, means the actual moneys expended for such purposes, and will not include the care and trouble of the sheriff in looking after the prisoners, or in feeding them. *People v. Board of Sup'rs of Saratoga County*, 60 N. Y. Supp. 1122, 1127, 45 App. Div. 42.

#### Of traveling salesman.

The word "expenses," in a contract of employment of a traveling salesman for a certain salary per annum and allowance of expenses, not to exceed five dollars per day, was construed not to include the living expenses of the salesman. *Dowd v. Krall*, 65 N. Y. Supp. 797, 82 Misc. Rep. 252.

#### Of trust.

Under a deed creating a trust and allowing the trustee reasonable expenses, if the nature of the trust and the circumstances require it, the word "expenses" would embrace, even without express provision, the fees of an attorney necessarily employed. *Brady v. Dilley*, 27 Md. 570, 582.

"Expenses," within the provision of a will creating a trust and providing for payment of proper expenses and charges out of the rents and profits, referred, not to the compensation of the trustee, but to necessary disbursements in administration. *Greer v. Greer* (N. Y.) 5 Redf. Sur. 214, 215.

#### Of writing risk.

"Expenses of writing the risk," as used in a fire insurance policy providing that the insurance might be terminated at the request of the insured by repaying the company the customary short rates from the date of the policy, together with the "expenses of writing the risk," means the expense of writing the policy, together with the commission paid by the company to its agent. *State Ins. Co. v. Horner*, 23 Pac. 788, 14 Colo. 391.

## EXPENSIVE.

In a statute providing that, where execution shall be levied on live stock, the preservation of which would be expensive, the same shall be sold, the term "expensive" means that which would require expense, and is applicable to the ordinary keeping of the animals; and, where the keeping would require an expenditure for which the officer would have to pay out money, he must sell within the time required by the statute in such case. *Webster v. Peck*, 31 Conn. 495, 499.

## EXPERIMENT.

In chemistry an experiment is the bringing together of two organic substances and the noting of the result. *State v. Bidell*, 54 N. H. 379, 383.

An experiment, as used in regard to inventions, may be a trial, either of an incomplete mechanical structure, to ascertain what changes or additions may be necessary to make in it to accomplish the design of its projector, or of a completed machine to illustrate or test its practical efficiency. In the first case, the inventor's efforts, being incomplete, if they are then abandoned, will have no effect upon the right of a subsequent inventor; but, if the experiment proves the capacity of the machine to effect what its inventor proposed, the law assigns to him the merit of having produced a complete invention. An experiment with a fire extinguisher, which failed to extinguish the fire in a burning mass of straw only because of the insufficient capacity of the extinguisher, was an experiment of the latter kind. *Northwestern Fire Extinguisher Co. v. Philadelphia Fire Extinguisher Co.* (U. S.) 18 Fed. Cas. 394, 399.

## EXPERT.

See "Nonexpert"; "Professional Experts."

An expert witness is one possessed of special knowledge or skill in respect of the subject upon which he is called to testify. *Congress & Empire Spring Co. v. Edgar*, 99 U. S. 645, 657, 25 L. Ed. 487; *Green v. Terwilliger* (U. S.) 56 Fed. 384, 392, 393; *Thompson v. Pennsylvania Ry. Co.*, 51 N. J. Law (22 Vroom) 42, 15 Atl. 833, 835; *Wheeler & Wilson Mfg. Co. v. Buckhout*, 36 Atl. 772, 773, 60 N. J. Law, 102; *Lineoski v. Susquehanna Coal Co.*, 27 Atl. 577, 580, 157 Pa. 153; *Struthers v. Philadelphia & D. R. C. Co.* 174 Pa. 291, 34 Atl. 443; *Ardesco Oil Co. v. Gilson*, 63 Pa. (13 P. F. Smith) 146, 151; *Baltimore & L. Turnpike Co. v. Cassell*, 7 Atl. 805, 806, 66 Md. 419, 59 Am. Rep. 175; *White v. Clements*, 39 Ga. 232-242; *Hyde v. Woolfolk*, 1 Iowa (1 Clarke)

159, 167; *Abbott v. Coleman*, 22 Kan. 250, 254, 255, 31 Am. Rep. 186; *City of Parsons v. Lindsay*, 26 Kan. 426, 432; *Sweetser v. Lowell*, 33 Me. 446, 450; *Heald v. Thing*, 45 Me. 392, 394; *Jones v. Tucker*, 41 N. H. 546, 547; *Haddock v. O'Rourke*, 6 N. Y. Supp. 549, 552; *Cheney v. Dunlap*, 29 N. W. 925, 927, 20 Neb. 265, 57 Am. Rep. 825 (citing 1 Greenl. Ev. § 440); *Yates v. Yates*, 76 N. C. 142, 149; *Murphy v. Hagerman* (Ohio) Wright, 293, 298, 299; *State v. Simonis*, 65 Pac. 595, 596, 39 Or. 111; *Benedict v. Flanigan*, 18 S. C. 506, 508, 509, 44 Am. Rep. 583; *Speiden v. State*, 3 Tex. App. 156, 159, 30 Am. Rep. 126; *State v. Phair*, 48 Vt. 366, 377; *Powers v. McKenzie*, 16 S. W. 559, 562, 90 Tenn. 167; *Bratt v. State*, 41 S. W. 622, 623, 38 Tex. Cr. R. 121; *Graney v. St. Louis, I. M. & S. Ry. Co.*, 57 S. W. 276, 280, 157 Mo. 666, 50 L. R. A. 153; *Goins v. Chicago, R. I. & P. Ry. Co.*, 47 Mo. App. 173, 181; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199, 222, 24 S. W. 192; *Flynt v. Bodenhamer*, 80 N. C. 205, 207.

Experts are persons selected by the court or parties to a cause, on account of their knowledge or skill, to examine, estimate, and ascertain things and make a report of their opinion. *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126 (citing *Bouv. Law Dict.*); *Heacock v. State*, 13 Tex. App. 97, 131; *Le Mere v. McHale*, 30 Minn. 410, 15 N. W. 682; *Travis v. Brown*, 43 Pa. (7 Wright) 9, 12.

An expert witness has sometimes been defined to be a witness who testifies to conclusions from facts, while an ordinary witness testifies only to facts. *People v. Wheeler*, 60 Cal. 581, 583, 44 Am. Rep. 70. The true distinction between the expert and the nonexpert is this: The nonexpert testifies as to the subject-matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The nonexpert gives the results of a process of reasoning familiar to everyday life; the expert gives the results of a process of reasoning which can be mastered only by special scientists. *Heacock v. State*, 13 Tex. App. 97, 131 (citing *Whart. Ev.*); *Thompson v. Pennsylvania R. Co.*, 15 Atl. 833, 835, 51 N. J. Law, 42 (citing 1 *Whart. Ev.* § 434).

An expert is, from the derivation of the word, one instructed by experience, and to become one requires a course of previous habit and practice, or of study, so as to be familiar with the subject. *Nelson v. Sun. Mut. Ins. Co.*, 71 N. Y. 453, 460; *Ellis v. Thomas*, 82 N. Y. Supp. 1064, 1067, 84 App. Div. 628; *Wehner v. Lagerfelt*, 66 S. W. 221, 222, 27 Tex. Civ. App. 520; *State v. Anderson*, 10 Or. 448; *State v. Simonis*, 65 Pac. 595, 596, 39 Or. 111; *Scott v. Astoria R. Co.*, 72 Pac. 594, 598, 43 Or. 26, 62 L. R. A. 543; *Turner v. Haar*, 21 S. W. 737, 738, 114 Mo.

335; *Farmer v. Stillwater Water Co.*, 90 N. W. 10, 11, 86 Minn. 59.

An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation, and he must have special knowledge on the subject. *Jones v. Tucker*, 41 N. H. 546, 547; *Town of Pendleton v. Saunders*, 24 Pac. 506, 510, 19 Or. 9; *State v. Davis*, 33 S. E. 449, 450, 55 S. C. 339.

The right to be considered an "expert," as the term is understood in the law of evidence, is based on knowledge of any kind gained for and in the course of one's business, as pertaining thereto. *Buffum v. Harris*, 5 R. I. 243, 251; *Town of Pendleton v. Saunders*, 24 Pac. 506, 510.

An expert witness is one whose possession of special knowledge renders his opinion upon a state of facts within his specialty without regard to the manner in which the facts are established, and without requiring that they should come in whole or in part under the personal observation of the witness, whereas the sole ground upon which a witness may give an opinion as to matters of ordinary knowledge is that they not only come within his personal observation, and that they come into proof so blended with the opinion to which they give rise that it is receivable in proof as a substitute for a specification of a host of circumstances that called it forth. *Kocis v. State*, 27 Atl. 800, 801, 56 N. J. Law, 44.

"The term 'expert' from 'expertl,'" says Bouvier, "signifies instructed by experience." This definition is perhaps too narrow, for we must concede that there may be in some instances and individuals a high degree of knowledge, not derived from nor perfected or enhanced by a great degree, or even any degree, of practical experience. Mr. Justice Redfield, in his edition of 1 Greenl. Ev. § 440a, says, "The term 'expert' seems to imply both superior knowledge and practical experience in the art or profession, but generally nothing more is required to entitle one to give testimony as an expert than that he has been educated in the particular art or profession." The most common definition of the term "expert" is "one possessed of science and skill," but this definition is too general to be satisfactory. An expert must be really a man of science. He should at least be sufficiently acquainted with the subject-matter of his testimony to know what its laws are, and not merely to conjecture or to have an idea about it. The science which an expert should be required to possess and employ on a given subject implies that special and peculiar knowledge acquired only by a course of observation and study and the expenditure of time, labor, and preparation in a particular employment and calling of life. *Dole v. Johnson*, 50 N. H. 452, 453.

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An expert witness is one who has made the subject-matter of inquiry the object of particular attention or study, and hence is competent to give an opinion. It must, however, be first shown that the witness is a skillful or scientific man, or at least has superior skill or scientific knowledge in relation to the question. Mere opportunity for observation is not sufficient. *Page v. Parker*, 40 N. H. 47, 59 (citing 1 Phill. Ev. [Edwards' Ed.] p. 778, c. 10, § 4, and notes; *Town of Rochester v. Town of Chester*, 3 N. H. 349; *Robertson v. Stark*, 15 N. H. 109; *Beard v. Kirk*, 11 N. H. 397; *Concord R. R. v. Greely*, 23 N. H. [3 Fost.] 237; *Pickard v. Bailey*, 26 N. H. [6 Fost.] 152; *Marshall v. Columbian Mut. Fire Ins. Co.*, 27 N. H. [7 Fost.] 157; *Lincoln v. Inhabitants of Barre*, 59 Mass. [5 Cush.] 590; *Lusk v. McDaniel*, 35 N. C. 485, 57 Am. Dec. 566; *McLean v. State*, 16 Ala. 672; *Luning v. State* [Wis.] 1 Chand. 264; *In re Blake's Estate*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135. The highest degree of skill is not necessary. *Congress & Empire Spring Co. v. Edgar*, 99 U. S. 645, 657, 25 L. Ed. 487, *Hyde v. Woolfolk*, 1 Iowa (1 Clarke) 159, 166; *State v. Hinkle*, 6 Iowa (6 Clarke) 380; *Beckett v. Northwestern Masonic Aid Ass'n*, 69 N. W. 923, 925, 67 Minn. 298; *Dole v. Johnson*, 50 N. H. 452; *Yates v. Yates*, 76 N. C. 142, 149; *Richmond Locomotive Works v. Ford*, 27 S. E. 509, 510, 94 Va. 627; *Bratt v. State*, 41 S. W. 622, 623, 38 Tex. Cr. R. 121.

The term "expert" should not be construed as limited, by the strict sense of its Latin derivation, to a person instructed by experience, but the legal sense of the term has always been much broader, meaning all persons professionally acquainted with the science or practice in question. In 2 Best. Ev. § 513, it is said that "on questions of science, skill, trade, and the like, persons conversant with the subject-matter are permitted to give their opinions in evidence"; and the same rule is laid down in 1 Greenl. Ev. § 440. In *Oil Co. v. Gibson*, 63 Pa. (13 P. F. Smith) 152, it is said that while undoubtedly it must appear that a witness called as an expert has enjoyed some means of special knowledge or experience upon the subject in question, no rule can be laid down as to its extent. In *Congress & Empire Spring Co. v. Edgar*, 99 U. S. 645, 25 L. Ed. 487, it is said it is very much a matter within the discretion of the court whether to receive or exclude the evidence, but the appellate court will not reverse the ruling in such a case unless it is manifestly erroneous." *Bryan v. Town of Branford*, 50 Conn. 246, 253.

The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific



works or by practical observation; and one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly educated and skilled gunsmith. *State v. Davis*, 33 S. E. 449, 450, 55 S. C. 339.

In order to qualify one to testify as an expert the subject must be one peculiar and exceptional, concerning which some examination such as peculiar knowledge alone can afford is required in order to render it intelligible to the comprehension and understanding of ordinary men. In other words, the subject-matter of the evidence must so far partake of the nature of a science as to require a course of previous habit or study to the attainment of a knowledge of it. *Ellingwood v. Bragg*, 52 N. H. 488, 489; *Jones v. Tucker*, 41 N. H. 546, 547.

The word "expert" is "a word meaning only the acquisition of certain habits of judgment, based on experience or special observation. And the scale rises as the qualifications become nicer, and require greater capacity or knowledge and experience, until it reaches scientific observers and practitioners in arts and sciences requiring peculiar and thorough special training. In several of the grades or kinds of what may be classed as expert testimony there may be witnesses whose testimony is only received in regard to their conclusions, based on their own observation of facts to the cause at issue, and others who can lawfully give conclusions on facts described by others. So there may be cases where a safe opinion may be drawn from a few leading facts, and others where the variations of a single fact—as in a chemical mixture—changes the entire result." *Kelley v. Richardson*, 37 N. W. 514, 516, 69 Mich. 430.

Mr. Lawson lays down the rule that one may be qualified as an expert witness by studying without practice or practice without study. *Lawson*, Exp. Ev. p. 210. He justly adds that mere observation without either study or practice will not be sufficient. *Wheeler & Wilson Mfg. Co. v. Buckhout*, 36 Atl. 772, 773, 60 N. J. Law, 102.

## EXPIRE—EXPIRATION.

Termination distinguished, see "Termination—Termination."

Expiration means cessation; end; as the expiration of a lease, a contract, or statute. *Marshall v. Rugg*, 45 Pac. 486, 487, 6 Wyo. 270, 33 L. R. A. 679 (quoting *Bouv. Law Dict.*)

### Of charter.

Rev. St. c. 36, § 31, provides that holders of stock in a bank at the time when its char-

ter shall expire shall be individually liable for the payment of bills issued by the bank and remaining unpaid. But chapter 44, § 7, provides that any corporation whose charter shall expire or be annulled by forfeiture or otherwise shall be continued a body corporate for certain purposes therein named, the object of the section being to authorize the corporation to collect dues, pay debts, etc., but not to transact any business other than what is necessary to settle its concerns. Held that, where a bank charter was repealed by the Legislature in accordance with a reservation therein granted, it expired within the meaning of chapter 36 at the time of such repeal, and that the nature of its qualified prolongation of existence under chapter 44 was that of an administrator of its estate. *Crease v. Babcock*, 40 Mass. (23 Pick.) 334, 346, 34 Am. Dec. 61.

### Of grant.

As used in Act April 21, 1871, § 8, providing that pre-emption entries made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant, at a time subsequent to "expiration of such grant," shall be deemed valid and a compliance with the laws, refers to the time limited in the original granting act for the performance of the condition; for, if it referred to the actual forfeiture, it would be meaningless, as then the land would be covered by the general acts for the disposal of public lands. *St. Paul, M. & M. R. Co. v. Greenhalgh* (U. S.) 28 Fed. 563, 566.

### Of lease.

"Expire and terminate," when used in a lease providing that on default of payment of rent the lease shall "expire and terminate," means "just as much and just as little as would the phrase 'shall become void' if inserted at the same place." *Bowman v. Foot*, 29 Conn. 331, 338.

In a lease for 21 years, providing for an annual rental and for the erection of a building of a size and material specified, and that at the "expiration of the term" the value of the building should be appraised, and upon payment of one-half the appraised value the building should belong to the lessor, the term "expiration of the term" meant at the end of the 21 years, and did not apply to the termination of the lease at the end of 5 years by the default of the lessee in the payment of rent. *Finkelmeier v. Bates*, 92 N. Y. 172, 178.

"Expiration," as used in a statute giving the landlord double rent in case of the willful holding over after the expiration of the term, applies to a holding over after the term has expired by efflux in time; and a holding over where the term is ended by an act of the landlord in declaring a forfeiture

is not such an expiration, the word meaning, according to lexicographers, to emit the last breath, to perish, to cease, to come to an end, to conclude, and to terminate; all of which, but the last, seem to repel the idea that the term would be ended except by the efflux of time. *Stuart v. Hamilton*, 66 Ill. 253, 255.

The term "expiration" in a lease requiring the lessee on the expiration of the lease to deliver up the possession of the premises in as good repair as at the commencement of the term, except, etc., was construed not to be limited in meaning to the termination of the time of the term, but to include a termination of the term by a surrender before the time contemplated in the lease as the end of the term. *Snowhill v. Reed*, 10 Atl. 737, 738, 49 N. J. Law, 292, 60 Am. Rep. 615.

Expiration, within the meaning of Code Civ. Proc. § 2231, subd. 1, authorizing removal by summary proceedings of a tenant holding over after the expiration of his term, does not cover a forfeiture for a breach of a condition, but refers only to the expiration of the lease by lapse of time. In *re Guaranty Bldg. Co.*, 64 N. Y. Supp. 1056, 1058, 52 App. Div. 140.

There are a number of ways in which a lease may be effectually ended—as by the lapse of its term, by merger, by condemnation proceedings, by wrongful acts of the tenant, by the death of either party in a case of tenancy at will, etc.; and when a tenancy was terminated before the expiration of the term of the lease the lease is as effectually at an end as if it had expired by the lapse of the term, and where a lease is surrendered before the end of the term by agreement it is an expiration at the time of the surrender. *Marshall v. Rugg*, 45 Pac. 486, 487, 6 Wyo. 270, 33 L. R. A. 679.

"Expiration of the lease," as used in a conveyance of a marble quarry, reserving the use of the quarry "until the expiration of the lease," means "until it shall expire according to the terms of it, and not the termination of it by a new agreement between the parties to it; and the reservation inures to the use of a lessor as well as the lessee, for it saves the quarry from the operation of a deed for the time as much as it would if the reservation had been for the unexpired time, without any mention of the lease." *Farnum v. Platt*, 25 Mass. (8 Pick.) 339, 341, 19 Am. Dec. 330.

"Expiration of the lease," as used in Code Civ. Proc. § 2231, authorizing summary proceedings against a defendant who holds over "after the expiration of the lease," means that the lease has come to an end either by effluxion of time or its own limitation. The ending of the lease by the exercise of the landlord's option after condition broken is

the termination, not the expiration, of the lease. *Kramer v. Amberg*, 4 N. Y. Supp. 613, 15 Daly, 206.

Gen. St. 1878, c. 84, § 12, as amended by Laws 1881, c. 9, provides that where an action is brought on a written lease against a tenant holding over after the expiration of the lease restitution shall be made, etc. Held, that the words "expiration of the lease" mean the expiration of the time expressed in the lease as the term thereof. *State v. Burr*, 13 N. W. 676, 29 Minn. 432.

"Expiration of the term for which it is let to him," as used in Code Civ. Proc. § 1161, subd. 1, which declares that a tenant of real property for a term less than life is guilty of unlawful detainer when he continues in possession, in person or by subtenant, of the property, or any part thereof, after the "expiration of the term for which it is let to him," without permission of his landlord, etc., means an expiration by lapse of time; that is, the expiration of the term named in the lease. *Silva v. Campbell*, 24 Pac. 316, 317, 84 Cal. 420.

"Expiration of his term," as used in 2 Rev. St. p. 512, § 23, providing that tenants for years may be removed by certain officers, among whom are judges of county courts, in certain cases where the tenant holds over after the "expiration of his term," means an expiration by lapse of time. It does not mean expiration by the commission of acts which would work a forfeiture. *Oakley v. Schoonmaker* (N. Y.) 15 Wend. 226, 230 (cited and approved in *Beach v. Nixon*, 9 N. Y. [5 Seld.] 35, 37).

#### Of patent.

The statute providing that, where an invention has been patented in a foreign country, a patent issued therefor in this country shall "expire" at the same time as the foreign patent, means that the term of the patent here shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. It refers to fixing the term, and not to keeping the foreign patent in force. Therefore, if the protection of an English patent is lost by the failure of the inventor to pay the required taxes thereon, such failure would not cause the patent in this country to expire. *Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co.* (U. S.) 21 Fed. 458, 459; *Paillard v. Bruno* (U. S.) 29 Fed. 864, 865; *Bonsack Mach. Co. v. Smith* (U. S.) 70 Fed. 383, 392 (citing *Pohl v. Anchor Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. 577, 33 L. Ed. 953).

#### Of term of office.

Expiration of term of office or otherwise, see "Otherwise."

**EXPLAIN.**

Under a statute requiring a notary on taking the acknowledgment of a married woman to explain the contents to the wife, while it is the duty of the officer to see that the woman understood the nature and effect of the instrument, he is not required to explain its contents to her when, from her statements at the time, it plainly appears that she understands their nature and effect. The object of the law is to afford her an official source of information apart from her husband or what he may have told her. *Bohan v. Casey*, 5 Mo. App. 106.

**EXPLANATION.**

An explanation may consist either in excusing any delinquency or apparent neglect or incapacity; that is, explaining its unfavorable appearance, or disproving the charges. *People v. City of New York*, 72 N. Y. 445. To do this efficiently, the accused must not have to grope in the dark. He should know not only the technical charge, but upon what in fact it is based. It is apparent that, to enable the accused thus to explain, he must be apprised not only of the general charge, but of the specification. *People v. La Grange*, 2 App. Div. 444, 446, 37 N. Y. Supp. 991, 992.

The use of the word "explanation" in Laws 1873, c. 335, § 28, providing that no regular clerk or head of bureau in the city of New York shall be removed until he has been informed of the cause for removal and been allowed an opportunity for explanation, imports "an oral or written statement of the charges made, without the process and formality which is required upon a hearing or trial," such as is implied in a provision for removal for cause only after an opportunity to be heard." *People v. Thompson*, 94 N. Y. 451, 465.

**EXPLORE—EXPLORATION.**

The words "explore for," as used in mining leases, have a well-defined meaning, to wit, the examination and investigation of lands by means of test pitting, drilling, and boring for the purpose of discovering the presence of iron ore thereunder, and the extent of the ore body therein. *Colvin v. Welmer*, 65 N. W. 1079, 64 Minn. 37.

The provision in a charter for a railroad company permitting them to make an exploration as to a proposed tunnel does not authorize the sinking of a shaft in a public street to the depth of 65 feet, and, if no insuperable difficulty presents itself, to proceed from the shaft to the construction of their tunnel, working it through the shaft. *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. (10 C. E. Green) 384, 388.

**EXPLOSION.**

See "Loss by Explosion."

Explosion cannot be exactly defined, but it may be described generally as a sudden and rapid combustion, causing a violent expansion of the air, and accompanied by a report. The rapidity of the combustion, the violence of the expansion, and the vehemence of the report vary in intensity as often as the occurrences multiply. Hence an explosion is an idea of degree, and the true meaning of the word in each particular case must be settled not by any fixed standard of accurate measurement, but by the common experience and notions of men in matters of that sort. *United Life, Fire & Marine Ins. Co. v. Foote*, 22 Ohio St. 340, 348.

There is often difficulty experienced in insurance cases in accurately defining the term "explosion." We all understand that the term is not used as a synonym of "combustion." It has at least some distinctive characteristics. An explosion produced by ignition, according to common understanding, may be accurately enough described for practical purposes as a sudden and rapid combustion, causing a violent expansion of the air, and producing a report more or less loud, according to the resistance offered. That it greatly varies in its degrees of violence and the effects produced are facts fully within the knowledge of all. The term as used in policies of insurance must be supposed to have been used in its ordinary and popular meaning. *Transatlantic Fire Ins. Co. of Hamburg v. Dorsey*, 56 Md. 70, 81, 40 Am. Rep. 403.

An explosion is a sudden bursting with noise, and, where all the witnesses except one assumed that it meant a rending force caused by the instantaneous and violent expansion of the mixture of gas and air, and that one called it a "deflagration of gas" without showing that it differed from an explosion, it was not error not to instruct as to its meaning. *St. Louis Gaslight Co. v. American Fire Ins. Co.*, 33 Mo. App. 348, 385.

Webster gives the definition of "explode" thus: "To explode; to burst forth as sound; to burst and expand with force and a violent report, as by an elastic fluid." He defines "burst" "to break or rend by force or violence." There is no difference in these definitions. It is a common, perhaps not refined, expression that the boiler has burst. Others would say that there has been an explosion. Explosion is defined as a sudden expansion of the parts of a body. In the new American Encyclopædia the same definition is given, with the addition, "by its component parts acquiring a great increase of bulk." *Evans v. Columbian Ins. Co.*, 44 N. Y. 146, 151, 4 Am. Rep. 650.

Where a fire policy relieved the insurer from liability caused by an explosion, it was proper in an action on the policy to charge that the parties should be presumed to have used the word "explosion" in its ordinary and popular sense, and that the question for them to determine was whether it was an explosion in such sense, or was a fire with subsequent explosion, etc., and that an explosion according to the common understanding might be accurately described as a sudden and rapid combustion producing a violent expansion of the air and producing a report more or less loud. *Mitchell v. Potomac Ins. Co.*, 16 App. Cas. D. C. 241, 270.

Explosions of any kind, within the meaning of a fire policy providing that the company should not be liable to make good any loss or damage by fire occasioned by explosions of any kind, by means of invasion, insurrection, riot, etc., was to include all explosions, and not merely explosions resulting from invasions, insurrections, riots, etc. *Smiley v. Citizens' Fire Marine & Life Ins. Co.*, 14 W. Va. 33, 37.

Where a stock of merchandise in a frame building situated in a town in which there were no means of extinguishing fire by the use of water was reached and ignited by a fire which commenced in another building, and the citizens, to prevent the further spread of the fire, blew up the building with gunpowder, thereby destroying such goods as had not already burned, the loss was from fire, and not within the exception of a policy which provided that the insurer should not be liable for an explosion by gunpowder; such exception covering only a fire originating from an explosion of gunpowder, and not an honest effort, even if injudicious, on the part of those present to stop the flames.—*Greenwald v. Insurance Co.*, 3 Phila. 323, 324.

#### **As an accident.**

See "Accident—Accidental."

#### **Collapse distinguished.**

"Explosion," as used in a marine insurance policy against any loss occasioned by fire except when caused by explosion of boiler, and except as limited by warranties therein contained, such as bursting of boilers, collapsing of flues, or the consequences of any character resulting from either of the foregoing exceptions, is one and the same thing as the bursting of a boiler. But the collapsing of a flue is not the explosion or the bursting of a boiler. The flue is inside of, and forms a part of, the boiler if a flue boiler; but it is not the boiler proper, and may collapse, and the boiler proper remain intact. But the collapsing of a flue is not the explosion of a flue. Webster defines collapse thus: "To fall together suddenly, as the two sides of a hollow vessel; to close by falling or

shrinking together; to shrink up; as, a tube in a steam boiler collapses." He defines explosion as follows: "The act of exploding; bursting with a loud noise or detonating sound; a sudden inflaming with force and a loud report—as the explosion of gunpowder;" "the shattering of a boiler by a sudden and immense pressure, in distinction from rupture." The Century Dictionary defines collapse thus: "To fall together or into an irregular mass or flattened form through the loss of firm connection or rigidity and support of the parts, or loss of the contents; as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it." It defines explosion as follows: "A sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart—as by explosion of a steam boiler." From these definitions it will be seen that the words "explosion" and "collapse" have almost an opposite meaning.—*Louisville Underwriters v. Durland*, 24 N. E. 221, 223, 123 Ind. 544, 7 L. R. A. 399.

"Explosion," as used in a fire insurance policy exempting the company from liability for loss by explosion, means explosion in its ordinary popular sense, and not what some scientific man would define to be an explosion; and where there was evidence that the fall of a building was caused by the rapid combustion of gasoline vapor first expanding the atmosphere, and then, through cooling, producing a vacuum that caused the crushing in of the floor by the unresisted pressure of the external atmosphere, an instruction was proper which so defined the term and further charged that the jury should find for the plaintiff in case they believed that the damage was caused not by explosion, but by an accidental combustion, in consequence of which the building was prostrated. *Mitchell v. Potomac Ins. Co.*, 22 Sup. Ct. 22, 25, 183 U. S. 42, 46 L. Ed. 74.

#### **As fire.**

See "Fire."

#### **Noise as part of.**

Rev. St. c. 17, §§ 23, 24, making it the duty of persons engaged in blasting rocks before each explosion to give seasonable notice thereof for the protection of persons within the limits of danger, and making a violator of the statute liable for all damages caused by the explosion, it was held that the party violating the statute was liable for injuries resulting from an explosion, whether caused by flying debris or the frightening of horses by the noise of the explosion. One of Webster's definitions of the word "explosion" is a bursting with violence and loud noise because of internal pressure. *Wadsworth v. Marshall*, 34 Atl. 30, 31, 83 Me. 263, 32 L. R. A. 588.

**As peril of the sea.**

See "Peril of the Sea."

#### **Explosion of gas.**

Where the indemnity provided for by a fire policy is against loss or damage by fire without making any exception, a damage from an explosion will be covered by the policy whether it result from an accidental fire gradually coming in contact with coal oil or gasoline or from an innocent fire, such as a gas jet purposely left burning, igniting the inflammable gas mixed with atmosphere, which had escaped and filled the room. All explosions caused by combustion are preceded by fire. The scientist may demonstrate in a case where gunpowder is destroyed by fire, or in any case where the explosion is caused by or accompanies combustion, that ignition and combustion precede explosion; but the court argues that they occur in such rapid succession that the combustion and explosion would be covered by an exception contained in a policy that the insurer would not be liable for loss or damage resulting from an explosion. In the absence of such exception, the court could only have held the loss to have been occasioned by fire. *Renshaw v. Missouri State Mut. Fire & Marine Ins. Co.*, 15 S. W. 945, 949, 108 Mo. 595, 23 Am. St. Rep. 904.

A fire policy which provides that the insurer shall not be liable for loss by "explosions of any kind" is to be construed to include a loss caused by the explosion of gas becoming ignited by a lamp. "There seems to be no reason for excluding an explosion like this from the exception. There was no fire prior to this explosion. The burning lamp was not a fire within the policy. The machinery was not on fire, as such a term is ordinarily used, until after the explosion. The explosion here was the principal and the fire the incident. In such case there can be no doubt that the defendant is not liable for the damage caused by the explosion. Where, however, the explosion is the instance and the fire the principal, a different question would be presented." *Briggs v. North American Mercantile Ins. Co.*, 53 N. Y. 446, 449.

A fire policy declaring that the insurer shall not be liable for loss caused by an "explosion of any kind" unless fire ensues should be construed to relieve the insured of loss where the explosion is the proximate cause of the loss, though fire might also have been the cause of the explosion; and therefore there was no liability for damages from an explosion of gunpowder produced by the ignition of a match in a room filled with illuminating gas, since the explosion of the gas, and not the lighting of the match, though it produced the fire, was the proximate cause of the loss. *Heuer v. North-*

*western Nat. Ins. Co.*, 33 N. E. 411, 412, 144 Ill. 393, 19 L. R. A. 594.

#### **Explosion of lamp.**

A fire policy providing that the company shall not be liable for loss in case of fire happening by any insurrection, nor explosion of any kind whatever within the premises, nor by concussions merely, includes a liability for loss by fire caused by the explosion of a lamp. *Heffron v. Kittanning Ins. Co.*, 20 Atl. 698, 700, 182 Pa. 590.

### **EXPLOSIVE.**

"Explosive," as used in a fire policy on a flour mill, providing that the company shall not be liable for loss or damage occasioned by the explosion of a steam boiler, gunpowder, or "any other explosive substance," will not include an explosive substance known as "flour dust," it being presumed that the parties had knowledge of the presence of such dust in a flour mill, and contracted with reference thereto. *Washburn v. Miami Valley Ins. Co.* (U. S.) 2 Fed. 633, 636.

The word "explosive" or "explosives," as used in the statutory provisions relative to the keeping of explosives, shall be understood to include gun cotton, nitroglycerin or any compound thereof, and any fulminate, or any substance intended to be used, by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder. *Rev. Laws Mass. 1902, p. 880, c. 102, § 105.*

#### **EXPLOSIVE COMPOUND.**

By the words "explosive compound," as used in the act regulating the transportation of explosive compounds, shall be understood gun cotton, nitroglycerin or any other compound of the same; any fulminate, or, generally, any substance intended to be used by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder. *Civ. Code S. O. 1902, § 2156.*

### **EXPORT—EXPORTATION.**

See "Produce for Export."

Export means to carry out, and is the opposite of import. *United States v. Forest* (U. S.) 25 Fed. Cas. 1147, 1152.

The constitutional provision that no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, has reference only to goods carried to foreign countries, and not to goods transported from one state to another. *Rothermel v. Meyerle*, 20 Atl. 583, 586, 136 Pa. 250, 9 L. R. A. 366; *Ex parte Martin*, 7 Nev. 140, 142, 8 Am. Rep.

707; *People v. Walling*, 18 N. W. 807, 810, 53 Mich. 264; *Brown v. Houston*, 5 Sup. Ct. 1091, 1094, 114 U. S. 622, 29 L. Ed. 257; *Woodruff v. Parham*, 75 U. S. (8 Wall.) 123, 19 L. Ed. 382; *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 600, 15 Sup. Ct. 459, 39 L. Ed. 544; *Patapsco Guano Co. v. Board of Agriculture*, 18 Sup. Ct. 862, 864, 171 U. S. 345, 43 L. Ed. 191.

A shipment of goods from New York to Puerto Rico does not come within the term "exports." *Dooley v. United States*, 22 Sup. Ct. 62, 64, 183 U. S. 151, 46 L. Ed. 128.

Timber which is cut in the forest and intended for exportation, and partially appropriated for that purpose by being deposited at a place or port of shipment within the state, and being owned by persons residing in another state, is not an export. Such property is taxable in common with other property of the state. *Coe v. Town of Errol*, 6 Sup. Ct. 475, 116 U. S. 517, 29 L. Ed. 715.

Whatever primary meaning be indicated by its derivation, the word "export," as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. True, the context may sometimes give it a narrower meaning, and in the execution of administrative affairs of government it may have been applied to cases in which there was not, in the full sense of the term, an exportation. These are exceptions, and do not destroy its general signification. It cannot mean simply to carry goods out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word "export." Coal placed on a steamer in San Francisco to be consumed in propelling that vessel to San Diego would never be so designated. Another country or state as the intended designation of the goods is essential to the idea of exportation. *Swan & Finch Co. v. United States*, 23 Sup. Ct. 702, 703, 190 U. S. 143, 47 L. Ed. 984.

Fed. Const. art. 1, § 9, par. 5, providing that no tax or duty shall be laid on articles exported, means a duty levied on goods in course of exportation, because of their intended exportation, and not a tax or duty on property while contained in a factory, which is levied on every such article, without regard to whether or not it be for exportation, even if such article in fact be intended for exportation. *Turpin v. Burgess*, 6 Sup. Ct. Rep. 835, 836, 117 U. S. 504, 29 L. Ed. 988.

"Exporting," as used in an indictment for exporting a slave, means the taking or carrying of the slave out of the state as an article of trade or merchandise. Export is a mercantile term, and means to send or carry out of the state for the purpose of sale, trade, or disposition. It does not include carrying a slave as a body servant for the

master's own use and bringing him back. *State v. Turner* (Del.) 5 Har. 501, 502.

The transportation of persons and passengers does not come within the provisions of the United States Constitution declaring that no state shall without consent of Congress lay any impost or duties on imports or exports, since an export is a thing exported, and not a person. *Ex parte Martin*, 7 Nev. 140, 142, 8 Am. Rep. 707; *Crandall v. Nevada*, 6 Wall. 35, 37, 18 L. Ed. 744; *People v. Campagne Generale Trans-Atlantique* (U. S.) 10 Fed. 357, 361.

A dead body of a human being not being property, such body is not an export within the constitutional provision that no state shall levy any duty on exports. *In re Wong Yung Quy* (U. S.) 2 Fed. 624.

The term "exported," as used in Rev. St. § 2500, providing that on the reimportation of articles, once "exported," of the growth, product, or manufacture of the United States, there should be paid a certain duty, means carried from one country into another and there unloaded; and it is entirely immaterial whether or not the owner intended to bring them back again. The dictionary meaning of the term "export" is "to carry from a state or country, as wares in commerce; to send goods and merchandise from one country to another." The term is the direct converse of import, which means to bring into a country merchandise from abroad. Import signifies etymologically "to bring in"; export, "to carry out." *Kidd v. Flagler* (U. S.) 54 Fed. 367, 369.

Pork owned by nonresidents of a city, which had been brought there by them to be slaughtered, cured, and stored there subject to their order, was not an export within the meaning of the city charter exempting from taxation property intended for export. *Powell v. City of Madison*, 21 Ind. 335.

Act Pa. April 14, 1835, § 1, providing that all flour of wheat, flour of rye, and meal made of Indian corn shall, if "designed for exportation" from either of the places named in the section, be liable to be inspected at those places, cannot be construed as meaning only that flour designed for exportation to nations or countries foreign to the United States, but includes flour designed for exportation to any other state of the Union. *Commonwealth v. King* (Pa.) 1 Whart. 448, 455.

The Legislature has on various occasions used the word "exportation" in a sense less extensive than the exporting of commodities to foreign ports or places, and in the more restrained sense of carrying commodities from one port to another within the kingdom; and, where the language of an act of Parliament is ambiguous, that construction is to be adopted which is most favorable to

the public. Therefore, where an act of Parliament contained a clause authorizing a railway company to demand a rate, not exceeding 4d. per mile, on all coal carried along the railway, and the subsequent clause directed that for all coal "shipped for exportation" a rate not exceeding 1/2d. per ton per mile should be charged, coal shipped for London was to be considered as shipped for exportation. *Barrett v. Stockton*, 2 Man. & G. 134, 163; *Stockton & D. Ry. Co. v. Barrett*, 7 Man. & G. 870, 879.

Exportation is not the clearance outward, but the actually going out of the port; and if a vessel be cleared outwards, and has paid the export duty, and new export duties are laid before she actually leaves port, the new duties attach to the cargo. *United States v. Lyman*, 26 Fed. Cas. 1024, 1028.

## EXPOSE.

Rev. St. 1846, c. 153, § 31, 2 Comp. Laws 1857, § 574, providing that if a father or mother of any child under the age of six years, or any person to whom such child shall have been confided, shall expose such child in any street, house, field, or other place with intent wholly to abandon it, he or she shall be punished, etc., should be construed to mean to place the child in such a place as to hazard it to personal injury, or as to peril its life or health, or produce severe suffering or serious bodily harm. To leave a child, with intent to wholly abandon it, in a house or other place where it would be certain to be cared for, would not constitute the exposure contemplated by the statute. Expose means, in its general sense, as defined by Webster, "to remove from shelter; to place in a situation to be affected and acted on"; in reference to paying, "to make liable"; "to subject" (referring to the custom of some nations to expose their children); "to cast out to chance"; "to place abroad or in a situation unprotected." If the acts of the party leaving or abandoning the child, viewed in connection with the time, place, and all the accompanying and surrounding circumstances, subject the child to the hazard of personal injury, it is an exposure. A bare possibility of injury would not constitute the exposure; but if, from all the surrounding circumstances, the party leaving the child had reasonable ground to apprehend or fear that such injury might result to the child, accompanied with intent wholly to abandon it, it is an exposure within the statute, and the crime is complete. A party seeking to abandon a child, and with that intent leaving it at night, even at the door of a stranger's dwelling, without previous notice, should not be satisfied with ringing the bell or making an alarm at the door, and then leaving the child to the chances which

might await it, or whether the child would be discovered, or, if discovered, taken in charge; but he should remain within view until he sees that it has found the protection of another, and, if he neglects this precaution, he must, at his peril, take care that it be under circumstances which do not subject the child to hazard or injury, for, if he does, it is to "expose" the child within the meaning of the statute. *Shannon v. People*, 5 Mich. 71, 90.

### Deposit distinguished.

In Rev. Laws, § 4191, providing for the punishment of any person who willfully and maliciously exposes a poisonous substance with intent that it should be taken by a horse, cattle, sheep, or swine of any person, "expose" is not equivalent to, nor synonymous with "depositing," as used in an information charging defendant with depositing poison on hay, contrary to the statute. Deposit and expose not only do not mean the same thing, but are often—perhaps generally—used to express opposite ideas. Things are often deposited so as to not be exposed, and for that purpose one word scarcely suggests the other; hence the information does not charge the offense defined by the statute. *State v. Pratt*, 54 Vt. 484, 486.

### Expose for sale.

In the statute providing that no person shall "expose to sale" any wares, merchandise, fruits, herbs, goods or chattels on Sunday, the prohibition is directed against the public exposure of commodities to sale in the streets, or in stores or shops or other places. It has no reference to mere private contracts which are made without violating or tending to produce a violation of the public order and solemnity of the day. *Boynton v. Page* (N. Y.) 13 Wend. 425, 432; *Eberle v. Mehrbach*, 55 N. Y. 682.

"Exposure for sale," as used in a complaint drawn under Laws 1891, c. 58, § 1, charging defendant with the exposure for sale of oleomargarine in imitation of butter, does not include the keeping of the article in a closed and covered refrigerator, so that it could not be seen by customers. *Commonwealth v. Byrnes*, 33 N. E. 343, 158 Mass. 172.

A statute punishing the illegal exposing for sale of intoxicating liquors, requires an offer of the liquor by exposing it to those who would become purchasers; and where the liquor was concealed or deposited where its presence could not be known to the public it was not exposed for sale. *Commonwealth v. McCue*, 121 Mass. 358, 359.

Whether a defendant exposes or keeps for sale intoxicating liquor, or both keeps and exposes them for sale, it is but one of

fense under St. 1875, c. 99, § 1. *Commonwealth v. Atkins*, 136 Mass. 160, 161.

Laws 1897, c. 76, § 1, providing that no person shall go about from town to town, or from place to place in the same town, exposing for sale any goods, wares, or merchandise, without a license, cannot be construed to include the soliciting of orders by a person for his employers, a firm having a permanent place of business in the state, and subsequently delivering the goods thus ordered, he not carrying any goods about with him for sale, nor exposing any for that purpose. *State v. Wells*, 45 Atl. 143, 144, 69 N. H. 424, 48 L. R. A. 99.

"Expose to sale," as used in Act Dec. 14, 1863, providing that in all cases in which common carriers have a lien on any goods on account of the costs or expenses of carriage, storage, or labor they may expose to sale at public auction such goods, means to exhibit, to bring in view, to display, to point out or show to the bystanders. Selling trunks with the goods locked up in them, and describing the contents as unknown, withholds from the bidders all knowledge of the character or value of the contents, and clearly is not within the meaning of the law which directs the manner of sale. *Adams Exp. Co. v. Schlessinger*, 75 Pa. (25 P. F. Smith) 246, 256.

#### **Expose to view.**

Where the charter of a turnpike company requires them to keep their rates of toll "exposed to view," such phrase means exposed to the view of travelers passing the gate, and it is not sufficient that the rates of toll be written and pasted up in a toll-house. *Centre Turnpike Co. v. Smith*, 12 Vt. 212, 216.

#### **Exposed places.**

"Exposed places," as used in a city charter giving the city power to compel or cause the making of railings at exposed places in the streets, means dangerous places. *Hubbell v. City of Yonkers*, 10 N. E. 858, 860, 104 N. Y. 434, 58 Am. Rep. 522.

#### **Exposed to contagious disease.**

In Laws 1893, c. 661, art. 2, § 24, providing that the board of health shall require the isolation of all persons affected with or exposed to contagious diseases, exposed means an actual exposure, and not a mere possibility, such as the likelihood of a person being infected because he is in the express business and may handle infected goods, and go into infected districts. In re *Smith*, 40 N. E. 497, 498, 146 N. Y. 68, 28 L. R. A. 820, 48 Am. St. Rep. 769.

#### **Exposed to injury.**

A brother of deceased, who died single, and who is one of the heirs at law and

largely interested in the estate, is one exposed to injury within a statute providing for an action by one exposed to injury against an executor who shall waste the estate. *Appeal of Treat*, 40 Conn. 288, 291.

#### **EXPOSURE.**

See "Dangerous Exposure"; "Indecent Exposure"; "Intentional Exposure"; "Willful Exposure to Danger"; "Voluntary Exposure."

Exposure is the state of being exposed; openness to danger; accessibility to anything that may affect, especially detrimentally. It is a word much used in the business of insurance in the sense of this definition to indicate danger of destruction or injury by fire to property insured from external sources, and not inherent to the property itself. *Davis v. Western Home Ins. Co.*, 46 N. W. 1073, 1074, 81 Iowa, 496, 10 L. R. A. 859, 25 Am. St. Rep. 509.

The phrase "exposure or occupation classed by this company as more hazardous," in a life policy, was construed to mean distinct classified occupations or employments, such as railroad conductors, brakemen, engineers, blacksmiths, carpenters, etc. *Miller v. Travelers' Ins. Co.*, 40 N. W. 839, 840, 39 Minn. 548.

In an accident policy providing that, "if the insured is injured, fatally or otherwise, by any occupation or exposure classed by the company as more hazardous than that stated" in the application, the company's liability shall be for such principal sum or weekly indemnity as the premium paid will purchase at the rate fixed for such increased hazard, exposure means risks arising from the business, occupation, or employment. *Hoffman v. Standard Life & Accident Ins. Co.*, 37 S. E. 466, 467, 127 N. C. 337.

"Exposure," as used in an insurance policy relieving the company from liability in case of exposure to danger, does not exempt the company from mere thoughtlessness on the part of the assured, and implies an intentional act. *Irwin v. Phoenix Accident & Sick Ben. Ass'n*, 86 N. W. 1036, 127 Mich. 630.

#### **Exposure of the person.**

Mr. Bishop defines exposure of the person to be such an intentional exhibition in a public place of the naked human body as is calculated to shock the feelings of chastity in those who witness it, "or to corrupt their morals." *Gilmore v. State*, 45 S. E. 226, 227, 118 Ga. 299.

#### **Exposure to unnecessary danger.**

In a contract of accident insurance providing that no claim for insurance shall be



made when death or injury may have happened in consequence of "exposure to unnecessary danger, hazard, or perilous adventure," such phrase is equivalent to negligence, and hence where the facts were sufficient to show that the deceased was guilty of negligence at the time he met his death it constituted an exposure to unnecessary danger, within the meaning of the policy. *Sawtelle v. Railway Pass. Assur. Co.*, 21 Fed. Cas. 555, 556.

Where a policy of accident insurance does not cover death or injury resulting from "exposure to unnecessary danger," the act of the insured in jumping from a rapidly moving freight car without any reasonable cause therefor, on a dark night, is an act of gross negligence, precluding recovery under the policy for the injuries sustained. The expression plainly includes all causes of exposure to unnecessary danger where such exposure is attributable to negligence on the part of the insured; that is, the exception was intended to hold the insured responsible for the exercise of ordinary care. *Shevlin v. American Mut. Acc. Ass'n*, 68 N. W. 866, 867, 94 Wis. 180, 36 L. R. A. 52.

Under a policy of insurance against accident which provides that no claim shall be valid when the death or injury happens in consequence of exposure to obvious or unnecessary danger, no recovery can be had for the death of the assured, which is caused by his being struck by a train while running along the tracks in front of it, in the nighttime, for the purpose of getting on a train approaching in the opposite direction on a parallel track. *Tuttle v. Travelers' Ins. Co.*, 134 Mass. 175, 176, 45 Am. Rep. 316.

### EXPOSURES.

An interrogatory in an application for fire insurance asked "the relative situation (of the property insured) as to other buildings, the distance to each within 10 rods," and the printed form concluded with the statement, "All 'exposures' within ten rods are mentioned." Held, that the application constituted a warranty that no other buildings than those named therein existed within 10 rods, since the term "exposures" means, in the connection used, precisely the same thing as buildings. *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376, 379.

### EXPOSITORY STATUTE.

An expository statute is one which is substantially in the nature of a mandate to the courts to construe and apply a former law not according to judicial, but according to legislative, judgment. *Lindsay v. United States Savings & Loan Co.*, 24 South. 171, 174, 120 Ala. 156, 42 L. R. A. 783.

### EXPRESS.

See "Clearly Expressed."

The word "express" means given in direct terms, not implied, not dubious, clear, definite, explicit, plain, manifest. *State v. Denny*, 21 N. E. 274, 279, 118 Ind. 449, 4 L. R. A. 65; *McGuire v. Allen*, 18 S. W. 282, 285, 108 Mo. 403.

"Expressed," as used in an agreement of reference leaving all differences to arbitration, the arbitration to pass only upon the proper interpretation of the rights of each of the contracting parties as expressed by the contract and its renewals, means no more than if the agreement had declared it the referee's duty to pass only upon the proper interpretation of the right of each of the contracting parties under the contract and its renewals. *Straus v. Wanamaker*, 34 Atl. 648, 655, 175 Pa. 213.

The words "express" and "special," as used in the statute, providing that an agent's authority to execute a note for another must be express and special, are used in contradistinction to "implied" and "general." *Howcott v. Kilbourn*, 44 Ark. 213, 215.

### As designate.

In a statute authorizing a town to subscribe for shares of the capital stock of a railroad company and to borrow money to pay for such shares on obtaining the written consent of two-thirds of the taxpayers of the town, expressing the corporation to which the money to be borrowed by the town shall be paid, the statute does not require that the taxpayers should express (that is, designate) the company by its name. Any mode or description that designated it was sufficient. *Scipio v. Wright*, 101 U. S. 665, 670, 25 L. Ed. 1037.

### Expressed in the title.

The word "expressed," as used in Const. art. 3, § 23, providing that the subject of any private or local law shall be expressed in the title, is peculiar, and does not mean that the subject should be stated in so many words in the title of the bill, but that it should be shown forth, made apparent, expressed so that by reflection the mind may grasp it. *O'Leary v. Cook County*, 28 Ill. (18 Peck) 534, 537.

Const. art. 3, § 16, provides that no local or private bill shall embrace more than one subject, which shall be expressed in the title. Held, that it is not requisite that the most expressive title shall be adopted, as the degree of particularity with which the title of the act is to express its subject rests in the Legislature's discretion; and, where the title expresses a general purpose or object, all matters reasonably connected with it are ger-

mane thereto, and hence an act entitled "An act to amend the several acts in relation to the city of Rochester" (Laws 1872, c. 771), is comprehensive enough to embrace all the details of city charter and government. *People v. Briggs*, 50 N. Y. 553, 557.

Where the subject of a bill is clearly stated in the title, it is not obnoxious to the clause of the Constitution providing that an act shall express the subject clearly in its title, on account of the presence in it of any provisions that are germane to the subject expressed in the title, or that would be naturally suggested by it as necessary or appropriate to the complete accomplishment of the purpose it discloses. *Tabor v. Commercial Nat. Bank*, 62 Fed. 383, 387, 10 C. C. A. 429.

#### EXPRESS ACCEPTANCE.

Acceptance is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. *Civ. Code La.* 1900, art. 988.

#### EXPRESS AGREEMENT.

An express agreement is where the parties thereto expressly agree. *Cuneo v. Cuneo*, 59 S. W. 284, 285, 24 Tex. Civ. App. 436.

#### EXPRESS ASSENT.

An indorsement in blank of a check payable to the indorser is an express assent by the wife in writing, within a statute providing that such assent is necessary in order to authorize the husband to dispose of the wife's property for his own benefit. *McGuire v. Allen*, 18 S. W. 282, 285, 108 Mo. 403.

Act March 30, 1871, providing that personal property of the wife shall not be deemed reduced to possession by her husband without the express assent of the wife, does not require that the assent shall be established by evidence proving words spoken or written by her, and if it be clearly proven that the wife was called to act upon a definite proposal that she should consent to her husband's reduction to possession of a specific article of her property for his own use, and she did act affirmatively upon that proposal, the assent is express within the meaning of the statute. *Franc v. Nirdlinger*, 41 Ohio St. 298, 301.

#### EXPRESS BUSINESS.

Express business involves the idea of regularity as to route or time, or both; and a person not running regular trips or other regular routes, but merely performing certain services on calls and at special request, is not engaged in the express business. *Pacific Exp. Co. v. Seibert*, 44 Fed. 310, 319; *Retzer v.*

*Wood*, 3 Sup. Ct. 164, 165, 109 U. S. 185, 27 L. Ed. 900.

It has been held that "express business" is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized so as to require the court to take notice of the same as distinct from the ordinary transportation of the large mass of freight usually carried on steamboats and railroads. *Pfister v. Central Pac. Ry. Co.*, 11 Pac. 686, 691, 70 Cal. 169, 59 Am. Rep. 404.

#### EXPRESS CAR.

As freight car, see "Freight Car."

#### EXPRESS COMPANY.

Business of, see "Business."

An express company is a species of common carrier to which have been accorded important privileges, and which, from the nature of its business, incurs great responsibility. These companies originate out of the necessity, in conducting the growing commerce of the world through the agency of railroads and steamboats, for securing the safe carriage and speedy delivery of small but valuable packages of goods and money. *Alsop v. Southern Exp. Co.*, 104 N. C. 278, 288, 10 S. E. 297, 300, 6 L. R. A. 271.

The term "express company," as used in the chapter relating to the listing of personal property for taxation, includes any person or persons, joint-stock association or corporation, wherever organized or incorporated, engaged in the business of conveying to, from, or through this state, or any part thereof, money, packages, gold, silver, plate, or other articles by express, not including the ordinary lines of transportation or merchandise or property in this state. *Bates' Ann. St. Ohio* 1904, § 2777. For similar definitions, see *Ann. St. Ind. T.* 1899, § 4954; *Comp. Laws N. M.* 1897, § 3926; *Civ. Code S. C.* 1902, § 289.

#### EXPRESS CONDITION.

An "express condition," otherwise called a "condition in deed," is one declared in terms of the deed or instrument by which the estate is created. *Raley v. Uncatilla County*, 13 Pac. 890, 894, 15 Or. 172, 3 Am. St. Rep. 142.

A conveyance of land upon express condition that the purchaser shall keep a certain fence in repair, will be construed as a covenant, and not as a condition. *Hartung v. Witte*, 18 N. W. 175, 177, 59 Wis. 285.

The words "upon express condition" will not always be held to create conditions, as the

law, because of its abhorrence of a forfeiture, will consider such clauses in a deed to be covenants, rather than conditions, whenever this can reasonably be done. *Brown v. Chicago & N. W. R. Co.* (Iowa) 82 N. W. 1003, 1004.

#### EXPRESS CONSENT.

See "Express Assent."

#### EXPRESS CONTRACT.

An express contract may be defined to be an agreement whose terms are openly uttered or expressed by the contracting parties. *Linn v. Ross*, 10 Ohio, 412, 414, 36 Am. Dec. 95; *Wickham v. Well*, 17 N. Y. Supp. 518, 519; *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 409.

Express contracts are such as are voluntarily made by the parties thereto. *Grevell v. Whiteman*, 65 N. Y. Supp. 974, 975, 32 Misc. Rep. 279.

An express contract is one where a bargain has been made by the two parties covering the subjects in question. *Coffroth v. Somerset County*, 19 Pa. Co. Ct. R. 354, 358.

An express contract is one, the terms of which are stated in words. *Rev. St. Okl.* 1903, § 776; *Civ. Code Cal.* 1903, § 1620; *Rev. Codes N. D.* 1899, § 3883; *Civ. Code S. D.* 1903, § 1234.

To make a contract an express one it is not necessary for the party to be bound to have direct communication with the other party. He may become so bound by an agent, for the act of an agent will establish the privity required by law between the contracting parties. *Buile v. Shipman*, 46 N. C. 10, 12.

#### Implied contract distinguished.

The distinction between an express and an implied contract is that the first is proved by an actual agreement and the other by circumstances in the course of dealing between the parties. *McCarthy v. City of New York*, 96 N. Y. 1, 8, 48 Am. Rep. 601 (citing *Hill. Cont.* 54; *Add. Cont.* 22).

The term "express contract" differs from the term "implied contract" in the true sense of the latter term in the mere fact of difference in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed upon by the parties, while in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104.

An express contract is one whose terms are stated in parol or writing, while an im-

plied contract is a matter of inference or deduction. It creates an obligation akin to duty. As a special contract is one of peculiar terms or provisions, an express contract may or may not be special, but a special contract is always express. *Pence v. Beckman*, 39 N. E. 169, 170, 11 Ind. App. 263, 54 Am. St. Rep. 505.

"An express contract is one to which the minds of the parties have assented, while the latter are those implied by law from the facts and circumstances of the transaction, although they are even against the consent of the party to be bound. The distinction between an express contract and an implied one is that in one the invalidity arises directly from the contract, while in the other the contract is implied or arises from the liability." An implied contract never exists except in the absence of an express one. *Musgrove v. City of Jackson*, 59 Miss. 390, 392.

The terms "express contract" and "contract implied in fact" are used to indicate a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties. *Keener, Quasi Cont.* 5. A "contract implied in law," on the other hand, denotes not the evidence, but the source of the obligation. *Id.* It is a quasi contract, created by the law, without the intent of the parties to the contract, and even against their intention. *Bliss v. Hoyt's Estate*, 41 Atl. 1026, 1027, 70 Vt. 534.

Contracts are dependent upon the intentions of parties and the meeting of the minds, and when these intentions are expressed it is an express contract. As distinguished from implied contracts, an express contract is said to be one in which the terms are expressly agreed on by the parties, while in the implied contracts they are inferred as a matter of fact from the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. A party performing services that should have been performed by another, without any expectation of compensation, or without any intention of claiming any reward therefor, will be unable to show any meeting of the minds sufficient to establish an express contract. *Columbus, H. V. & T. Ry. Co. v. Gaffney*, 61 N. E. 152, 153, 65 Ohio St. 104.

Neither an express contract nor one of implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation, and not in the nature of the thing itself. To constitute either one, the parties must occupy towards each other a contract status, and there must be that connection, mutuality of will, and interaction of parties generally expressed, though not very clearly, by the term

"privity." Without this, a contract by implication is quite impossible. *Woods v. Ayres*, 39 Mich. 345, 350, 33 Am. Rep. 396.

### EXPRESS CORPORATION.

An express corporation is where an individual or body is expressly constituted or declared to be a body politic or corporate by a given name, and for a specified object. Its essential powers, according to its nature and object, and within the enumeration of the statute, flow from this act of creation, and as incidents of the body created. *Warner v. Beers* (N. Y.) 23 Wend. 103, 178.

### EXPRESS COVENANT.

Express covenants are those stated in words more or less distinctly exposing the intent to covenant. *McDonough v. Martin*, 16 S. E. 59, 88 Ga. 675, 18 L. R. A. 843.

### EXPRESS DEDICATION.

If the owner of land sets it apart for the use of the public, and declares that such is his intention, or if he conveys it to a municipality or to a trustee to hold for the use of the public, the dedication is express. *City of Athens v. Burkett* (Tenn.) 59 S. W. 404, 408.

To constitute an express common-law dedication it is necessary that there should be an appropriation of the land by the owner to the public use by some express manifestation of his purpose to devote the land to the public use. *City of San Antonio v. Sullivan*, 57 S. W. 42, 44, 23 Tex. Civ. App. 619.

A dedication may be express, as where an intention to dedicate is expressly manifested, as by an explicit oral or written declaration or deed of the owner, or it may be implied from the acts and conduct of the owner of the land, from which the law will imply such an intent. *Town of Kent v. Pratt*, 48 Atl. 418, 420, 73 Conn. 573 (citing *Elliott, Roads & S.* p. 90; *Ang. Highw.* § 143; *Noyes v. Ward*, 19 Conn. 250-264; *Dunn v. Sanford*, 51 Conn. 445).

An express dedication of land is made by deed. *Close v. Swanson*, 89 N. W. 1043, 1044, 64 Neb. 389 (citing 1 *Bouv. Law Dict.* 492).

### EXPRESS DIRECTION.

"Express," as used in Gen. St. § 1854, providing that a will shall be signed by testatrix or by another in her presence and by her "express directions," and shall be signed by three or more witnesses, does not necessarily require an expression in words, but a desire may be indicated in acts, and is sufficient if

it be a direction in fact, though not in words. *Ex parte Leonard*, 18 S. E. 216, 218, 39 S. C. 518, 22 L. R. A. 302; *In re Bowen's Estate*, 18 S. E. 216, 218, 39 S. C. 518.

In Comp. St. 1901, c. 23, § 127, providing that no will shall be effective to pass any estate, nor to charge or in any way affect the same, unless in writing, and signed by the testator, or by some person in his presence or by his express direction, the word "express" is used not only in contrast to the word "implied," but to some extent by way of emphasis, so that it is incumbent upon the proponent to show by unequivocal evidence that the testator gave the direction for writing his name consciously and explicitly, and in the free and voluntary exercise of his faculties. *McCoy v. Conrad*, 89 N. W. 665, 669, 64 Neb. 150.

"Express direction," as used in a statute requiring a will to be witnessed by the express direction of the testator, means not a subsequent act of ratification, but a direction preceding the act to be done in obedience to it; and in this respect a direction expressed in words differs from a direction implied from subsequent assent. There is a maxim that ratification is equivalent to command, but it is not equivalent to express direction. *Greenough v. Greenough*, 11 Pa. (1 Jones) 489, 496, 51 Am. Dec. 567.

### EXPRESS MALICE.

#### In homicide.

Express malice is where one with a se-date mind and formed design kills another, and the design is evinced by external circumstances, discovering the inward intention; as by lying in wait, antecedent menaces, former grudges, or concerted schemes to do bodily harm. *State v. Town* (Ohio) *Wright*, 75, 76; *Sparf v. United States*, 15 Sup. Ct. 273, 277, 156 U. S. 51, 715, 39 L. Ed. 343; *United States v. Lewis* (U. S.) 111 Fed. 630, 632; *Same v. Boyd* (U. S.) 45 Fed. 851, 857; *Same v. Carr* (U. S.) 25 Fed. Cas. 306, 308; *State v. Neal*, 37 Me. 468, 469; *Same v. Reddell*, 14 Atl. 550, 9 Houst. (Del.) 470; *Same v. Harrigan*, 31 Atl. 1052, 9 Houst. (Del.) 369; *Same v. Miller*, 32 Atl. 137, 138, 9 Houst. (Del.) 564; *Same v. Lodge*, 33 Atl. 312, 315, 9 Houst. (Del.) 542; *Same v. Jones*, 47 Atl. 1006, 1007, 2 Pennewill (Del.) 573; *Same v. Symmes*, 19 S. E. 16, 17, 40 S. C. 383; *Jordan v. State*, 10 Tex. 479, 492; *Thompson v. State* (Tex.) 24 S. W. 290, 291; *McCoy v. State*, 25 Tex. 33, 39, 78 Am. Dec. 520; *Spears v. State*, 56 S. W. 347, 349, 41 Tex. Cr. R. 527; *Plasters v. State*, 1 Tex. App. 673, 681; *Martinez v. State*, 16 S. W. 767, 768, 30 Tex. App. 129, 28 Am. St. Rep. 895; *Lewis v. State*, 15 Tex. App. 647, 665; *Neyland v. Same*, 13 Tex. App. 536, 548; *Sullivan v. People* (N. Y.) 1 Parker, Cr. R. 847,

351; *Warren v. State*, 44 Tenn. (4 Cold.) 180, 185; *Kilpatrick v. Commonwealth*, 31 Pa. (7 Casey) 198, 201; *Commonwealth v. Sayres* (Pa.) 12 Phila. 553, 556; *Commonwealth v. Moore* (Pa.) 2 Pittsb. R. 502, 503; *Territory v. Catton*, 16 Pac. 902, 905, 5 Utah, 451; *People v. Halliday*, 17 Pac. 118, 119, 5 Utah, 467; *Agullar v. Territory*, 46 Pac. 342, 343, 8 N. M. 496; *People v. Evans*, 56 Pac. 1024, 1025, 124 Cal. 206; *Same v. Dice*, 120 Cal. 189, 201, 52 Pac. 477.

Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof. *United States v. Lancaster* (U. S.) 44 Fed. 896, 930, 10 L. R. A. 333; *People v. Nichol*, 34 Cal. 211, 212; *Kota v. People*, 27 N. E. 53, 136 Ill. 655; *McCoy v. People*, 51 N. E. 777, 780, 175 Ill. 224; *Mills' Ann. St. Colo.* 1891, § 1175; *Smith v. People*, 1 Colo. 121, 137; *May v. People*, 6 Pac. 816, 821, 8 Colo. 210; *Kent v. People*, 9 Pac. 852, 857, 8 Colo. 563; *Taylor v. People*, 42 Pac. 652, 655, 21 Colo. 426; *Powell v. State*, 20 S. E. 483, 95 Ga. 502; *Mitchum v. State*, 11 Ga. 615, 623, 628; *Roberts v. State*, 3 Ga. (3 Kelly) 310, 324; *Williams v. United States* (Ind. T.) 69 S. W. 871, 872; *State v. Gay*, 44 Pac. 411, 423, 18 Mont. 51; *Comp. Laws Nev.* 1900, § 4671; *Comp. Laws N. M.* 1897, § 1061; *Territory v. Guillen* (N. M.) 66 Pac. 527, 529; *Borrego v. Territory*, 8 N. M. 446, 473, 46 Pac. 349, 356; *Dillard v. State*, 46 S. W. 533, 535, 65 Ark. 404; *Territory v. Scott*, 17 Pac. 627, 7 Mont. 407.

Deliberation, reflection, coolness, plan and calculation are necessary ingredients of "express malice." *Mitchell v. State*, 1 Tex. App. 194, 199.

Express malice is where one with a sedate deliberate mind and premeditated design kills another. *People v. Enoch* (N. Y.) 13 Wend. 159, 167, 27 Am. Dec. 197; *Territory v. Bannigan*, 46 N. W. 597, 598, 1 Dak. 451; *State v. Harrigan*, 31 Atl. 1052, 9 Houst. (Del.) 369; *State v. Lodge*, 33 Atl. 312, 315, 9 Houst. (Del.) 542; *Jordan v. State*, 10 Tex. 479, 492; *Fendrick v. State* (Tex.) 56 S. W. 626, 627. Or inflicts upon him by an unlawful act some serious bodily harm which might probably end in depriving him of life. *Primus v. State*, 2 Tex. App. 369, 376; *McCoy v. State*, 25 Tex. 33, 39, 78 Am. Dec. 520; *Farrer v. State*, 42 Tex. 265, 271; *Warren v. State*, 44 Tenn. (4 Cold.) 180, 135; *State v. Talley*, 33 Atl. 181, 9 Houst. (Del.) 417; *Pennsylvania v. Honeyman* (Pa.) 1 Add. 147, 148. "From the analysis of this definition it will be seen that the killing may be with express malice, though there was in fact no intention or design to take the life of the deceased. It is the act by which one doth kill to which the formed design must refer, and not to the fact of killing. Nor, on the

other hand, does the mere design to kill, without lawful excuse or justification, however fully formed and firmly fixed in the mind, constitute of itself express malice; for the design must originate in or result from a sedate, deliberate mind. These words, indicating the state of the mind when the design is formed, are not, however, to be understood in an absolute and unconditional sense, for it would be almost impossible that any one not altogether devoid of human sensibilities and reduced to the level of the brute could deliberately design to take the life of a fellow-being with an absolutely calm and unruffled mind, without any character of mental excitement whatever. Still they certainly import that the mind is sufficiently composed, calm, and undisturbed to admit of reflection and consideration on the design; that is, a condition to comprehend and understand the nature and character of the act designed, and its probable consequences and results. The act must not result from a mere sudden, rash, and immediate design, springing from an inconsiderate impulse, passion, or excitement, however unjustifiable and unwarranted it may be; for in such case the sedate, deliberate mind is wanting, and without it there can be no express malice. To guard against all danger of misconception, we add we do not intend to be understood, if the design is formed with a sedate, deliberate mind, the fact of such design being executed while the slayer is under the influence of rage, passion, or other character of excitement, the killing may not be attributable to the preconceived expressed malice. But when the design has its first inception and origin in an inflamed and excited mind, incapable of such sedate, deliberate action as is compatible with express malice, and such design is carried into immediate effect, before there has been any cooling time for passion, or for the excitement to abate, and the mental equilibrium to be restored, the killing, under such circumstances, no matter how such passion or excitement may have been induced or originated, cannot be murder in the first degree." *Farrer v. State*, 42 Tex. 265, 271.

The mind of the murderer need not be entirely free from excitement in order to bring it within the meaning of the term "sedate and deliberate"; for, if it be in such condition as to admit of reflection upon the character of the act, then it is sedate and deliberate, within the meaning of the law. *Cain v. State*, 59 S. W. 275, 277, 42 Tex. Cr. R. 210.

Express malice is a deliberate intention of doing bodily harm to another, not authorized by law. 1 Hale, P. C. 451. This is the common-law definition, and has been adopted in prior decisions of this court. *Herrin v. State*, 33 Tex. 638, 645.

Express malice, in the law of murder, is when a party evidences an intention to commit the crime. *State v. Mills*, 21 S. E. 106, 107, 116 N. C. 992.

Express malice is malice positively appearing; actual malice, either positively or inferentially appearing. *Hogan v. State*, 36 Wis. 226, 238.

The malice necessary to constitute murder is called "express" when it is established by other evidence than the naked fact of the homicide. *Darry v. People*, 10 N. Y. (6 Seld.) 120, 137, 138.

"Express malice" is a condition of the mind which shows a heart regardless of social duty, and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken. *Stevens v. State*, 59 S. W. 545, 549, 42 Tex. Cr. R. 154.

Malice, to become what the law terms "express malice," need not be declared in words at all. It is evidenced not by words only, for then a dumb person or a secret assassin would never be guilty of committing a murder with express malice; but it is evidenced by external circumstances discovering that inward intention, such as lying in wait, antecedent menaces, former grudges, by the nature and character of the act done, the instrument used, and the coolness and deliberation shown in preparing it, as well as the manner in which the murder is committed. *Singleton v. State*, 1 Tex. App. 501, 507; *Plasters v. Same*, Id. 673, 681.

The express malice which constitutes murder in the first degree is proved by circumstances satisfactorily evidencing a sedate, deliberate purpose and formed design to kill another, such as the deliberate selection and use of a deadly weapon, the preparation and use of poison, and the like. *State v. Di Guglielmo* (Del.) 55 Atl. 350, 351.

Where one with a cool, composed mind, in pursuance of a formed design to kill another, or to inflict upon him some serious bodily harm which would probably end in depriving him of life, does kill such person in the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide, such killing would be a murder committed with express malice. *Cox v. State*, 5 Tex. App. 493, 499.

The term "express malice" means that the homicide was the result of a formed design, based upon a wicked and depraved spirit, and is maliciously conceived and wickedly executed without justifiable or lawful excuse. The most usual illustrations, and the ones best understood generally, of the term "express malice," are such as lying in wait for the intended victim, or the preparation and administration of poison for the

purpose of taking life, because in such instances the acts clearly show the formed design and the unlawful intent and its execution. *Hotema v. United States*, 22 Sup. Ct. 895, 896, 186 U. S. 413, 46 L. Ed. 1225.

A definition of express malice as existing "where one with a calm, sedate, and deliberate mind and formed design kills another," without adding that the killing must be unlawful, is incomplete and incorrect, since it will include either justifiable or excusable homicide. *Crook v. State*, 11 S. W. 444, 447, 27 Tex. App. 198; *Gonzales v. State*, 12 S. W. 733, 734, 28 Tex. App. 130 (citing *Cahn's Case*, 27 Tex. App. 709, 11 S. W. 723; *Crook's Case*, 27 Tex. App. 198, 11 S. W. 444).

The intent to kill upon express malice must be formed and carried out in a sedate and deliberate mind, while the intent to kill upon implied malice may be formed and carried out in a mind somewhat disturbed and ruffled by passion. *Spears v. State*, 56 S. W. 347, 349, 41 Tex. Cr. R. 527.

Express malice requires the person to be of sedate and deliberate mind, sufficiently self-possessed as to comprehend and contemplate the consequences of his acts. His acts must not be the result of a sudden inconsiderate impulse or passion. This, when there was an intention to kill, might still be murder, but not open, express malice. Hence it is said if a man kills another suddenly, without any or without a considerable provocation, the law implies malice. The design formed must be to kill the deceased, or to inflict some serious bodily harm upon him. Mr. Hawkins says that is most properly called express malice when murder is occasioned through an express purpose to do some personal injury to him who is slain in particular. *McCoy v. State*, 25 Tex. 33, 39, 78 Am. Dec. 520; *Duebbe v. Same*, 1 Tex. App. 159, 165.

A mere grudge or malice, in its general sense, is not sufficient to bring a case within the principle that where one, having express malice towards another, kills that other, the killing is referable to previous malice, and not to a provocation at the time of the killing. To do this there must be a particular and definite intent to kill, so that the provocation is a mere collateral circumstance. Intent to kill must exist independently of it. *Hunt v. State*, 16 South. 753, 755, 72 Miss. 413 (citing *Cannon's Case*, 57 Miss. 147).

Probably the phrase "express malice" is identical with "malice in fact," and "implied malice" identical with "malice in law." *Missouri Pac. Ry. Co. v. Behee*, 21 S. W. 384, 385, 2 Tex. Civ. App. 107.

There is a plain distinction between express and implied malice. The one is char-

acterized by a sedate and deliberate intention and formed design, evidenced by the external circumstances; the other is the offspring of sudden impulse. *Anthony, a slave, v. State*, 21 Miss. (13 Smedes & M.) 263, 264.

The term "express malice" originally meant malice proved independently of the mere act from which death resulted, and "implied malice" the reverse. They therefore describe only different modes of proving actual guilt, not different degrees of it, and they belong to the law of evidence, and not to a definition of homicide. *Wilson v. Noonan*, 35 Wis. 321, 352 (citing *Darry v. People*, 10 N. Y. [6 Seld.] 123).

Malice, in the old definitions, is spoken of as express and implied. That is a distinction which is a delusion and a snare. Practically jurymen never deal with express malice. There is no express malice given to them. Express malice is an intent of the mind and heart. There is never presented to a jury direct evidence of what goes on in a man's heart at the time. He is the only possible direct witness to that, and, if he meant so to testify, he would plead guilty. The existence or nonexistence of malice is an evidence to be drawn by the jury from all the facts of the case. *United States v. King* (U. S.) 34 Fed. 302, 311.

The legal idea of malice in the crime of murder is simply an intent to kill a human being in a case where the law would neither justify nor in any degree excuse the intention, if the killing should take place as intended. There is no difference between malice express and malice implied, except in the mode of arriving at the fact. You may prove the particular intent or the more general intent, which includes it and implies it, but the thing, when you once get it, is the same in both cases, and is a simple intent to kill a human being. Whether this springs from hatred, or from a sense of shame, or from the mere phrensy of drunkenness, it is malice. It is the mental constituent of murder, unless there is something to justify the intent, or in some degree to excuse it. The popular idea of malice, in its sense of revenge, hatred, and ill will, has nothing to do with the subject. *Jones v. State*, 29 Ga. 594, 607, 608.

#### In libel and slander.

Express malice in the law of libel is such as is shown by other words, either spoken or written or printed. *Grace v. McArthur*, 45 N. W. 518, 521, 76 Wis. 641.

Express malice in regard to a publication means that it was made with an evil design existing in the mind of the defendant towards the plaintiff; that not only was it unjustifiable, and not privileged, but that its actual intent, as distinguished from the legal

intent, was malicious; that he had ill will and an evil design against the plaintiff in making the publication. *Wynne v. Parsons*, 17 Atl. 362, 365, 57 Conn. 73; *Parke v. Blackiston* (Del.) 3 Har. 373, 378.

By "express malice," as used in the rule that, when qualified privilege of a criminating statement has been shown, the burden rests upon the plaintiff to prove express malice, is meant some motive actuating the defendant different from that which prima facie rendered the statement privileged, and being a motive contrary to good morals. *Fahr v. Hayes*, 13 Atl. 261, 263, 50 N. J. Law, 275.

"Express malice," as applied in an action for libel, would possibly include a want of good faith; but a want of good faith does not necessarily imply that the statement was made on express malice. The statement may be made without the party entertaining any express malice against the other, but still there may be circumstances that would indicate a want of good faith in making it. *Davis v. Wells*, 60 S. W. 566, 567, 25 Tex. Civ. App. 155.

Express malice consists in a libelous publication from ill will, or some wrongful motive implying a willingness or intent to injure, in addition to the intent to do the unlawful act. *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 1007, 81 App. Div. 183.

Express malice in an action for libel consists in publishing that which is injurious to the character of another from ill will or some wrongful motive, implying a willingness or intent to injure, in addition to the intent to do an unlawful act. It requires affirmative proof indicating ill feeling, or such want of feeling as to impute a bad motive. It only becomes an issue where punitive damages are claimed. It must be malice in the special case set forth in the pleading, to be inferred from it and the attending circumstances. *Howard v. Sexton*, 4 N. Y. (4 Comst.) 157, 161. Moreover, the malice of defendant cannot be imputed to another without connecting proof. In accordance with these principles, remarks made by an owner of a paper five years before the commencement of the libel suit against the editor and the author of the libelous article are inadmissible to prove expressed malice when neither the author nor editor knew of said remarks at the time of the publication. *Krug v. Pitass*, 56 N. E. 526, 528, 162 N. Y. 154, 76 Am. St. Rep. 317.

Malice in the law of libel is either express or implied. Express malice is malice to be specially proved; that is, to be proved by evidence not contained in the language itself. It is shown either to aggravate damages or to refute inquiries from a qualified

privilege. *Haft v. First Nat. Bank*, 46 N. Y. Supp. 481, 482, 19 App. Div. 423.

"Express malice is defined as the malice which is inferred from the doing of a wrongful act without lawful justification or excuse. 1 *Starkey, Sland. & L.* 213." It is synonymous with the term "malice in fact." *Smith v. Rodecap*, 81 N. E. 479, 5 Ind. App. 78.

In relation to libel and slander, express malice in fact is distinguished from implied malice, which is raised as a matter of law by the use of the words libelous per se, when the occasion is not privileged. *Ramsey v. Cheek*, 13 S. E. 775, 109 N. C. 270.

#### **In malicious prosecution.**

"Express malice," as applied to a malicious prosecution, is defined to mean ill will against a person, and is indicated by the disposition or temper of mind with which the party did a particular act; as, where he did it with the view to injure a particular individual generally, or in some specific manner, or that he acted from personal animosity or an old grudge. *Herbener v. Crossan* (Del.) 55 Atl. 223, 224.

#### **EXPRESS MANDATE.**

"Express mandate," as used in Rev. Civ. Code, art. 2997, requiring the mandate to sell corporate stock to a third person to be express and special, is distinguished from implied. *Woodhouse v. Crescent Mut. Ins. Co.*, 35 La. Ann. 238, 242.

#### **EXPRESS NOTICE.**

Express notice embraces not only knowledge, but also that which is communicative by direct information, either written or oral, from those who are cognizant of the fact communicated. *City of Baltimore v. Whittington*, 27 Atl. 984, 985, 78 Md. 231.

#### **EXPRESS OBLIGATION.**

The obligations in a railroad charter are express only when they are declared in positive terms, and the grant of such a charter imposes no positive or express obligation on the corporation to build the road. *People v. Albany & V. R. Co.* (N. Y.) 37 Barb. 216, 218.

#### **EXPRESS PROMISE.**

The law recognizes two kinds of promises: express and implied promises. The first is the express stipulation of the party making it to do or not to do a particular thing. The second the law presumes from some benefit received by the party against whom it is raised; or, to illustrate it by the rule to take a case out of the statute of limitations, payment or an acknowledgment of

the justice of a debt implied a promise to pay it. *Foute v. Bacon*, 24 Miss. (2 Cushm.) 156, 164.

#### **EXPRESS REVOCATION.**

Express revocation of a will is when the change of mind or intention of the testator to revoke is declared by a subsequent will or codicil. It is implied when the existence of the same intention of the testator is presumed and inferred from a subsequent act or event. *Langdon v. Astor's Ex'rs*, 10 N. Y. Super. Ct. (3 Duer) 477, 561.

#### **EXPRESS TRUST.**

See "Trustee of Express Trust."

Express trusts are those which are created by the direct and positive acts of the parties, by some writing, deed, or will. *State v. Campbell*, 52 Pac. 454, 455, 59 Kan. 246; *Tenney v. Simpson*, 15 Pac. 187, 196, 37 Kan. 353; *Caldwell v. Matthewson*, 45 Pac. 614, 615, 57 Kan. 258; *McCarthy v. McCarthy*, 74 Ala. 540, 552; *Lovett v. Taylor*, 34 Atl. 896, 899, 54 N. J. Eq. 311; *Martin v. Greer*, Ga. Dec. 109, 117, pt. 1.

"Express trusts are those which are created in express terms in a deed, writing, or will, while implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law as matters of equity, independent of a particular intention of the parties." *Bouv. Law Dict.* Where A. acquires land for B., but the deed is made to A. without showing a trust relation, it creates an implied trust, and not an express trust, as the terms are used at common law; but it is an express trust within the meaning of the Code provision authorizing a trustee of an express trust to sue without joining the beneficiary, and providing that the term "trustee of an express trust" shall include a person with whom or in whose name a contract is made for the benefit of another. *Brown v. Cherry* (N. Y.) 38 How. Prac. 352, 357.

An express trust is a trust which is sometimes called a direct one, and is generally created by an instrument that points out directly and expressly the property, persons, and purposes of the trust. *Olcott v. Gabert*, 23 S. W. 985, 987, 86 Tex. 121 (citing 1 Perry, *Trusts*.)

An express trust is one created in express words of agreement, and, where the statute operates, these words must be expressed in writing. *Martin v. Martin* (Iowa) 94 N. W. 493, 494.

Trusts created by the express words of the grantor or settlor pointing out the prop-



erty, persons, and purposes of the trust are termed "express trusts," and may be created by parol or by writing. Express trusts are defined by Judge Story to be those which are created by the direct and positive acts of parties by some writing or deed or will; but it is evident an express trust may be created by parol. *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913.

"An express trust" can be created only by an agreement express or implied between the parties to the trust. A voluntary trust is created as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty, first, an intention on the part of the trustor to create a trust, and, second, the subject, purpose, and beneficiary of the trust. Civ. Code Cal. § 2221. And by section 2222 a voluntary trust is created as to the trustee by any words or acts of his indicating, first, his acceptance of the trust, or his acknowledgment made upon sufficient consideration of its existence; and, second, the subject, purpose, and beneficiary of the trust. Thus, where M., as attorney in fact for a devisee residing in a distant city, received her share of an estate, remitted a portion, and retained the remainder, which he invested in real estate, took the title in his own name, and afterwards conveyed the property to his wife, and the devisee permitted him to retain her property at his request, and upon his representations that he could thereby obtain for her a greater profit, no express trust was created. *McMonagle v. McGilun* (U. S.) 85 Fed. 88, 91.

A resulting trust is not converted into an express trust by being set forth fully by the trustee in his answer in chancery. *Warren v. Tynan*, 34 Atl. 1065, 54 N. J. Eq. 402.

Express trusts are those created or manifested by agreement of the parties. Civ. Code Ga. 1895, § 8152.

An express trust assumes an intention of the parties to create that relation or position, and a direct act of the parties by which it is created in accordance with such intention outside of the mere operation of the law. An express trust primarily assumes three parties—the one who by proper language creates or declares the trust; the second, the recipient of the authority thus conferred; and, the third, for whose benefit the authority is received and held. *Harris v. Calvert*, 44 Pac. 25, 29, 2 Kan. App. 749.

Every trust is clearly an express trust where the legal title or property is conveyed to a trustee to be held by him for the benefit of another, no particular words or formality being required for its creation. 1 Perry, Trusts; Law of Trusts (Tiff. & Bul.) 11. And where a deed, designed as a mar-

riage settlement for the grantor's intended wife, expressly declares in the habendum clause that the grantee was to hold the lot "upon trust and confidence" and for the sole use, profit, and benefit of such intended wife during her life, an express trust is clearly created. *McCarthy v. McCarthy*, 74 Ala. 546, 552.

The term "express trust" designates a trust the terms and conditions of which are fixed by the express agreement of the parties. The term applies to a trust created by agreement between the parties thereto that one shall purchase land and hold the title in said lands in trust for the equal benefit of both. *Tynan v. Warren*, 31 Atl. 596, 597, 53 N. J. Eq. 313; or that a deed may be taken in the name of another, and held in trust by him for a complainant until the payment of a certain trust deed lien which exists against said land. *Godschalk v. Fulmer*, 51 N. E. 852, 853, 176 Ill. 64.

An instrument expressly declaring that the parties executing it hold certain lands in trust for themselves and to others is an "express trust" within the meaning of How. Ann. St. Mich. § 5578, which provides that no person for whose benefit an express trust is created shall take an estate or interest in the land, but may enforce the performance of the trust. *Culbertson v. H. Witbeck Co.*, 8 Sup. Ct. 1136, 1140, 127 U. S. 326, 32 L. Ed. 134.

Rights reserved to the grantor in a deed or conveyance are in the nature of an express trust. Thus a parol agreement by the grantee of an absolute conveyance to dispose of the property and return the property to the grantor after the payment of the grantee's debts creates an express trust within Rev. St. c. 59, § 9, requiring express trusts to be in writing. *Benson v. Dempster*, 55 N. E. 651, 654, 183 Ill. 297.

It is settled law in *Burns' Rev. St.* 1894, § 3391, concerning trusts, that an express trust may be established by any writing or writings under the hand of the party to be charged, or of the party who is by law enabled to declare the same, provided the fiduciary relations and the terms and conditions of the trust are set forth with sufficient certainty. *Ransdel v. Moore*, 53 N. E. 767, 769, 153 Ind. 393 (citing *Kintner v. Jones*, 122 Ind. 148, 151, 23 N. E. 701; *Gaylord v. City of Lafayette*, 115 Ind. 423, 428, 17 N. E. 899, and cases cited; *Wright v. Moody*, 116 Ind. 175, 178, 179, 18 N. E. 608; *Kinsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; 1 Perry, Trusts [4th Ed.] §§ 79-83; 27 Am. & Eng. Enc. Law, 46, 57, and notes).

Under 1 Rev. St. p. 728, § 55, it is provided that express trusts may be created for one of several purposes, one of which is: "(3) To receive the rents and profits of

land, and apply them to the use of any person during the life of such person or for any shorter term, subject to the rules prescribed in the first article of this title." Thus, a devise to trustees of money, to invest the same and pay over the income, as provided, to certain persons, created an express trust. *Maitland v. Baldwin*, 24 N. Y. Supp. 29, 31, 70 Hun, 267.

Civ. Code, § 857, declares that express trusts may be created for any of the following purposes: First, to sell real estate, and apply and dispose of the proceeds in accordance with the instrument creating the trust; second, to mortgage or lease real estate for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon. Under such authority the mere power given to executors by a will to sell the testator's real estate at public or private sale without an order of court, and to execute all necessary conveyances, does not create a trust. *Bennalack v. Richards*, 48 Pac. 622, 623, 116 Cal. 405.

#### **Resulting or implied trusts distinguished.**

An express trust is a trust created by act of the parties. It differs from resulting trust, which is a trust raised or created by act or construction of law. *Lovett v. Taylor*, 34 Atl. 896, 899, 54 N. J. Eq. 311.

Express trusts are created by contracts and agreements, which directly and expressly point out the persons, property, and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties. *Wilson v. Welles*, 81 N. W. 549, 550, 79 Minn. 53.

Express trusts are those which are created in express terms in the deed or will, and as such are to be distinguished from "implied trusts," which, without being expressed, are deducible from the nature of the transaction as matters of intent, or superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties. *Russell v. Peyton*, 4 Ill. App. (4 Bradw.) 473, 478; *Brown v. Cherry* (N. Y.) 38 How. Prac. 352, 357.

Express trusts are created by contract of parties; implied or resulting trusts are such as arise by operation of law upon certain acts of parties. Hence resulting trusts may be shown by parol, or, what is more correct to say, is that, the necessary facts and circumstances being shown by parol, the resulting trust does not rest upon further evidence, but is an implication which the law itself attaches to the given state of facts. Express trusts, being a matter of agreement between the parties, must be

proved as contracts. *Learned v. Tritch*, 6 Colo. 432, 439.

A direct or express trust is one springing from the agreement of the parties, created by words either expressly or impliedly evincing the intention to create a trust. It is distinguished from a constructive or implied trust, which are trusts created by equity law; a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice. *Currence v. Ward*, 27 S. E. 329, 330, 43 W. Va. 367.

#### **EXPRESS WAGON.**

Under a statute exempting from attachment one express wagon, it was held that a vehicle suited and adapted to the transportation of luggage, truck, small parcels of merchandise, light country produce, and other light articles, and one that may conveniently be used for such purposes, though owned by a farmer and used by him, is within the exemption. *Walker v. Carlin*, 34 Atl. 29, 88 Me. 302.

#### **EXPRESS WAIVER.**

A waiver is express when it is made by release, and implied whenever it may be reasonably and fairly inferred from the act or omission or silence of the party who has the power of waiving. *Roumage v. Mechanics' Fire Ins. Co.*, 13 N. J. Law (1 J. S. Green) 110, 124.

#### **EXPRESS WARRANTY.**

According to the modern cases warranties are divided into two kinds: express warranties, where there is a direct stipulation, or something equivalent to it; or implied warranties, which are conclusive, and in reference to law they are facts which are admitted or proved before the jury. *Borrekens v. Bevan* (Pa.) 3 Rawle, 23, 36, 23 Am. Dec. 85.

An express warranty is an express statement which the party undertakes shall be a part of a contract, and, though part of a contract, yet collateral to the express object of it. Any assertion or averment by the seller to the purchaser during the negotiations to effect a sale respecting the quality of the article or the efficiency of the property sold will be regarded as a warranty if relied on by the purchaser in making the purchase. *White v. Stelloh*, 43 N. W. 99, 100, 74 Wis. 435.

A warranty is express when the seller makes an affirmation with respect to the article to be sold pending the treaty of sale, upon which it is intended that the buyer

shall rely in making the purchase. *Danforth v. Crookshanks*, 68 Mo. App. 311, 316 (citing *Bid. War. Sale Chat.* §§ 1, 2).

An express warranty arises when the vendor makes an affirmation in respect to the quality of the goods sold. *Carleton v. Lombard, Ayres & Co.*, 72 Hun, 254, 259, 25 N. Y. Supp. 570.

An express warranty, as applied to an application for insurance, is a stipulation inserted in a writing on the face of the policy on the literal truth or fulfillment of which the validity of the entire contract depends. *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 87 (Gil. 32, 36) (citing *Ang. Ins.* § 140; *Arn. Ins.* 577; *Bac. Ins.* § 1940; *May, Ins.* [2d Ed.] § 156); *Buell v. Connecticut Mut. Life Ins. Co.*, 4 Fed. Cas. 590, 591; *Petit v. German Ins. Co. (U. S.)* 98 Fed. 800, 802; *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251; *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 333, 35 Am. Dec. 92; *Virginia Fire & Marine Ins. Co. v. Morgan*, 80 Va. 290, 292, 18 S. E. 191; *McKenzie v. Scottish Union & National Ins. Co.*, 44 Pac. 922, 924, 112 Cal. 548.

"The stipulation is considered to be on the face of the policy, though it may be written in the margin, or transversely, or on a subjoined paper referred to in the policy." *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 87 (Gil. 32, 36) (quoting *Ang. Ins.* § 140, note 1); *Fitzgerald v. Supreme Council Catholic Mut. Ben. Ass'n*, 56 N. Y. Supp. 1005, 1009, 39 App. Div. 251.

### EXPRESSED OILS.

"Expressed oils," as the term is used in Act March 3, 1883 (22 Stat. 489, 525), providing that the duties on all preparations known as "expressed oils," not specifically enumerated or provided for in the act, shall be 25 per cent. ad valorem, includes olive oils, both salad and lamp. *Hartman v. Oliver*, 8 Sup. Ct. 958, 959, 125 U. S. 525, 31 L. Ed. 813.

### EXPRESSLY.

As used in Const. art. 3, § 1, providing that no person charged with official duties under the legislative, executive, or judicial departments should exercise functions under the others except as expressly provided, "expressly" should be construed in its ordinary sense, and given its well-defined definition and meaning. The word "express," as defined by Worcester, means "given in direct terms, not implied, not dubious, clear, definite, explicit, plain, manifest." The word "expressly" is defined by Worcester to mean in direct terms, plainly. *Bouvier's Law Dictionary* gives the definition of "express" as "stated or declared, as opposed to implied; that which is made known, and

not left to implication." Hence, under the Constitution the Legislature has no functions other than legislative, except such as are expressly, plainly, certainly, or directly granted, and not by implication. *State v. Denny*, 21 N. E. 274, 279, 118 Ind. 449, 4 L. R. A. 65; *Same v. Hyde*, 22 N. E. 644, 649, 121 Ind. 20; *City of Evansville v. State*, 21 N. E. 267, 272, 118 Ind. 426, 4 L. R. A. 93.

"Expressly," as used in Const. art. 3, § 1, which is as follows: "No person charged with official duties under one of its departments shall exercise any of the functions of another except as in this Constitution expressly provided," means in an express, direct, or pointed manner; in direct terms; plainly—citing *Webst.*: "Directly stated; not implied or left to inference; directly and pointedly given; made unambiguous by special mention; clear; plain." *Hovey v. State*, 21 N. E. 21, 27, 119 Ind. 395.

An instruction on the question of ratification by a bank of an act of its cashier declared that the law presumes that they are repudiated, and will not infer an affirmation, and that such acts, to estop the plaintiff from recovery, must be "expressly ratified." It was objected that the use of the words "expressly ratified" was erroneous, and that the terms called for a higher degree of action and a more definite specific performance than the law required; but the court held that the phrase was not to be understood as requiring a ratification in terms (there being no evidence of such a ratification), and therefore that the term must be construed to mean an intent to approve the acts which the cashier had done, and that proof of such approval must be plain and clear. *Iowa State Sav. Bank v. Black*, 59 N. W. 283, 284, 91 Iowa, 490.

### As especially.

In its primary meaning "expressly" denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to "in an express manner" or "in direct terms." It is also commonly used to designate purpose, and as equivalent to "especially" or "particularly," or "for a distinct purpose or object." As used in the tariff act of 1883, exempting from duty chemicals and chemical products expressly used for manure, the word means "especially" or "particularly." *Magone v. Heller*, 14 Sup. Ct. 18, 19, 150 U. S. 70, 37 L. Ed. 1001.

### As intentionally.

Act 1870 (Thomp. & S. § 2486a et seq.), providing that married women owning real estate are authorized to sell, convey, devise, charge, or mortgage the same by will, deed, or otherwise, as femes sole, provided the power of disposition is not "expressly withheld" in the deed or will under which they

hold the property, means withheld by a general clause restrictive of all disposition, or by words restrictive of any other mode of disposition than those prescribed; and the latter contingency may occur when the language would, either by limiting the power or purpose of disposition, show a clear intention to restrain by implication, equivalent to an express provision. That a power may be "expressly withheld" it is not necessary that it should be expressly forbidden. The word "expressly" is only used as a mode of saying that the power is intentionally, effectually, or certainly withheld. *Lightfoot v. Bass*, 2 Tenn. Ch. 677, 681.

## EXPULSION.

The term "expulsion," as used in a statute chartering a corporation, and providing that membership may be terminated by death, voluntary withdrawal, or expulsion, means a termination of membership by acts necessarily hostile to the member expelled, and against his will. *New York Protective Ass'n v. McGrath*, 5 N. Y. Supp. 8, 10.

*Littledale, J.*, in *Hanks v. Virtue*, 5 Adol. & E. 367, says, "A party who comes to claim, but has never entered, cannot be expelled." To constitute an eviction or expulsion, there must be some affirmative act on the part of the party sought to be charged with the consequences flowing therefrom. An eviction does not consist in putting a tenant in possession of something which by the agreement of the parties he ought to have enjoyed. His remedy in such a case is by an action to recover damages for a breach of the covenant. Consequently, where a landlord reserved to his own use a building on the demised premises until a specified date, and, no demand being made by the tenants, continued to occupy it after such specified date, he certainly was guilty of no eviction, and it would seem that he would not have been guilty of an eviction even had a demand been made by the tenants. *Vanderpool v. Smith*, 4 Abb. Dec. 461, 464.

The distinction between suspension and expulsion is often recognized in the by-laws of a society. The former is a temporary privation of the rights and benefits. The latter is a disfranchisement severing the connection between the expelled member and the society. *Palmetto Lodge, No. 5, I. O. O. F., v. Hubbell* (S. C.) 2 Strob. 457, 462, 49 Am. Dec. 604.

## EXSCIND.

"Exscinded," as used in a partnership agreement providing that a partner might, by resolution of the board, be exscinded,

means cut off. *Robinson v. Floyd*, 28 Atl. 258, 260, 159 Pa. 165.

## EXTEND—EXTENSION.

To extend means to expand; to enlarge; to widen; to carry out further than the original limit. *Flagler v. Hearst*, 70 N. Y. Supp. 956, 62 App. Div. 18, 25.

Within the provision of the Constitution of the United States that the judicial power shall extend to all cases in equity, "extend" means to stretch, reach, or continue in any particular direction, and there is no meaning in the word which carries with it the exclusion of anything else extending to the same matter. When, therefore, the judicial power is extended to any particular subject, it is simply empowered to take jurisdiction over it whenever it is invoked; and the mere extension of the judicial power to all acts, or, what is the same thing, to all suits or proceedings which may be instituted invoking its action, touching the enumerated subjects, does not give any exclusive character to the power granted, so as to exclude the concurrent jurisdiction of the ordinary tribunals. *Piqua Branch of State Bank v. Knoup*, 6 Ohio St. 342, 355.

### As not to exceed

"To extend," as used in reference to time, is synonymous with to "continue" or "stretch over," so that an agreement to perform services not to extend six months is equivalent to an agreement not to exceed six months. *Campbell v. Jimenes*, 27 N. Y. Supp. 351, 352, 7 Misc. Rep. 77.

### As postpone.

A request to extend the time for delivery of rock sold cannot be construed to mean postponed or arbitrarily put off to a later day. Neither the etymology of the word, nor its ordinary use, would permit such an understanding. In the derivation, construction, and definition of every authority, it means to enlarge, prolong, expand, stretch out. *Goulding v. Hammond* (U. S.) 54 Fed. 639, 642, 4 C. C. A. 533.

### As reach.

"Extending," as used in a deed of conveyance describing the land as extending to a thoroughfare, means reaching or stretching, and not produced or protracted. *Steelman v. Atlantic City Sewerage Co.*, 38 Atl. 742, 743, 60 N. J. Law, 461.

### Date of expiration related to.

In Rev. St. 1889, § 2168, providing that the time for filing a bill of exceptions in certain cases may be extended by the court or judge in vacation, for good cause shown, "extended" means "prolonged," and the time

cannot be extended after the time originally limited has expired. *State v. Scott*, 20 S. W. 1076, 1077, 113 Mo. 559.

Laws 1877, c. 21, § 1, extended for three years the time during which the lands of the Wisconsin Central Railroad Company should be exempt from taxation. It was held that the period of exemption related back to the expiration of the former period of exemption, and did not commence at the date of the act. The word "extended" implies something to be extended, and must necessarily be connected with that something. It is derived from "ex," meaning from or out of, and "tendere," to stretch or stretch out, and signifies to draw forth or stretch or prolong. *Webst. Dict.* The time is stretched out or prolonged three years. The other construction of the statute, that the exemption commenced at the date of the act, would not make it an extension, but a new exemption, independent of any other exemption. *Wisconsin Cent. R. Co. v. Comstock*, 36 N. W. 843, 844, 71 Wis. 88.

A stipulation by counsel providing that the time for taking testimony be extended 60 days means that the testimony shall be taken within 60 days from the expiration of the time under the original order of the court for taking the testimony. *James v. McMillan*, 20 N. W. 826, 55 Mich. 136.

#### Definite time implied.

"Extended," as used in a note stipulating that all the signers agree to be "holden, should the time of payment be extended," naturally and by the ordinary force of language means a natural extension for a definite time, and not a series of extensions indefinite in number and endless in repetition. *Rochester Sav. Bank v. Chick*, 13 Atl. 872, 873, 64 N. H. 410.

#### New transaction or new terms authorized.

"The word 'extend' is relative in its application, and refers to something already begun, and implies a continuation of the same act. A power to extend or continue an act or piece of business cannot authorize a totally distinct transaction." *Clement's Ex'rs v. Dickey* (U. S.) 5 Fed. Cas. 1025, 1027.

"Extension," as used in 3 Mills' Ann. St. § 4559k, providing that the act creating the office of public trustees shall not affect the extension of any indebtedness secured by deeds of trust executed and recorded prior to the taking effect of the act, while it means literally an indulgence by giving time to pay a debt or perform an obligation, yet it will be construed to authorize an extension on any terms upon which the parties mutually agreed. *Brewer v. Harrison*, 62 Pac. 224, 225, 27 Colo. 349.

"Extended," as used in Rev. Code, § 4699, declaring that a mortgage on real property can be renewed or extended only by a writing executed with certain formalities, means to make the mortgage stand as security for some debt or obligation not originally included therein, and does not refer to an extension of time for the payment of the debt secured. *People's State Bank of Lakota v. Francis*, 79 N. W. 853, 855, 8 N. D. 369.

#### Renewal distinguished.

In connection with patents, "extension" means practically the same as "renewal." It is true that some renewals are not extensions in the sense of prolonging the term of the patent—that is, when an old patent is surrendered and a new one is taken out—or a renewal may be for the rest of the term, while all extensions prolong the term. But still renewals are as often used for the prolongation of the term, or for a new term, as extensions are. To renew a lease is to extend it another term. To renew an office is to extend it another term. *Wilson v. Roseau*, 45 U. S. (4 How.) 646, 697, 11 L. Ed. 1141.

A lease provided that "if the lessee shall signify a wish to the lessors at the expiration of this lease to have the same extended, they (the lessors) hereby covenant and agree to extend the lease for a term of 99 years." The verb "to extend" implies far less in this connection than the verb "to renew," found in other cases. In fact, it has nothing of the same strength and significance. To extend is to draw forth; to stretch; to prolong; to protract; to continue. "To renew" signifies to make over; to make anew; to give new life to; to restore; to re-create; to rebuild. Each word is so defined by the lexicographers. The covenant to extend this lease, therefore, means more than to prolong or to continue it at the option of the lessors, or that it shall be so prolonged, which clearly forbids the inference that a new lease is to be executed. The language implies, as clearly as language can, that the lease was to be a continuing one. *Orton v. Noonan*, 27 Wis. 272, 282, 283.

#### Charter.

"Extend," as used in Const. art. 1, § 25, providing that no corporate body shall be created, renewed, or extended without giving a certain notice of an intent or application in a certain manner, means to give a charter which now exists greater or longer time to operate in than that to which it was originally limited. *Moers v. City of Reading*, 21 Pa. (9 Harris) 188, 201.

An act providing that building and loan associations might bring and maintain suits after the expiration of their charter for the

sole purpose of enabling them to wind up their affairs is not in violation of article 1, § 25, of the Constitution, declaring that no law shall "create, renew, or extend the charter of more than one corporation." The act neither created charters, nor did it renew or extend the time of its existence, within the meaning of the Constitution. *Cooper v. Oriental Savings & Loan Ass'n*, 100 Pa. 402, 406.

#### Charter party.

Where a charter party of a vessel for a period of six weeks specifies that it is for a voyage to the West Indies, and gives the charterer the privilege of taking an extension, it authorizes the charterer to enlarge the term of six weeks; but the privilege to enlarge has relation to the voyage for which the vessel was chartered, and does not give a right to the unlimited enlargement of the use of the vessel, entirely disconnected with the voyage, and for another and entirely different purpose. *Flagler v. Hearst*, 70 N. Y. Supp. 956, 62 App. Div. 18, 25.

#### Debt.

In an indemnity bond given to insure a merchant against loss through the insolvency of debtors, and providing that losses on claims under extension at time of payment of the guaranty fee should not be included in the calculation of losses, "extension" signifies an agreement made between a debtor and his creditors by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agreed to wait for a definite length of time after their several claims should become due and payable before they would demand payment. *Strouse v. American Credit Indemnity Co.*, 46 Atl. 328, 336, 91 Md. 244 (citing *Bouv. Law Dict.* 503).

A provision in a note that the makers, sureties, and guarantors agree to extensions without notice, "hereby ratifying such extensions," etc., must be understood as meaning an actual extension of the time of payment, resting upon a contract to that effect, supported by a sufficient consideration, and does not refer to extensions by payment of interest. *Wellington Nat. Bank v. Thomson*, 59 Pac. 178, 9 Kan. App. 667.

#### Gasworks.

In Rev. St. § 2485, providing that it shall not be lawful for any council to agree by ordinance, contract, or otherwise with any person or persons for the extension of gasworks for supplying the corporation or its inhabitants with gas, "extension" is the act of extending or stretching out. Gasworks are extended when the mains and pipes are prolonged in a village so as to supply the village and its inhabitants with the gas

of such works. *Cincinnati Gaslight & Coke Co. v. Avondale*, 1 N. E. 527, 531, 43 Ohio St. 257.

#### Limits of municipality.

"Extended limits," as used in Laws 1876, c. 47, as amended by Acts 17th Gen. Assem. c. 169, authorizing municipal corporations to extend their limits, and providing that no lands within such extended limits which shall not have been laid off into lots, etc., shall be taxable for city purposes, mean the lands within such extended limits which did not form a part of the city limits before the extension thereof, and do not apply to extensions made prior to the passage of the act. *Perkins v. City of Burlington*, 42 N. W. 441, 77 Iowa, 553.

#### Railroad.

Under Pub. St. c. 156, § 18, providing that a railroad may build an extension of its line if it is determined to be for the public good, the word "extension" will include the building of a line longer than the existing line, which in effect constituted a new system. In re *Laconia St. Ry.*, 52 Atl. 458, 71 N. H. 355.

"Extensions," as used in Laws 1892, c. 672, authorizing extensions of street railroads, will not be held to mean merely a prolongation in a given direction of the existing railroads, but will include an extension of its operation in any direction or upon any street or avenue. *Bohmer v. Haffen*, 54 N. Y. Supp. 1030, 1036, 35 App. Div. 381.

"Extend," as used in a statute giving a railroad company which had been authorized to build a single or double track on certain streets in a city the right to extend its course, means to continue or prolong its course, and not to build independent branch roads. *People v. New York & H. R. Co.* (N. Y.) 45 Barb. 73, 74 (cited in *Williams v. Odessa & M. Ry. Co.*, 44 Atl. 821, 830, 7 Del. Ch. 303).

St. 1874, c. 29, § 11, providing that the board of aldermen of any city and the selectmen of any town may from time to time authorize any street railway corporation whose charter has been accepted, and whose tracks have been located and constructed, to extend the location of its tracks within the territorial limits of such city or town, should be construed to include the location of an additional track not connected with the existing tracks except by the tracks of another railway corporation. The word "extend" may, in its primary sense, when applied to a railroad track or other line, import a continuation of the line without a break, but it was not used in this restricted sense in the statute. *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485, 489.

Where a street railway company was incorporated to build a road of the length, as near as may be, of 3 miles, and, as laid out, its length was 3.9 miles, and, to avoid a closely built up portion of the city, a road was proposed making the distance 6.6 miles, the proposed road was a branch, within authority given to the railroad company to construct a branch, and not an extension, though the branch road was longer than the main line. *Appeal of Vollmer*, 8 Atl. 223, 224, 115 Pa. 166.

An "extension," as used in a township ordinance granting to a street railway company the right to construct an extension of its railway, as the word signifies, is a prolongation of the railroad from one of its termini to some other designated point, and, where some distance intervened between the terminus of the road and the proposed road, the proposed road was not an extension. *Trenton St. R. Co. v. Pennsylvania R. Co.*, 49 Atl. 481, 483, 63 N. J. Eq. 276.

#### Street.

"To extend a street" means its prolongation and continuance in the direction to which it already points, and does not authorize its deflection in order to reach a given point. *Mayor, etc., of Monroe v. Ouachita Parish*, 17 South. 498, 499, 47 La. Ann. 1061.

"Extension," as used in the report of viewers, speaking of the extension of a straight and open street, implies that it is to be continued, or, in mathematical language, produced, as a straight line, to the point indicated for intersection with another street. In *re Charlotte St.*, in *Lancaster City*, 23 Pa. 286, 288.

"Extension" signifies enlargement in any direction—in length, breadth, or circumference. Where the extension of a street to a certain point is directed, the street must be continued in its length in the direction to which it points, and cannot be deflected unless there are physical obstructions which make it necessary. *Mayor, etc., of Monroe v. Ouachita Parish*, 17 South. 498, 499, 47 La. Ann. 1061.

A statutory power to extend and open a street includes the construction of the street, or the extension thereof, as well as the mere act of laying it out. *Matthiessen & Wiechers Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. (11 C. E. Green) 247, 254.

An authority to a municipal corporation to open or extend streets has been held not to authorize the extension of a street across the right of way of an existing railroad, as such right of way is already devoted to a public use by express legislative grant, and the extension of the street across it is an unauthorized appropriation of it to another

public use. *Illinois Cent. R. Co. v. City of Chicago*, 30 N. E. 1044, 1045, 141 Ill. 586, 17 L. R. A. 530.

The right given cities by Act March 24, 1890, to project and extend their streets over tide lands, confers merely the right to continue existing streets in the same direction, and with the same width. *Seattle & M. Ry. Co. v. State*, 34 Pac. 551, 553, 7 Wash. 150, 22 L. R. A. 217, 38 Am. St. Rep. 866.

## EXTENT.

Extent is an execution writ in the nature of final process. *Nason v. Fowler*, 47 Atl. 263, 264, 70 N. H. 291.

The writ of extent seems to have taken its name from the fact that the sheriff is to cause the land to be appraised at its full extended value before he delivers it to the plaintiff. It is said that, at English common law, by this writ the defendant's body, land, and goods may all be taken at once to compel payment of a debt; that in several of the states of this country it is employed to give the creditor possession of the debtor's land for a limited time, until the payment of the debt. In *Hackett v. Amsden*, 56 Vt. 201, the court said: "Under our statute, an extent may be likened to an extent in chief in England. It is, so to speak, prerogative process, affording a summary remedy for recovering public revenue from public officers who have committed a breach of public duty, and, in case of state taxes, for recovery from the inhabitants of the town as well. No notice is given to show cause against the State Treasurer's extent." *Town of Mt. Holly v. French*, 52 Atl. 1038, 1039, 75 Vt. 1.

## EXTENUATING CIRCUMSTANCES.

In an instruction placing the burden of proof on one accused of murder of showing "extenuating circumstances," such words include intoxication. *State v. Davis*, 43 S. E. 99, 52 W. Va. 224.

## EXTERIOR.

A platform attached to a building partly roofed, and all open to the air, is embraced within the meaning of the word "exterior," as used in a lease wherein the landlord agreed to repair the exterior, and the tenant the interior. *May v. Ennis*, 79 N. Y. Supp. 896, 897, 78 App. Div. 552.

## EXTERNAL.

An insurance policy on a vessel, providing that the company should not be held liable for the bursting of boilers or the breaking of engines, unless occasioned by external

violence, should be construed as meaning a violence external to the boat, such as striking a log, rock, or sand bar, or collision, etc., and not to mean a violence external to the engine which breaks, or the boiler which bursts. *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411, 420.

The external parts of the premises are those which form the inclosure and beyond which no part of the premises extends; and it is immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building, which forms no part of the premises. This is the meaning of the words as used in a lease by which the lessor covenanted to repair all the external parts of the premises. *Green v. Eales*, 2 Q. B. 224, 237.

"External alteration," as used in a lease of a wharf and dock, dwelling house, wash-house, and courtyard, providing that the lessee would not make any external alteration whatever in the premises, applies to everything external to the house, or, as it is popularly called, out of doors. *Perry v. Davis*, 3 C. B. (N. S.) 769, 776.

#### EXTERNAL AND VISIBLE SIGNS.

The phrase as used in the certificate of an accident association which provides that the benefits under the certificate shall not extend to any bodily injury of which there shall be no "external and visible sign," etc., does not mean merely broken limbs, or bruises on the surface of the body, as there may be other external indications which are visible signs of internal injury. It would include any evidence of an internal injury, such as pale and sickly looks, or vomiting or retching, or anything which sends forth to the observation of the eye, in the struggle of nature, any signs of the injury. *United States Mut. Acc. Ass'n v. Barry*, 9 Sup. Ct. 755, 759, 131 U. S. 100, 33 L. Ed. 60 (citing *Barry v. United States Mut. Acc. Ass'n* [U. S.] 23 Fed. 712, 716).

An "external or visible sign" is not limited to a sign visible to the eye, but extends to a strain of the recti muscles which can be ascertained by a physician by the sense of feeling—by applying the hands on the exterior of the body. *Gale v. Mutual Aid & Accident Ass'n*, 21 N. Y. Supp. 898, 66 Hun, 600.

Whether the phrase "visible and external signs of injury" extends to a case where the only marks on the body of the insured are bloody froth at the mouth, and spots upon the face and breast, and red spots upon the body, is a question to be determined by the jury; and such marks cannot be said, as a matter of law, not to constitute external and visible signs of injury. *United States Mut. Acc. Ass'n v. Newman*, 3 S. E. 805, 809, 84 Va. 52.

#### EXTERNAL, VIOLENT, OR ACCIDENTAL MEANS.

"External means," as used in an accident insurance policy made payable in case of death resulting from external, violent, and accidental means, should be construed to mean that the means, or that which caused the injury, should be external, and not that the injury must be external. *American Acc. Co. v. Reigart*, 23 S. W. 191, 192, 94 Ky. 547, 21 L. R. A. 651, 42 Am. St. Rep. 374.

Where a person while crossing a rail road track was knocked down and killed by a car under circumstances which did not indicate suicide, the death was accidental, within the meaning of a policy insuring against death through external, violent, and accidental means. *Payne v. Fraternal Acc. Ass'n of America*, 98 N. W. 361, 362, 119 Iowa, 342.

#### Death at hands of third persons.

The phrase covers the case of a person who was unexpectedly shot by another without cause or provocation. "Thus, where one was waylaid and assassinated for the purpose of robbery, his death was held to have been caused through external, violent, and accidental means. *Hutchcraft's Ex'r v. Travelers' Ins. Co.*, 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484. So death by hanging at the hands of a mob was held to be an accident, within the meaning of a policy against injuries through external, violent, and accidental means. *Fidelity & Casualty Co. v. Johnson*, 72 Miss. 333, 17 South. 2, 30 L. R. A. 206. So the death of a person who is shot by one whom he is trying to eject by force from an hotel office is a death by accident, and not a risk voluntarily assumed when he makes the attempt without knowing that the other person is armed." *Lovelace v. Travelers' Protective Ass'n*, 28 S. W. 877, 879, 126 Mo. 104, 80 L. R. A. 209, 47 Am. St. Rep. 638.

#### Drowning.

Death caused by accidentally drowning is death through "external, violent, and accidental means," within the meaning of the stipulation of an accident policy which gives indemnity against death by such means. *United States Mut. Acc. Ass'n v. Hubbell*, 47 N. E. 544, 546, 56 Ohio St. 516, 40 L. R. A. 453; *De Van v. Commercial Travelers' Mut. Acc. Ass'n*, 36 N. Y. Supp. 931, 932, 92 Hun, 256.

"External, violent, and accidental means" include involuntary death by drowning, though caused by a temporary physical trouble, which was entirely unusual and uncommon, whereby deceased falls into the water. *Manufacturers' Acc. Indemnity Co. v. Dorgan* (U. S.) 58 Fed. 945, 954, 7 C. C. A. 581, 22 L. R. A. 620.



**Epileptic fits.**

"External, violent, and accidental means" do not apply to the death of one subject to epileptic fits, who was found dead in a plunge bath, in an almost direct standing position, although he has an abrasion between his eyes and the side of his head, in view of medical evidence that the entrance into the bath of one of his then condition would be likely to result in an epileptic attack, and that the fall or blow which caused the abrasion or bruise was not sufficient to have caused death. *Tennant v. Travelers' Ins. Co.* (U. S.) 31 Fed. 322, 326.

**Fall.**

Injuries caused by a fall due to a temporary and unexpected disorder are violent, external, and accidental, within the meaning of such words in an insurance policy. *Meyer v. Fidelity & Casualty Co.*, 65 N. W. 328, 96 Iowa, 378, 59 Am. St. Rep. 374.

**Hanging while insane.**

A policy of insurance against "bodily injuries effected through external, accidental, and violent means," and occasioning death or complete disability, covers death of the insured by hanging himself while insane. *Accident Ins. Co. v. Crandal*, 7 Sup. Ct. 685, 687, 120 U. S. 527, 30 L. Ed. 740.

**Inhalation of gas.**

Under an accident policy indemnifying the insured against loss of time caused by an injury resulting from external, violent, and accidental means, it is held that injury caused by the accidental breathing of illuminating gas was an injury caused by external and violent means; the gas in the atmosphere being a violent agency, within this provision of the policy. *Paul v. Travelers' Ins. Co.*, 20 N. E. 347, 348, 112 N. Y. 472, 3 L. R. A. 443, 8 Am. St. Rep. 758.

**Poison by mistake.**

The phrase "external, violent, or accidental means" construed not to include death caused by an overdose of opium taken by mistake. *Bayless v. Travelers' Ins. Co.* (U. S.) 2 Fed. Cas. 1077, 1078. Nor does it include death caused by the accidental taking of poison, "since death was not caused by any external act, nor by anything acting externally, and certainly not by any violent external means." *Hill v. Hartford Accident Ins. Co.*, 22 Hun, 187, 189.

**Runaway.**

The phrase "external, violent, and accidental means" covers the death of insured by a runaway, resulting in such a physical and mental strain in finally controlling the horses that insured died therefrom in an hour, though there are no outward marks of violence. *McGlinchey v. Fidelity & Casu-*

*alty Co.*, 14 Atl. 13, 16, 80 Me. 251, 6 Am. St. Rep. 190.

**Snake bite.**

"External, violent, and accidental means," as used in an accident policy insuring against death by violent, external, and accidental means, includes death caused by the sting of an insect or the bite of a snake. *Omberg v. United States Mut. Acc. Ass'n*, 40 S. W. 909, 910, 101 Ky. 303, 72 Am. St. Rep. 413.

**EXTINCT.**

See "Extinguish—Extinguishment."

Coke says the word "extinct" comes from the word "extingueri," meaning to destroy or put out. *Co. Litt.* 147-6. *Taylor v. Hampton* (S. C.) 4 McCord, 96, 101, 17 Am. Dec. 710.

**EXTINCTION.**

Where stock or moneys, or securities for moneys, specifically devised, are sold or disposed of, there is a complete extinction of the subject, and nothing remains to which the words of the will can apply. The word "ademption," when applied to such specific legacies, is synonymous with "extinction." The intention of the testator is immaterial, because, a subject being extinct at the death of a testator, there is nothing upon which the will can operate. *King's Ex'rs v. Sheffey's Adm'r* (Va.) 8 Leigh, 614, 617.

**EXTINGUISH—EXTINGUISHMENT.**

Extinguishment is the extinction of a charge or equity by its passing into the hands of the owner of the lands charged. *James v. Morey*, 3 Shars. & B. Lead. Cas. Real Prop. 228. It takes place when the same hand that is to receive is to pay. That amounts to extinguishment. *Henderson, Hull & Co. v. Stryker*, 30 Atl. 386, 387, 164 Pa. 170 (citing *Wankford v. Wankford*, 1 Salk. 305).

The statute of limitations, fixing the time within which an action must be brought to recover taxes, does not extinguish such taxes, within the constitutional prohibition against extinguishing any liability or obligation in favor of the state; the statute merely limiting the right of action, while leaving the debt in force. *Custer County Com'rs v. Story*, 69 Pac. 56, 58, 26 Mont. 517.

In adjudications that where the statute of limitations operates to extinguish the right upon which it has operated the term "extinguish the right" does not mean actual satisfaction of the right by the operation of the statute. The idea is that the right to insist upon the statutory bar is a

vested property right protected by the Constitution, the effect of which is to forever prevent the judicial enforcement by it against the will of the owner of a prescriptive right. *Eingartner v. Illinois Steel Co.*, 79 N. W. 433, 434, 103 Wis. 373, 74 Am. St. Rep. 871.

Code Civ. Proc. § 1352, provides that, by the marriage of an executrix, her authority is extinguished. Held, that the marriage of an executrix does not extinguish her authority ipso facto, the phrase "authority is extinguished" being equivalent to "ceases to be competent," and hence she may be proceeded against for suspension and removal. *Schroeder v. Superior Court*, 11 Pac. 651, 652, 70 Cal. 343; *In re Allen's Estate*, 21 Pac. 426, 427, 78 Cal. 581.

#### As annihilation or destruction.

"When the law speaks of a right or obligation as extinguished, it means that it is put out, taken away, destroyed." *Commercial Bank v. Lockwood's Adm'r* (Del.) 2 Har. 8, 14 (quoting *Co. Litt.* 147b; 1 Rolle, Abr. 933).

In *Bacon* it is said that "whenever a right or interest is destroyed or taken away by the act of God, operation of law, or the act of the party, this, in many books, is called 'extinguishment.'" *Taylor v. Hampton* (S. C.) 4 McCord, 96, 101, 17 Am. Dec. 710 (citing 3 Bac. tit. "Extinguishment").

"Extinguishment," as used with regard to incorporeal hereditaments, means an entire annihilation or destruction, and not a mere suspension of the right; and, when a right of this nature is once extinguished, it is forever gone, and cannot revive. Therefore an extinguishment for one moment is an extinguishment forever. *Taylor v. Hampton* (S. C.) 4 McCord, 96, 101, 17 Am. Dec. 710.

A judgment of a lower court is not "extinguished" by a judgment of affirmance entered by a court of appeals; the word "extinguished," as a legal phrase, meaning the annihilation or extinction of a right by its being consolidated with a greater or more extensive right. In its application to debts, an extinguishment takes place only when the original debt is destroyed, as if a feme sole marry her debtor, or if a debtor be made executor at common law, etc. So taking a security of a higher nature extinguishes the first security, but a security of an inferior or equal degree does not extinguish the first security. *Planters' Bank of State v. Calvit*, 11 Miss. (3 Smedes & M.) 143, 194, 41 Am. Dec. 616.

Act May 23, 1887, § 6, provides that a witness incompetent by reason of interest shall become fully competent by a release or extinguishment in good faith of his interest, upon which good faith the trial judge shall

decide. Held, that the words "extinguishment" and "release" require that the witness' interest shall be effectually terminated, not only as to himself, but as to the other party against whom he is about to testify, and hence an assignment of the interest of a witness to another is not within the statute, as an assignment terminates the claim only so far as the witness himself is concerned, leaving it in full force as to the other party against whom he is about to testify. *Daragh v. Bigger*, 39 Atl. 37, 38, 183 Pa. 397.

#### Release distinguished.

A release is a discharge of a debt by act of the party, in distinction from an extinguishment, which is a discharge by operation of law. *Baker v. Baker*, 28 N. J. Law (4 Dutch.) 13, 20, 75 Am. Dec. 243.

#### As payment.

"Extinguishment," as used in Ky. St. § 2219, cl. 3, providing that partial payments on a debt bearing interest shall be first applied to the extinguishment of the interest then due, is equivalent to the word "payment." *Louisville Trust Co. v. Kentucky Nat. Bank* (U. S.) 102 Fed. 442, 445.

Const. art. 14, § 2, requiring the creation of a sinking fund to be applied solely to the payment and "extinguishment of the state debt" and to be continued until the extinguishment thereof, should be construed to mean an acquiring of a fund, sufficient to meet the principal of the state debt, and not the actual payment of such debt. *Auditor General v. State Treasurer*, 7 N. W. 716, 718, 45 Mich. 161.

#### As suspension.

Suspension distinguished, see "Suspend—Suspension."

"Extinguishment," as used in relation to the extinguishment of the debts to and from a defunct corporation, is synonymous with "suspension." Notwithstanding a debt may be extinguished, the obligation may survive and be enforced. *Moultrie v. Smiley*, 16 Ga. 289, 304.

## EXTORSIVELY.

The word "extorsively" substantially and sufficiently avers the corrupt intent required in an indictment for extortion by a public officer. *Leeman v. State*, 35 Ark. 438, 439, 37 Am. Rep. 44.

"Extorsively" is descriptive of the crime of extortion, and charges the corrupt purpose. It is invariably used for that purpose in the approved precedents of common-law indictments for extortion. It has been considered that the word "extorsive" is as essential in such an indictment for extortion as the word

"proditorie" in treason, or "felonice" in felony. *Loftus v. State* (N. J.) 19 Atl. 183, 184.

## EXTORT—EXTORTION.

"Extort" means to obtain from a holder desired possessions or knowledge by force or compulsion; to wrest from another by force, menace, duress, etc. Citing Cent. Dict. In the law dictionaries the word "extort" is not found, and "extortion" is applied to an officer "who, by color of office, unlawfully takes any money or thing of value that is not due him, or more than is due, or before it is due." Citing 1 Bouv. Law Dict., and Rap. & L. Law Dict. In a statute providing a punishment for those who extort money from others it is used in its broader sense, as given in the Century Dictionary. *Cohen v. State*, 38 S. W. 1005, 1006, 37 Tex. Cr. R. 118.

The ordinary meaning of the word "extortion" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. *United States v. Deaver* (U. S.) 14 Fed. 595, 597; *Mann v. State*, 26 N. E. 226, 228; 47 Ohio St. 556, 11 L. R. A. 656.

Extortion is the obtaining of property from another with his consent, induced by a wrongful use of force or fear, or under color of official right. Pen. Code, § 518; *People v. Hoffman*, 58 Pac. 856, 126 Cal. 366; *In re Coffey*, 56 Pac. 448, 123 Cal. 522. Under this definition, it is no defense to his accusation of extortion that the charges or publications threatened to be made by the defendant, and by which he obtained valuable property, were true. The truth or validity of these matters form no element in establishing the guilt or innocence of a defendant charged with extortion. *Morrill v. Nightingale*, 28 Pac. 1068, 1070, 93 Cal. 452, 27 Am. St. Rep. 207.

Fear such as will constitute extortion may be induced by a threat either (1) to do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or (2) to accuse him, or any relative of his, or member of his family, of any crime; or (3) to expose or impute to him or them any deformity or disgrace; or (4) to expose any secret affecting him or them. Pen. Code, § 519; *People v. Tonielli*, 22 Pac. 678, 679, 81 Cal. 275.

"Extort" means to obtain money or other valuable things either by compulsion, by actual force, or by a force of motives applied to the will, often more overpowering and irresistible than physical force. *Commonwealth v. O'Brien*, 66 Mass. (12 Cush.) 84, 90.

To constitute extortion at common law, there must be the receipt of money or of

some thing of value. *Commonwealth v. Cony*, 2 Mass. 523, 524.

Wharton defines extortion as the exaction of money either for the performance of a duty, or the prevention of an injury, or for the exercise of an influence. *Edsall v. Brooks*, 25 N. Y. Super. Ct. (2 Rob.) 29, 34; 26 N. Y. Super. Ct. (3 Rob.) 284, 292.

The ordinary meaning of the word "extortion" is the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. The word has acquired a technical meaning in the common law, and in this sense may be defined to be the corrupt and unlawful taking by any officer of the law, under color of his office, of any money or thing of value that is not due him, or the corrupt or unlawful taking of any money or thing of value under color of his office in consideration of what is due him, or before it is due him. In Act No. 66 of 1884 the word "extort" is used in its ordinary, as distinguished from the technical, sense in which it is used in section 868, Rev. St., and, as so used, applies to persons generally, and signifies the taking or obtaining of anything from another by means of illegal compulsion, whether upon a claim of right or otherwise. *State v. Logan*, 29 South. 336, 337, 104 La. 760.

Extortion is the procuring of the property of another by means of fear induced, inter alia, by threats to injure his property. Pen. Code, §§ 552, 553. A threat to injure a person's business by inducing his employees, who are on a strike, to persist in their refusal to work for him, is not a threat to do an injury to the property of such person, within the meaning of those sections, and the obtaining of money by means of such threat is not extortion. *People v. Barondess*, 8 N. Y. Cr. R. 234, 248, 16 N. Y. Supp. 436, 61 Hun, 571.

At common law, "extortion" signified any imposition by color of right. But technically it was defined to be the taking of money by an officer, by reason of his office, where none at all was due, or when it was not yet due. *Whart. Cr. Law* (3d Ed.) p. 833; *People v. Whaley* (N. Y.) 6 Cow. 661. The obtaining of money by force or fear does not seem to be extortion either at common law or under the Revised Statutes. It was robbery, at common law, to extort money under the threat of charging one with an unnatural crime; and a threat to injure a person's business is not a threat to do an injury to the property of such person, within Pen. Code, §§ 552, 553, defining "extortion" as procuring the property of another by means of fear induced by threats to injure his property. *People v. Barondess*, 8 N. Y. Cr. R. 234, 242, 16 N. Y. Supp. 436, 61 Hun, 571.

"Extortion" is defined in Pen. Code, § 552, as the obtaining of property from another with his consent, induced by a wrongful use of fear; and fear, such as will constitute extortion, may be induced by an unlawful injury to the property of the individual threatened. *People v. Wilzig*, 4 N. Y. Cr. R. 403, 422.

Extortion is not an offense, *eo nomine*, so that a recognizance reciting that the defendant stands charged with extortion is insufficient to state the offense. *Johnson v. State*, 40 S. W. 982, 38 Tex. Cr. R. 26.

#### By color of office.

Extortion is the taking of money or thing of value by an officer, by color of his office, either when none is due, or not so much is due, or where it is not yet due. *Maguire v. State Sav. Ass'n*, 62 Mo. 344, 347; *United States v. Waltz* (U. S.) 28 Fed. Cas. 386, 387; *Commonwealth v. Evans* (Pa.) 13 Serg. & R. 426, 430 (citing Co. Litt. 368); *Commonwealth v. Saulsbury*, 25 Atl. 610, 611, 152 Pa. 554; *Commonwealth v. Hagan* (Pa.) 9 Phila. 574, 577 (citing 4 Bl. Comm. 137); *Williams v. State*, 34 Tenn. (2 Sneed) 160, 162 (citing 4 Bl. Comm. 141); *People v. Whaley* (N. Y.) 6 Cow. 661, 663; *Edsall v. Brooks*, 26 N. Y. Super. Ct. (3 Rob.) 284, 292; *Commonwealth v. Rodas*, 31 Ky. (1 Dana) 595, 601, 602; *Leeman v. State*, 35 Ark. 438, 442, 37 Am. Rep. 44; *Preston v. Bacon*, 4 Conn. 471, 480 (citing Co. Litt. 368b); *State v. Oden*, 37 N. E. 731, 732, 10 Ind. App. 136; *Commonwealth v. Bagley*, 24 Mass. (7 Pick.) 279, 281; *State v. Pritchard*, 107 N. C. 921, 929, 12 S. E. 50. Thus where a register of lands undertakes to act as attorney for an applicant in procuring a patent, and receives from him a gross sum, covering the execution of his official duties, as well as doing other things relating to procuring the patent, and no specified portion of it is taken as compensation for the one or the other, but the sum so taken is in excess of fees allowed by law, such taking of money is extortion. *United States v. Waltz* (U. S.) 28 Fed. Cas. 386, 387.

The word "extortion" implies that the money paid was extorted on the part of the one receiving it, and was paid unwillingly by the party paying it, so that the crime of extortion, at common law, was not committed by the taking of excessive or illegal fees by an officer, unless they were exacted and paid unwillingly under color of his office. *United States v. Harned* (U. S.) 43 Fed. 376, 377; *People v. Gardner*, 25 N. Y. Supp. 1072, 1073, 73 Hun, 66.

"Extortion" is defined by Pen. Code, art. 240, as the willful demand and reception by an officer authorized by law to receive fees of office, or by any person employed by such officer, of higher fees than

are allowed by law for the services in question. *Smith v. State*, 10 Tex. App. 413.

In general, it may be said that any officer, whether he be a federal, state, municipal, or judicial officer, and every person occupying an official or quasi official position, may be guilty of extortion. And hence a deputy constable appointed by an order of court which declares that he shall exercise and possess all the powers of policemen of the cities of the commonwealth, and shall be fully paid by private subscriptions, may be guilty of extortion. *Commonwealth v. Saulsbury*, 25 Atl. 610, 611, 152 Pa. 554.

In Massachusetts it has been held that, to subject an officer to the penalty provided by the statute, it must be proved that the sum alleged to have been extorted was demanded as a fee for some official duty. *Runnells v. Fletcher*, 15 Mass. 525. And according to some authorities, in order to constitute statutory extortion, there must have been some official service rendered, for which more pay is demanded or received than is allowed by law. *State v. Oden*, 37 N. E. 731, 732, 10 Ind. App. 136.

"Extortion" technically is an official misdemeanor. While in its larger sense it signifies any oppression under color of right, in its strict sense it signifies the taking of money by an officer, by color of his office, where none or a part only is due. The offense consists in the oppressive misuse of the exceptional power with which the law invests the incumbent of an office, and it is thus apparent that the crime of extortion is committable only by an officer. The incumbent of an office which an unconstitutional statute purported to create cannot be guilty of extortion, as he is neither a *de jure* nor a *de facto* officer. *Kirby v. State*, 31 Atl. 213, 57 N. J. Law (28 Vroom) 320.

To constitute extortion under color of office, all money or things received must have been claimed or accepted in right of office, and the person paying must have been yielding to official authority, and the rendition of services not official; and the acceptance of money therefor not in an official capacity, but as a private individual, however inconsistent with official duty may be the rendition of such services, is not extortion. *Collier v. State*, 55 Ala. 125.

#### Blackmail synonymous.

To charge a person with being a "black-mailer" would be equivalent to charging such person with being guilty of the crime of "extortion." The words are treated by lexicographers as synonymous. "The exaction of money for the performance of a duty, the prevention of an injury, or the exercise of an influence;" the "extortion of money from a person by threats of accusation or exposure;" the "wrongful exaction of mon-

ey." *Mitchell v. Sharon* (U. S.) 51 Fed. 424, 425.

In common parlance and in general acceptance, "extortion" is equivalent to and synonymous with "blackmail." *Edsall v. Brooks*, 25 N. Y. Super. Ct. (2 Rob.) 29, 34; *Id.*, 28 N. Y. Super. Ct. (3 Rob.) 284, 292.

## EXTRA.

A lease by which the lessee agreed to pay extra for steam heat, at a certain rate per foot of radiating surface, means in addition to the rent reserved in the lease. *Library Bureau v. Lothrop Pub. Co.*, 62 N. E. 380, 180 Mass. 372.

"The word 'extra' is Latin, signifying 'without' or 'outside of.' In its simple form it has been but lately admitted into the English dictionaries, but its compound use is ancient. 'Extraordinary' gives a familiar instance of its use, signifying 'outside of the ordinary,' 'not greater or less,' for a thing may be extraordinary for greatness or for littleness or for neither." *Carpenter v. State*, 39 Wis. 271, 284.

## EXTRA ALLOWANCE.

An extra allowance, in New York practice, is not included within the term "costs," but is a sum in addition to costs. *Code Civ. Proc.* § 3253, describes it as a "further sum." When an award of costs is made by the trial court, where such costs are discretionary, no further sum is embraced, unless an order therefor is made, and a direction of the appellate court remanding a cause that the lower court award costs does not authorize a special allowance. *Hascall v. King*, 68 N. Y. Supp. 1112, 1114, 54 App. Div. 441.

## EXTRA COMPENSATION.

"Extra compensation," as used in *Const. art. 4, § 28*, prohibiting the Legislature from granting any extra compensation to any contractor after the contract shall have been entered into, construed to mean any sum in addition to the contract price, though the value of the work is in excess of the amount so paid. "Extra compensation is such not merely for being greater or less than the contract, but properly because it is outside the contract." *Carpenter v. State*, 39 Wis. 271, 284.

The clause of the Constitution prohibiting the granting of extra compensation was intended to prohibit gifts of public moneys by the Legislature, and was not intended to take away the power of appropriating money for the payment of claims against the county, which, upon an audit therefor, had been ascertained to be just, though the claimant may have become disentitled, as a matter of strict

right, to enforce his claim. *Swift v. State* (N. Y.) 26 Hun, 508, 510; *Id.*, 89 N. Y. 52.

## EXTRA CONDUCTOR.

The term "extra conductor" is more comprehensive than that of "brakeman." The former includes within its distinction such persons as may be engaged as brakemen, whereas the latter does not include the former. In other words, all extra conductors are, in a sense, brakemen, but all brakemen are not extra conductors. *Standard Life & Accident Ins. Co. v. Koen*, 33 S. W. 133, 137, 11 Tex. Civ. App. 273.

## EXTRA PAY.

Act Cong. 1848, providing that soldiers and sailors who were engaged in military service of the United States in the war with Mexico should receive three months' extra pay, means the same pay they would have received if they had remained in the same service three months longer. *United States v. North*, 5 Sup. Ct. 285, 286, 112 U. S. 510, 28 L. Ed. 808.

## EXTRA SERVICES.

"Extra services," as used in Act 1855, providing that clerks and sheriffs shall be entitled to receive such reasonable earnings for extra services as the board of county commissioners may think right and proper, to be paid out of the county treasury, means services incident to their respective offices, for which compensation is not provided by law. *Miami County Com'rs v. Blake*, 21 Ind. 32, 34.

## EXTRA TRAIN.

An extra train or wild train is one not classified on the time-tables, and is required to keep entirely out of the way of all regular trains, of whatever class. *Hall v. Chicago, B. & N. R. Co.*, 46 Minn. 439, 442, 49 N. W. 239, 240.

## EXTRA WORK.

The distinction between "extra work" and "additional work" under a contract is that the former is work arising out of, and entirely independent of, the contract—something not required in its performance; the latter being something necessarily required in the performance of the contract, and without which it could not be carried out. *Shields v. City of New York*, 82 N. Y. Supp. 1020, 1021, 84 App. Div. 502.

## EXTRAHAZARDOUS.

Where a fire insurance policy authorized a building to be used for a packing house and for other extrahazardous purposes, the

latter term must be taken to mean purposes of the same class as those before specified, and to give the insured the right to use the premises for any similar extrahazardous purpose. *Reynolds v. Commerce Fire Ins. Co.*, 47 N. Y. 597.

"Extrahazardous," as used in a fire policy wherein it is provided that the insured premises may be occupied for extrahazardous purposes, means extradangerous. *Russell v. Cedar Rapids Ins. Co.*, 32 N. W. 95, 96, 71 Iowa, 69.

#### EXTRAJUDICIAL CONFESSION.

"Extrajudicial confessions, says Mr. Greenleaf, are those which are made by the party elsewhere than before a magistrate or in court, and they embrace not only explicit and express confessions of crime, but all those admissions of the accused from which guilt may be implied." *United States v. Williams* (U. S.) 28 Fed. Cas. 636, 643; *State v. Porter*, 49 Pac. 964, 966, 32 Or. 135; *Speer v. State*, 4 Tex. App. 474, 479 (citing *Greenl. Ev.* [6th Ed.] § 216); *State v. Lamb*, 28 Mo. 218, 230.

An extrajudicial confession is one made out of court, whether to an official or to a nonofficial person. *State v. Alexander*, 83 South. 600, 109 La. 557 (citing 1 *Bish. New Cr. Proc.* p. 1217).

#### EXTRAJUDICIAL OATH.

Extrajudicial oaths are those not taken in judicial proceedings, or without any authority of law, though taken formally before a proper person. *State v. Scatena*, 87 N. W. 764, 765, 84 Minn. 281.

#### EXTRATERRITORIAL JURISDICTION.

The term "extraterritorial jurisdiction," as used in a constitutional provision that circuit courts and circuit judges may have such extraterritorial jurisdiction in chancery cases as may be prescribed by law, is construed as having no reference to persons, so as to prohibit the Legislature from authorizing process to reach the person of a defendant anywhere within the limits of the state. *Chapman v. Reddick*, 25 South. 673, 677, 41 Fla. 120.

#### EXTRACT.

An "extract," as used in the tariff act, is anything drawn from a substance by heat, solution, distillation, or chemical process, as essences, tinctures, and the like. *Sykes v. Magone* (U. S.) 88 Fed. 494, 497.

#### EXTRADITION.

"Extradition" may be sufficiently defined to be the surrender by one nation to another

of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender. *Terlinden v. Ames*, 22 Sup. Ct. 484, 492, 184 U. S. 270, 48 L. Ed. 534.

Strictly speaking, transportation, extradition, and deportation, although each has the effect of removing a person from a country, are different things, and for different purposes. Transportation is by way of punishment of one convicted of an offense against the laws of the country. Extradition is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. Deportation is the removing of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken. *Fong Yue Ting v. United States*, 13 Sup. Ct. 1016, 1020, 149 U. S. 698, 37 L. Ed. 905.

In determining whether a person demanded as a fugitive from justice in extradition proceedings is charged with a crime against the laws of the state from whose justice he is alleged to have fled, it may be presumed that larceny is a crime in a state where the common law prevails. *Katynga v. Cosgrove*, 50 Atl. 679, 680, 67 N. J. Law, 213.

#### EXTRADOTAL PROPERTY.

Extradotal property, otherwise called paraphernal property, is that which forms no part of the dowry. *Civ. Code La.* 1900, art. 2335; *Fleitas v. Richardson*, 13 Sup. Ct. 495, 496, 147 U. S. 550, 37 L. Ed. 276.

#### EXTRANEOUS INFLUENCE.

"Extraneous influence," within a rule allowing a juror, after rendition of verdict, to testify as to extraneous influence, does not mean improper communications between the jurors themselves, whether in the courtroom or out of it. *Sharp v. Merriman*, 66 N. W. 372, 376, 108 Mich. 454.

#### EXTRAORDINARY.

The difference between work upon highways, which is spoken of as ordinary and extraordinary in *Rev. St.* 1881, § 5069, providing that road superintendents shall in certain months put all the roads in their respective townships in good, ordinary repair, and then, with such other means as may be in their hands, proceed to do work denominated "extraordinary," and, by judicious ditching,

draining, and making embankments, and grading, construct smooth roads, etc., is more in degree than in character, and hence work upon a highway is not of an extraordinary character simply because, in doing it, drains, etc., may be constructed. *Clark Civil Tp. v. Brookshire*, 16 N. E. 132, 135, 114 Ind. 437.

The words "unusual and extraordinary," as in common use, very often are exaggerations of speech, and in many cases, if properly inquired into and explained, would be found not to be synonymous with "unnatural and unexpected"; and, in an action for a fire started by sparks from an engine, it is error to instruct that if the wind causing the escape of sparks from defendant's engine was unusual and extraordinary, and if, but for the unusual and extraordinary character of the wind, the sparks would not have escaped and communicated the fire to plaintiff's premises, the defendant is not liable, without explaining the meaning of the words so as to present to the jury the question whether the wind could reasonably have been expected at that season in that section of the country. *Blue v. Aberdeen & W. E. R. Co.*, 21 S. E. 299, 300, 116 N. C. 955.

A lease provided that the tenant should pay all assessments for paving, etc., the streets adjoining the leased premises, and that the lessor should pay the assessments for opening streets or for other public purposes of an extraordinary character. It was held that changing the paving of a street from cobblestone pavement, which existed at the time the lease was made, to a granite block pavement, resulting in an assessment of a sum equal to the annual rent reserved by the lease, was an assessment for extraordinary purposes; the word "extraordinary" being defined as meaning "beyond or out of the common order or rule; not usual, regular, or of an extraordinary kind; not ordinary; remarkable; uncommon; rare."—*Ten Eyck v. Protestant Episcopal Church*, 20 N. Y. Supp. 157, 158, 65 Hun, 194.

#### EXTRAORDINARY ACCIDENT.

The term "extraordinary and unforeseen accident," in Code La. art. 2743, providing that a tenant of a predial estate cannot claim an abatement of the rent under a plea that during the lease thereof the whole or part of his crop was destroyed by accidents, unless those accidents be of such an extraordinary nature that they could not have been foreseen by either of the parties at the time the contract was made, and that the tenant shall have no right of abatement if it is stipulated in the contract that the tenant shall run all the chances of foreseen and unforeseen accidents, does not include an overflow of the Mississippi river, or even a crevasse, as the overflows of the river are so frequent that a

system of levees have been constructed, and the annual inundation of its banks have so often made breaches in the levees that even a crevasse itself cannot be considered an extraordinary accident. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 975, 120 U. S. 707, 30 L. Ed. 776; *Payne v. James*, 12 South. 492, 493, 45 La. Ann. 381.

#### EXTRAORDINARY AVERAGE.

"Extraordinary average" means a contribution by all the parties concerned in a mercantile voyage, either as to the cargo or vessel, toward a loss sustained by some of the parties in interest for the benefit of all. *Wilson v. Cross*, 33 Cal. 60, 69.

#### EXTRAORDINARY CARE.

The term "extraordinary care" means "a care more than ordinary." "It does not differ from the phrases 'greatest care,' 'utmost care,' 'the highest degree of care.'" *Toledo, W. & W. R. Co. v. Baddeley*, 54 Ill. 19, 24, 5 Am. Rep. 71.

The term "extraordinary care," as used in reference to the care exercised by the motoneer of an electric street railway, means care extraordinary even for a motoneer, whose ordinary care comprehends utmost vigilance. *Cowden v. Shreveport Belt Ry. Co.*, 30 South. 747, 748, 106 La. 236.

"Ordinary care" is the opposite of "ordinary negligence." There can be negligence less than ordinary negligence. "Slight negligence" is the opposite of "extraordinary care." *East Tennessee, V. & G. Ry. Co. v. Bridges*, 17 S. E. 645, 647, 92 Ga. 399.

"Extraordinary care," such as is imposed on carriers or passengers, means the greatest care, utmost care, highest degree of care. *Toledo, W. & W. Ry. Co. v. Baddeley*, 54 Ill. 19, 24, 5 Am. Rep. 71.

An instruction in an action for injuries received while crossing a railroad track which required that if plaintiff could see that the train was in motion, and could have avoided the accident, then he was negligent, required more than ordinary care on plaintiff's part, and was therefore erroneous. *Willoughby v. Chicago & N. W. R. Co.*, 37 Iowa, 432, 434.

An instruction required the agent of a railroad, in the discharge of his duties, to exercise such care as would be suggested by men of extraordinary care, skill, and diligence. The court said: "'Extraordinary' is a strong word. In the sense in which it is used, it means, 'Exceeding the common degree or measure; hence remarkable, uncommon, rare, wonderful.' It is a much stronger word than 'prudent' or 'ordinarily prudent.'" *Gadsden & A. U. Ry. Co. v. Causler*, 12 South. 439, 441, 97 Ala. 235.

**EXTRAORDINARY CASE.**

An extraordinary case, in the meaning of Code, § 309, providing for an extra allowance of costs in cases which are "difficult and extraordinary," is one which is remarkable and uncommon. Actions by an executrix against a son of the decedent, based on a note, and for the recovery of property claimed to have been converted by him, and in which the defendant set up a claim for \$2,100 for services rendered, the whole trial lasting about 8 days, and only 24 witnesses being examined, was not an extraordinary case, within the meaning of the statute. *Fox v. Fox* (N. Y.) 22 How. Prac. 453, 458, 465.

Code, § 309, providing for an allowance of extra costs in difficult and extraordinary cases, requires that the cause be both difficult and extraordinary. An action against a receiver of partnership property for a sale thereof without giving notice, and which was dismissed to secure postponement by reason of plaintiff's not being ready, is neither extraordinary nor difficult within the meaning of the statute. *Colton v. Morrissey* (N. Y.) 6 Wkly. Dig. 165.

A case which consumes a part of four days, and which would not have been extraordinary, even as to length, if dilatory methods had not been pursued, and if the plaintiff had not attempted to establish several claims which were eventually rejected, is not such an extraordinary case as will justify an extra allowance of costs to the plaintiff under a statute authorizing such allowance in difficult and extraordinary cases. *Sands v. Sands*, 6 How. Prac. 453, 455.

The fact that a trial lasted four or five days is enough to render it extraordinary, within the meaning of a statute providing that the courts might, in difficult or extraordinary cases, make an allowance for costs of not exceeding 10 per cent. on the recovery or claim. Such a case is of unusual length, and the expense of the winning party is proportionably increased. Also, the fact that plaintiff in the trial of the case was compelled to pay over \$30 to the engineers for their services in measuring the amount of hardpan removed by him in the fulfillment of the contract on which the action was based would entitle him, under the statute, to an extra allowance. The rates otherwise fixed by the statute were not intended for cases characterized by the necessity of procuring such scientific witnesses. *Howard v. Rome & Turin Plankroad Co.* (N. Y.) 4 How. Prac. 416.

"Extraordinary motion or case," as used in Code, §§ 3719, 3721, providing for secondary hearing of an extraordinary motion or case, means such as do not ordinarily occur in the transaction of human affairs, as when a man has been convicted of murder, and it afterwards appears that the man he is char-

ged with having killed is still alive, or where one is convicted on the testimony of a witness who is subsequently found guilty of perjury in giving that testimony, or where there has been some providential cause, and cases of like character. *Cox v. Hillyer*, 65 Ga. 57, 59.

**EXTRAORDINARY CIRCUMSTANCES.**

In an action for damages to plaintiff's property resulting from defendant's alleged failure to provide sufficient guttering for his building, the eaves of which extended over plaintiff's property, the court charged that if defendant, through any cause that could have been prevented by the exercise of ordinary care, failed to carry the water from his roof, whereas the building or property of the plaintiff was damaged, defendant was liable for all the consequences resulting from such acts, "unless the same resulted from extraordinary or accidental circumstances." It was held that the instruction was erroneous, in that there was no evidence that the action was due to any extraordinary or accidental circumstances; "extraordinary and accidental circumstances" sometimes being construed to mean something in opposition to the act of man, as storms, and defendant being required by law to have sufficient gutters to prevent the water falling on his building in all ordinary storms from being discharged upon plaintiff's property. *Hazeltine v. Edgmand*, 10 Pac. 544, 552, 35 Kan. 202, 57 Am. Rep. 157.

Poverty or pecuniary embarrassment is not such an extraordinary circumstance as will excuse a party for failing to exercise due diligence in filing a bill of exceptions according to the rule of diligence in civil procedure in the federal courts. *Whalen v. Sheridan* (U. S.) 10 Fed. 661, 662.

**EXTRAORDINARY DILIGENCE.**

Extraordinary diligence is such diligence as very prudent persons would use under like circumstances. *Chattanooga, R. & C. R. Co. v. Huggins*, 15 S. E. 848, 851, 89 Ga. 494.

The measure of extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use for securing and preserving their own property. The acts and facts constituting this diligence under all circumstances of the case are always for the determination of the jury. *Richmond & D. R. Co. v. White*, 15 S. E. 802, 805, 88 Ga. 805.

Extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. Civ. Code Ga. 1895, § 2899. As applied to the diligence required of railroad companies in caring for their passengers, such definition means that



extreme care and caution which every prudent and thoughtful person exercises under like circumstances, so that it is error to charge that such companies are required to observe the utmost care and diligence for the safe carriage of passengers. *East Tennessee, V. & G. Ry. Co. v. Miller*, 22 S. E. 660, 661, 95 Ga. 738.

#### EXTRAORDINARY EFFORTS.

There can be no extraordinary efforts which an officer can make to discharge his official duty, so as to entitle him to extra pay for such efforts. *Hatch v. Mann* (N. Y.) 15 Wend. 44, 49.

#### EXTRAORDINARY EMPLOYMENT.

The words "extraordinary employment," as applied to a soldier, include the enlisting of recruits. The enlisting of recruits is not the ordinary calling of a soldier. The ordinary calling of a soldier is to attend to drill, and to fight the battles of his country. *Wolton v. Gavin*, 16 Q. B. 48, 64.

#### EXTRAORDINARY EXPENDITURES.

Money paid out by the high constable of a borough to special constables to suppress riots at an election, and to the ordinary constables who were also constantly employed by him during the same period in endeavoring to keep the peace, were "extraordinary expenses incurred by the high constable in case of riot," within the meaning of 41 Geo. III, c. 78, § 2. *Rex v. Justices of Borough of Leicester*, 7 Barn. & C. 6.

"Extraordinary expenditures," as used in Const. art. 9, § 7, providing that, for the purpose of defraying extraordinary expenditures, the state may contract public debts, "is used in contradistinction to ordinary or annual expenses of the state government, which includes current interest in the public debt." *Walker v. State*, 12 S. C. 200, 280.

"Extraordinary expenditures," as used in Const. art. 9, § 7, authorizing the state to contract public debts for the purpose of defraying extraordinary expenditures by a vote of two-thirds of the members of each branch of the General Assembly, necessarily implies new obligations or debts which have not been previously incurred, over and above the ordinary current expenses of the government. *Robertson v. Tillman*, 17 S. E. 678, 679, 39 S. C. 298.

In construing an act for the incorporation of villages, passed April 20, 1870, which provided that the expenditures of the village should be denominated "ordinary expenditures" and "extraordinary expenditures," and that ordinary expenditures should be those necessarily incurred to carry out and enforce the rules, by-laws, and ordinances

which the trustees are authorized to adopt, and to give force to the powers therein conferred, except as such expenditures may be specifically enlarged or diminished or controlled by other provisions of this act, and providing that no ordinary expenditure for any specific act, object, purpose, or thing, except the lighting of streets, shall exceed the sum of \$500, and providing, also, that the trustees shall have power to raise money for extraordinary expenditure for any village purposes by assessment and tax, by submitting a resolution stating the amount to be raised, etc., to the annual election or to a special election, it was held that the difference between the ordinary and extraordinary expenditures was not in their nature, but in their amount, and that, upon a vote of the electors of a village, duly taken, bonds might be issued under such act for any expenditure for any village purposes exceeding \$500 in amount. *Village of Arverne by the Sea v. Shepard*, 46 N. Y. Supp. 653, 654, 20 App. Div. 12.

The term "ordinary current expenses" shall be construed to include all current expenses, excepting only expenditures for education, for paving and macadamizing streets, and for payment of principal and interest of public debt, which shall be known as "extraordinary expenses." Code Ga. 1895, § 720.

#### EXTRAORDINARY FLOODS.

"Extraordinary Floods," as used in an instruction, in an action against a railway company for damages from water, that the defendant would not be guilty of such culpable negligence as to make it responsible if it failed to provide against such extraordinary floods as would not have been reasonably foreseen by men of ordinary skill and sagacity, means such floods as are of such unusual occurrence as could not have been foreseen by men of ordinary experience and ordinary prudence. *Gulf, C. & S. F. Ry. Co. v. Pool*, 8 S. W. 535, 537, 70 Tex. 713.

The term "extraordinary floods," within the rule that a railroad company constructing an embankment is not required to make provisions to carry off the water occasioned by extraordinary floods, means such floods as are of such unusual occurrence as cannot be foreseen by men of ordinary experience and ordinary prudence, and differs from "ordinary floods," which are those, the occurrence of which may be reasonably anticipated from the general experience of men residing in the region where the floods happen. *Gulf, C. & S. F. Ry. Co. v. Pool*, 8 S. W. 535, 537, 70 Tex. 713.

#### EXTRAORDINARY MARINE RISK.

In a charter party by which a vessel was hired by the government for the purpose

of plying in the harbor of Port Royal and South Carolina, or for such other service as the government might designate, it was stipulated that in case the vessel should be destroyed or damaged by any extraordinary marine risk, the owner should be indemnified. Held, that "extraordinary marine risk" was employed to distinguish an unusual risk, which the vessel might be compelled to run by order of the government, from those risks which would be covered by an ordinary marine policy, and which might be expected to arise from the service in which the vessel was engaged. And where, while complying with the orders of the harbor master in Port Royal, the vessel struck upon a fluke of a sunken anchor, and was sunk, the risk incurred was not an extraordinary risk. *Leary v. United States*, 81 U. S. (14 Wall.) 607, 612, 20 L. Ed. 756.

#### EXTRAORDINARY OCCASIONS.

"Extraordinary occasions," as used in Const. art. 3, § 12, authorizing the governor to convene the General Assembly on extraordinary occasions, means occasions deemed extraordinary by the governor. *Whiteman's Ex'x v. Wilmington & S. R. Co. (Del.)* 2 Har. 514, 524, 33 Am. Dec. 411.

#### EXTRAORDINARY PERILS.

"Extraordinary perils," within the meaning of the rule of law which provides that the shipowner is bound to provide against ordinary perils, while the insurer undertakes to insure against extraordinary perils, does not mean that which has never been previously heard of or within former experience, but only those perils which are beyond the ordinary, usual, or common perils. *The Titania (U. S.)* 19 Fed. 101, 105.

In determining the liability of underwriters, no distinction is more fully established or more strictly applied than that between ordinary and extraordinary perils and losses. He undertakes only to indemnify against extraordinary and unforeseen perils to which every ship is exposed in the course of the voyage. Although to discriminate between ordinary and extraordinary losses is in some cases a matter of great nicety and difficulty, yet the cases are numerous in which the discrimination has been made, and has operated to defeat the claims of the assured. Thus, if the masts and spars of the ship are damaged, or her sails torn or carried away, and even when in the course of the voyage she springs a leak, unless in such case the loss can be distinctly traced to the immediate and violent operation of a peril of the sea, it is considered as resulting from the ordinary wear and tear of the voyage, and the expense of repairing it is never a charge upon the underwriter. He is re-

sponsible only when the loss is occasioned by the operation of a cause acting externally upon the subject insured, never when it arises solely from an internal and inherent principle of decay or corruption. Thus he is not responsible if fruit becomes rotten or flour heated or wine turns sour merely from internal decomposition, nor even when the property is destroyed by a spontaneous combustion arising from its own nature or accidental condition when laden. *Moses v. Sun Mut. Ins. Co.*, 8 N. Y. Super. Ct. (1 Duer) 159, 170, 171.

#### EXTRAORDINARY PURPOSE.

Laws 1870, p. 1248, § 7, subd. 7, providing that village trustees, when the interests of the village require the expenditure of money for an "extraordinary or special purpose," shall submit the question of raising it by taxation to a vote of the electors, etc., should be construed as limited to a strictly municipal purpose, and not to authorize the raising of money by taxation in aid of a railroad through the county in which the village is situated. *Perrin v. City of New London*, 30 N. W. 623, 624, 67 Wis. 416.

#### EXTRAORDINARY SERVICES.

An executor's ordinary attendance on a pending suit is not extraordinary services, within Code, § 1825, for which he may be allowed special compensation. *Holman v. Sims*, 39 Ala. 709.

Procuring the discount of the notes taken of the surviving partner for the testator's interest in the goods, to expedite the settlement of the estate, is not an extraordinary service for which the executor should be compensated specially. *In re Mabley's Estate*, 41 N. W. 835, 74 Mich. 143.

Extraordinary services are services that are not ordinarily required of an executor in the discharge of the duties of his trust. They are services which do not fall within the ordinary routine of administration, and for which extra compensation is allowed. *Steel v. Holladay*, 28 Pac. 562, 563, 20 Or. 462.

#### EXTRAORDINARY SESSION.

An extraordinary session of the Legislature is a session which the Governor is empowered to call upon extraordinary occasions. While not a regular session, it is a session within the meaning of Const. art. 3, §§ 4, 5, providing that the enumeration of the inhabitants of the states shall be made under the direction of the Legislature at the end of every 10 years, and that the legislative districts shall be reapportioned by the Legislature at the first session after the enumeration, and therefore the reap-

portionment may be made at an extraordinary session. *People v. Rice*, 31 N. E. 921, 924, 135 N. Y. 473, 16 L. R. A. 836.

### EXTRAORDINARY TOWAGE.

There are two species of agreements which may be entered into by a vessel whose usual occupation is to tow vessels from one place to another. One is where she meets with a vessel disabled, and undertakes, for any sum agreed on, to bring the vessel from one port to another, or to a place of safety. That may be called an "extraordinary towage." Ordinary towage is that which takes place for the purpose of expediting a vessel on her voyage, either homeward or outward. *The Kinglock*, 26 Eng. Law & Eq. Rep. 596, 597.

### EXTREME.

"Extreme," as used in an instruction that a man may be in a state of extreme bodily or mental weakness, and yet possess sufficient understanding to direct how his property should be disposed of, is not used in its distinctly superlative meaning, as implying that the testator was on the point of dissolution, and hence the instruction is not erroneous. In *re Nelson's Estate*, 64 Pac. 294, 297, 132 Cal. 182.

### EXTREME CRUELTY.

"Mr. Bishop says that the term 'extreme cruelty,' and other similar expressions to be found in the statutes of most of the states, are to be interpreted to mean simply and only the cruelty which was ground for divorce from bed and board in England. *Bishop, Marriage & Divorce*, vol. 1, § 718. In arriving at a conclusion as to what cruelty can be properly designated as extreme, the surrounding circumstances of the parties should be considered. The courts should look to the mental and physical condition of the person on whom violence is inflicted. An act which would be lightly regarded by a woman of firm and vigorous mind, whose susceptibility to insult and ill treatment was dull and obtuse, might be an act of extreme cruelty to a woman in poor health or of acute sensibilities. They should also, in case of a single act of violence, exceptional in its nature, and its repetition extremely improbable, where the parties had previously lived peaceably, and there was no just reason to fear danger to the woman by a continuance of the cohabitation, use the greatest caution and discrimination. They should consider, too, whether the act was caused or provoked by the wife, and the degree of provocation. The better opinion, and one more consonant with humanity and justice, is that the cruelty to the wife need not necessarily be a

bodily infliction. Personal violence is not the only method of treating her with extreme cruelty. To an educated and fragile woman, the imagination can easily supply kinds of treatment which would equal, if not exceed, the cruelty of a blow. Grossly and repeatedly charging her with want of virtue; abuse and mistreatment of near relatives whom she revered; a denial to her of the means of making a decent appearance in society; continuous coldness of manner; the forcing upon her of low and vulgar associates—these and the innumerable annoyances which malicious ingenuity can inflict to the kind of woman supposed would, in their damaging effect on her health and happiness, far exceed the effect of a blow. *Donald v. Donald*, 21 Fla. 571, 573.

"Extreme cruelty" is the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. *Civ. Code Idaho* 1901, § 2023; *Rev. Codes N. D.* 1899, § 2739; *Civ. Code S. D.* 1903, § 69; *Civ. Code Cal.* 1903, § 94.

Extreme cruelty is the infliction or threat of bodily injury dangerous to life, or the repeated infliction or threat of grievous bodily injury, upon the other party, by one party to the marriage, or the repeated publication of false charges against the chastity of the wife by the husband. *Civ. Code Mont.* 1895, § 134.

"Extreme cruelty" is defined by *Civ. Code*, § 94, as the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage. It was held that this was not a complete definition of the term, since it did not imply wrong or injustice, and it may be justifiable, whereas cruelty alone is always understood as implying wrong or injustice, and extreme cruelty, which is a cause of divorce, is necessarily wrong, and never justifiable. *Waldron v. Waldron*, 24 Pac. 649, 650, 85 Cal. 251, 9 L. R. A. 487.

That cruelty which is contemplated by the law as being ground for a divorce is the cruelty which renders cohabitation intolerable, which destroys the concurrence, the harmony, and affection of the parties, and renders unsafe the actual existence of the marital relation. The cruelty contemplated by the law must operate upon the husband or wife living in the relation of husband and wife. It is not upon the individual distinct from the relation that it must operate, but upon the individual while he or she is without fault, and in the proper discharge of the duties which the relation of marriage imposes. *Beach v. Beach*, 46 Pac. 514, 515, 4 Okl. 359.

Where it is proven that a husband, who formerly had a good business as a tailor, became a drunkard, and whipped and kicked

his wife, and was very abusive of her, threatening at one time to kill her, and fired off a gun in the house in which she was; that on one occasion, when the neighbors were attempting to relieve his wife, who was sick and in bed, he knocked the food out of their hands and turned them out of doors; and that no complaint could be made of the conduct of the wife—a divorce was authorized on the ground of "extreme and brutal cruelty." *Beatty v. Beatty* (Ohio) *Wright*, 557, 558.

Extreme cruelty is not shown where it appears that the husband was unkind in his treatment and tyrannical in his disposition, but there was no personal violence, unless it may possibly be inferred upon one occasion, when, in bed together, she was overheard to request him not to kick her, and it was not shown whether or not he had kicked her, that upon one occasion he commanded her to make up a fire and get him some dinner, and reproved her harshly for talking with a neighbor passing by, in such a way as to evince a groundless jealousy on his part, and drove her from his house, to which she never returned. *Vignos v. Vignos*, 15 Ill. (5 Peck) 186, 187.

**As acts tending to injure life, limb, or health.**

Extreme cruelty, sufficient to authorize the granting of a divorce, "must be either personal violence, or the reasonable apprehension of personal violence, or a systematic course of ill treatment, affecting the health and endangering the life of the party against whom it is directed." *Duhme v. Duhme* (Ohio) 3 *Wkly. Law Gaz.* 186, 190.

In Rev. St. tit. "Divorce," § 5, "extreme cruelty" means anything which tends to do bodily harm to or endanger the life, limb, or health of the plaintiff. *Smith v. Smith*, 5 *Atl* 100, 121, 40 *N. J. Eq.* (13 *Stew.*) 566.

A statute authorizing a divorce for "cruelty extreme and repeated," means such cruelty as will produce physical harm, in contradistinction to mere harsh or even opprobrious language, or even mental suffering. It must be such grave cruelty as to injure the life or limb, or at least subject the person to great bodily harm. *Henderson v. Henderson*, 88 *Ill.* 248, 250.

"Extreme cruelty" does not necessarily mean actual physical violence, but such conduct by the husband as will justify the court in believing that if he is allowed to retain his power over his wife, and she is compelled to remain subject to him, her life or her health will be endangered, or that he will render her life one of such extreme discomfort and wretchedness as will incapacitate her to discharge the duties of a wife. *Black v. Black*, 80 *N. J. Eq.* (3 *Stew.*) 215, 221.

"Extreme cruelty," as used in St. 1810, c. 119, means such acts of cruelty as would cause injury to the life, limb, or health of the plaintiff, or a danger of such injury, or a reasonable apprehension of such danger, if the parties should continue to live together. *Bailey v. Bailey*, 97 *Mass.* 373, 378.

"Extreme cruelty," as used in the statute allowing divorces for extreme cruelty, is employed to mean the same thing as the cruelty of the English ecclesiastical courts; and the offense may be defined, in general terms, to be any conduct of one of the married parties which furnishes reasonable apprehension that the continuation of the cohabitation would be attended with bodily harm to the other. Courts do not interfere in these cases so much to punish an offense already committed, as to relieve the complaining party from an apprehended danger. The effect of an act of alleged cruelty is the criterion by which it must be tested. If the act is such as to create a reasonable apprehension that a continuation of the cohabitation would be attended with bodily harm, it justifies a divorce, even in the absence of any proof of violence. *Morris v. Morris*, 14 *Cal.* 76, 79, 73 *Am. Dec.* 615.

Extreme cruelty is such conduct of one of the married parties as renders further cohabitation dangerous to the physical safety of the other, or creates in the other such reasonable apprehension of bodily harm as naturally interferes with the discharge of marital duty. Citing *Bishop on Marriage and Divorce*, § 454. However, it seems to be settled that, in order to justify a divorce, the harm to be avoided must be bodily harm, and not merely mental; but any conduct sufficiently aggravated to produce ill health or bodily pain, though operating primarily upon the mind only, is to be regarded as legal cruelty. "Suppose," says *Bishop*, "the body is the only thing to be considered in these cases, yet, if we find various avenues to it, through any one of which may run the waters to drown its life or its health, surely we cannot say that the approaches through one avenue shall be left open by the law, while the others are closed." *Powelson v. Powelson*, 22 *Cal.* 358, 360.

"Extreme cruelty" does not necessarily mean actual personal violence, but it is sufficient if the acts alleged constitute menaces of bodily harm, coupled with harsh treatment, such as neglect in sickness, and a reasonable apprehension of danger to the health of the wife from cohabitation. *Harratt v. Harratt*, 7 *N. H.* 196, 198, 26 *Am. Dec.* 730.

In the judgment of law, any willful misconduct of the husband which endangers the life or health of the wife, and which exposes her to bodily hazard and intolerable hardship and renders cohabitation unsafe, is extreme

cruelty; and, in order to amount to such cruelty, it is not necessary that there should be many acts. *Poor v. Poor*, 8 N. H. 307, 316, 29 Am. Dec. 664.

Extreme cruelty is any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other, but there may be legal cruelty without evidence of actual personal violence, as where words of menace are used which are the expressions of a determined malignity. *Beebe v. Beebe*, 10 Iowa, 133, 136.

Divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the threats or abuse or neglect or bad conduct complained of be such as endangers health or renders cohabitation intolerable and unsafe, or unless there are threats of mistreatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties. *Palmer v. Palmer*, 26 Fla. 215, 7 South. 864.

"Extreme cruelty," as used in the statute making extreme cruelty a ground for divorce, "does not require actual, physical violence, as was formerly the doctrine; but the modern and better considered cases have repudiated this doctrine, as taking too low and sensual a view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty, under the statutes." *Carpenter v. Carpenter*, 2 Pac. 122, 144, 30 Kan. 712, 46 Am. Rep. 108 (citing *Gibbs v. Gibbs*, 18 Kan. 419; *Bennett v. Bennett*, 24 Mich. 482; *Goodman v. Goodman*, 26 Mich. 417; *Palmer v. Palmer*, 45 Mich. 150, 151, 7 N. W. 760, 40 Am. Rep. 461; *Whitmore v. Whitmore*, 49 Mich. 417, 13 N. W. 800; *Caruthers v. Caruthers*, 13 Iowa, 286; *Wheeler v. Wheeler*, 53 Iowa, 511, 5 N. W. 689, 36 Am. Rep. 240; *Powelson v. Powelson*, 22 Cal. 358; *Smith v. Smith*, 8 Or. 100; *Kennedy v. Kennedy*, 73 N. Y. 369; *Latham v. Latham* [Va.] 30 Grat. 307; *Black v. Black*, 30 N. J. Eq. [3 Stew.] 215; *Cook v. Cook*, 11 N. J. Eq. [3 Stockt.] 195; *Beyer v. Beyer*, 50 Wis. 254, 6 N. W. 807, 36 Am. Rep. 848; *Goodhue v. Daniels*, 54 Iowa, 19, 6 N. W. 129; *May v. May*, 62 Pa. [12 P. F. Smith] 206; *Beebe v. Beebe*, 10 Iowa, 133); *Avery v. Avery*, 5 Pac. 418, 33 Kan. 1, 52 Am. Rep. 523.

There is "extreme and repeated cruelty" when there have been at least two acts of physical violence against the wife, which,

viewed in the light of attending circumstances, were sufficient, either actually or apparently, to endanger her physical safety or health to a degree which rendered it impracticable for the wife to discharge properly her marital duties. That a husband refused to speak to his wife, or occupy the same room with her; that he failed to furnish her with sufficient clothing or fuel; that he refused her the privilege of having any company in the home; that on one occasion he gave her, for medicine, a mess of nastiness which he had prepared for that purpose; that on another he kicked her, and on still another turned her out of doors, without excuse, in the middle of the night—were sufficient to prove such cruelty. *Sharp v. Sharp*, 16 Ill. App. 348, 349.

#### As intolerable severity.

"Extreme cruelty and intolerable severity, as causes for divorce, are substantially identical." *Blain v. Blain*, 45 Vt. 538, 544.

#### As personal violence.

In order to amount to extreme cruelty, there must be proof of personal violence intentionally inflicted. *Lyster v. Lyster*, 111 Mass. 327, 329.

"Extreme cruelty," as used in the statute authorizing a divorce for extreme and repeated cruelty, means cruelty which consists in physical violence. *Embree v. Embree*, 53 Ill. 394, 395; *Hill v. Hill*, 2 Mass. 150; *Warren v. Warren*, 3 Mass. 321; *Conn v. Conn* (Ohio) *Wright*, 563.

"Extreme cruelty" means direct bodily injury, either actual or threatened, and reasonably to be apprehended. *Hart v. Hart*, 39 Atl. 430, 431, 68 N. H. 478.

As used in the divorce statute of 1786, the phrase "extreme cruelty" was defined by the court of Massachusetts to mean personal violence; and, as used as the third cause for divorce of the Maine act of 1883, it means personal violence, intentionally inflicted, so serious as to endanger life, limb, or health, or to create reasonable apprehension of such danger. *Holyoke v. Holyoke*, 6 Atl. 827, 828, 78 Me. 404.

Any acts or conduct which injure or endanger life, limb, or health, or create reasonable apprehension of such injury or danger from a continuance of the cohabitation, will constitute cruelty and abusive treatment, within the meaning of a statute authorizing a divorce for cruelty; but, in order to amount to extreme cruelty, there must also be proof of personal violence intentionally inflicted. *Lyster v. Lyster*, 111 Mass. 327, 329.

To constitute extreme cruelty there must be personal violence inflicted, of such a character as to endanger the life, limb, or health,

or as to create a reasonable apprehension of such danger. Whether the infliction of blows on a single occasion constituted extreme cruelty was a question for the jury. *Ford v. Ford*, 104 Mass. 198, 206.

For a husband to beat his wife, and pull the hair out of her head, is extreme cruelty. *Tyrrell v. Tyrrell* (N. J.) 3 Atl. 268.

Extreme and repeated cruelty characterizes the act of a husband in first striking his wife twice in anger, and again striking her a year later, and two years thereafter knocking her down. *Abbott v. Abbott*, 61 N. E. 350, 351, 192 Ill. 439.

A wife testified that the first blow her husband struck her was about a year before she left him. At that time he struck her on the cheek so violently as to knock her down. Two or three weeks later he slapped her in the face, and shortly after raised a carving knife over his head and said: "God damn you! if you open your mouth again, I will cut your throat from ear to ear." Afterwards he knocked her down and choked her until interrupted by a servant girl. On another occasion he raised a chair and threatened to strike her, and was interrupted by a roomer in the house. He also struck and choked her on several other occasions, and on the last one said to her: "Take your two young nuisances, and go to hell. I don't want anything more to do with either of you"—and there and then she took her two children and left him. It cannot be successfully questioned but that such treatment as this constituted a sufficient showing of extreme and repeated cruelty, within the meaning of the statute, justifying divorce. *Schipper v. Schipper*, 57 Ill. App. 170, 174, 176.

One whipping of a wife by her husband is sufficient to establish a charge of "extreme cruelty." Such an act could not be accidental or by mistake, and, if not, the probabilities would be that it might be repeated again and again, subjecting the wife to constant fear and rendering her life miserable. *Albert v. Albert*, 5 Mont. 577, 6 Pac. 23, 51 Am. Rep. 86.

Under the statute authorizing a divorce for extreme cruelty, a husband is guilty of extreme cruelty when on more than one occasion he inflicts violence upon the person of his wife, so that the marks thereof remain for several days. *Eldenmuller v. Eldenmuller*, 87 Cal. 364, 365.

Acts of personal violence, when intrinsically and separately considered, may not amount to such a degree of cruelty as to justify a divorce, yet, when attended by habitual brutal behavior, so as to be a constant outrage of the sense of decency and propriety, the case of extreme cruelty, within the meaning of the statute, is established. *Briggs v. Briggs*, 20 Mich. 34, 41.

#### Abuse of marital rights.

In *Moore v. Moore*, 16 N. J. Eq. (1 O. E. Green) 275, 279, it is stated that a gross abuse of marital rights, resulting in injury or suffering to the wife, may constitute cruelty, in the eye of the law, and justify the wife in separating herself from her husband. The law at the time of this opinion did not differ from the present statute (Rev. 1874, p. 275, § 5), and the learned chancellor meant that such conduct would constitute extreme cruelty, within the terms of the statute. We shall adopt the specific definition of "extreme cruelty" which has been approved in this case. *English v. English*, 27 N. J. Eq. (12 O. E. Green) 579, 580.

#### Abusive language and threats.

Abusive and threatening language and threats of violence, without an actual assault, do not constitute the extreme cruelty which is a legal cause for divorce. *Hill v. Hill*, 2 Mass. 150.

Violent or profane language is not of itself extreme cruelty so as to furnish a ground for divorce. *Hewitt v. Hewitt* (N. J.) 37 Atl. 1011, 1013.

Extremity of temper, sallies of passion, or the use of abusive language do not constitute extreme and repeated cruelty, within the statute relating to divorce. *Turbitt v. Turbitt*, 21 Ill. (11 Peck) 438.

In *Embree v. Embree*, 53 Ill. 394, it was held that "mere anger, or abusive words, menaces, or indignities, do not constitute cruelty, within the divorce statute. There must be extreme and repeated cruelty, which must consist in physical violence." In *Harman v. Harman*, 16 Ill. (6 Peck) 85, 90, it is said: "There must be acts or threats which may raise a reasonable presumption of bodily hurt. The causes must be grave and weighty, and show a state of personal danger incompatible with the duties of married life. It is not mere austerity of temper, petulance of manners, rudeness of language, a want of civil attentions, occasional sallies of passion, denials of little indulgences, and particular accommodations, and which do not threaten bodily harm. These are not legal cruelty." *Fizette v. Fizette*, 34 N. E. 799, 801, 146 Ill. 328.

Extreme cruelty is not mere austerity of temper, petulance of manners, rudeness of language, or a want of civil attention, if there be no threat of bodily harm. It is not the denial of little indulgences or particular accommodations. Such denial may in some cases be extremely unkind, unhandsome, and disgraceful to the character of the husband, but they do not amount to cruelty. To constitute extreme cruelty in a husband, his misconduct must be such as to show that the inward knot of marriage, which is peace

and love, is untied. *Poor v. Poor*, 8 N. H. 307, 315, 29 Am. Dec. 664.

2 Rev. St. 147, § 51, authorizing a divorce for extreme cruelty, includes threats of violence by a husband against a wife, of such character as to induce a reasonable apprehension of bodily injury, such as charges of infidelity made in bad faith as auxiliary to and in aggravation of threatened violence. *Kennedy v. Kennedy*, 73 N. Y. 369, 373.

Undoubtedly extreme and protracted suffering may be produced primarily by operating on the mind alone, and hence threats of physical violence and false charges of adultery, maliciously made, are competent evidence, and prove cruelty; and when they are accompanied or followed by acts of actual, malicious, physical violence, they magnify the atrocity of the act. *Ward v. Ward*, 103 Ill. 477, 482; *Sharp v. Sharp*, 6 N. E. 15, 16, 116 Ill. 509.

That cruelty may be extreme, without blows, cannot be doubted; and we have no difficulty in holding that where the causes are grave and weighty, such as to show an impossibility that the duties of the married life can be discharged—when violence is menaced, and there is reasonable apprehension of danger to life, limb, or health—the case comes within our statute, and that the court ought not to wait until the hurt is actually done. *Harratt v. Harratt*, 7 N. H. 196, 198, 26 Am. Dec. 730.

Where it is proven that a husband was intoxicated almost continually; that he was quarreling constantly with his wife; that he frequently threatened to beat her, and sometimes to murder her, and that he had often struck her; that when her child was about a week old he pulled her out of bed and beat her; that on one occasion he threw a chair at her, and on another choked her—divorce was authorized on the ground of extreme cruelty. *Jones v. Jones* (Ohio) *Wright*, 244, 245.

#### **Failure to live with wife.**

Extreme cruelty, as a cause for divorce, does not include the failure of a husband to live with his wife, unless it has, or tends to have, a serious effect on her health. *Burton v. Burton*, 27 Atl. 825, 826, 52 N. J. Eq. (7 Dick.) 215.

#### **Intemperance.**

Extreme cruelty, within the meaning of the divorce statute making extreme cruelty a ground of divorce, does not include habitual intemperance, though, in a popular sense, extreme cruelty might include habitual intemperance. *Haskell v. Haskell*, 54 Cal. 262, 263.

The cruelty must be something more than mere injuries to the wife's sensibilities or sense of delicacy by the husband's intemperance, harshness of manner, and inde-

cency of conduct. *Waskam v. Waskam*, 31 Miss. 154, 155.

#### **Mental suffering.**

"Extreme cruelty" is described by the Code to be the infliction of grievous bodily injury or grievous mental suffering upon the other by one party to the marriage, and it is now established law that the infliction of grievous mental suffering, independent of physical injury, may constitute extreme cruelty. *Andrews v. Andrews*, 52 Pac. 298, 299, 120 Cal. 184.

Extreme cruelty is effectually caused by conduct which produces mental suffering, and robs complainant of his or her peace of mind, as by blows inflicted, and to many persons the burden of the mental suffering will be much harder to bear than the burden of any ordinary physical suffering. *Rosenfeld v. Rosenfeld*, 40 Pac. 49, 50, 21 Colo. 16.

As used in Comp. St. c. 25, § 7, extreme cruelty, whether practiced by personal violence or by any other means, includes any unjustifiable conduct on the part of either the husband or wife which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health and endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, though no physical or personal violence may be inflicted, or even threatened. *Ellison v. Ellison*, 91 N. W. 403, 404, 65 Neb. 412.

In *Morris v. Morris*, 14 Cal. 76, 73 Am. Dec. 615, this language is employed by the court: "We construe the expression 'extreme cruelty,' as used in our statute, to mean the same thing as the 'sævitia' or 'cruelty' of the English ecclesiastical courts; and the offense may be defined, in general terms, to be any conduct which furnishes reasonable apprehension that the continuance of the living together would be attended with bodily harm to the other." This is the general language of the books, and it will be observed that physical injury alone seems to merit consideration, while the subtle torture of moral anguish, unless occasioned by personal violence done or apprehended, is universally overlooked. *Reed v. Reed*, 4 Nev. 395, 398.

#### **Nonsupport.**

A man's neglecting to provide a support for his family, however immoral, is not extreme cruelty. *Warren v. Warren*, 3 Mass. 321.

#### **EXTREME HAZARD.**

"Extreme hazard," as used in the statement that, to justify the abandonment of a vessel, she must be in extreme hazard, means that the situation of the vessel must be such that there is imminent danger of her being lost, notwithstanding all the means that can

be applied to get her off—all the means within the power of the crew to use, and all the assistance within the power of the master to obtain. A vessel may be in a situation where her loss would be inevitable, without the application of means to save her, and yet by the application of such means there would be no difficulty in preventing a loss. This is not a case of extreme hazard. *King v. Hartford Ins. Co.*, 1 Conn. 422, 425.

## EXTREMIS.

See "In Extremis."

## EXTRINSIC EVIDENCE.

Extrinsic evidence is evidence not legitimately before the tribunal in which the determination is made. *Baldwin v. City of Buffalo*, 35 N. Y. 375, 382.

## EYE SPLICE.

An "eye splice" is defined in the Century Dictionary as a splice made by splicing the end of the rope into itself. *Trapp v. McClellan*, 74 N. Y. Supp. 130, 68 App. Div. 362.



## F

**F. O. B.**

See "Free On Board"; "Prices F. O. B."

When used with respect to a sale of merchandise "f. o. b." means "free on board" the vessel, cars, or other conveyance which is to transport it to the buyer. *Silberman v. Clark*, 96 N. Y. 522, 523; *Hobart v. Littlefield*, 13 R. I. 341, 344; *Branch v. Palmer*, 65 Ga. 210, 213; *Rose v. Weinberger*, 34 S. E. 28, 29, 108 Ga. 533, 75 Am. St. Rep. 73; *Knapp Electrical Works v. New York Insulated Wire Co.*, 42 N. E. 147, 148, 157 Ill. 456; *Consolidated Coal Co. v. Schneider*, 45 N. E. 126, 127, 163 Ill. 393; *J. K. Armsby Co. v. Blum*, 70 Pac. 669, 670, 187 Cal. 552.

"F. o. b." is an abbreviation signifying "free on board," and the court will take judicial notice of such meaning, so that parol evidence is not needed or admissible for the purpose of interpreting the expression. *Sheffield Furnace Co. v. Hull Coal & Coke Co.*, 14 South. 672, 681, 101 Ala. 446; *Capehart v. Hurman Farm Implement Co.*, 16 South. 627, 628, 103 Ala. 671, 49 Am. St. Rep. 60.

**FABRIC.**

The word "fabric," in the customs act of 1883, includes elastic cords and braids manufactured of silk and India rubber. The word is as broad, if not broader, in common speech, than the word "cloth." *In re Mills* (U. S.) 49 Fed. 726, 727; *Converse v. United States* (U. S.) 113 Fed. 817.

**FACE.**

See "Bad on the Face of It"; "Void on Its Face"; "On Its Face."

"Face," as used in Code 1882, § 3392, requiring that a copy of "what appears upon the face and in the body of the policy" should be attached to the complaint, does not mean anything less than if applied to contracts other than insurance policies, and covers all that precedes the maker's signature. *Southern Mut. Ins. Co. v. Turnley*, 27 S. E. 975, 976, 100 Ga. 296.

**Of the judgment.**

An agreement whereby a party agreed to pay "one-half of the face of the judgment" assigned to him was an agreement to pay one-half the sum for which the judgment was rendered, excluding the interest accrued thereon. *Osgood v. Bringolf*, 82 Iowa, 265, 270.

**Of the record.**

"Face of the record," in matters pertaining to motions in arrest of judgment, does not mean merely the face of the indictment, but embraces the record as made up to that point. *State v. Haines*, 25 South. 372, 373, 51 La. Ann. 731, 44 L. R. A. 837.

**Of the work.**

A contract to perform all the cutting, fitting, and lewisling for tunnel fronts and wing walls to be used at a tunnel, and providing that "all the face of the work that shows is to be measured" in determining the amount to be paid for, should be construed to include all the cut and dressed surface, including the horizontal surfaces called the "tread," and the perpendicular surfaces called the "drop," of steps made by the regular shortening of the courses of the masonry of the walls sloping upward from the base, and also the coping horizontal stones of the structure. *St. Martin v. Thrasher*, 40 Vt. 460, 466.

**FACE TO FACE.**

Under the Missouri Bill of Rights, securing to the accused, among other things, the right to meet the witnesses against him face to face, such right has its exceptions and limitations, which are well settled, and among these exceptions, in its application to the administration of criminal justice, are dying declarations in reference to homicide, and the deposition of a witness regularly taken in a judicial proceeding against the accused in respect to the same transaction and in his presence, when the subsequent death of the witness has rendered his production in court impossible. So, on the trial of one accused of murder, the deposition of a witness regularly taken before the committing magistrate upon the preliminary examination, in the presence of the accused, may, on proof of the deponent's death, be read in evidence. *State v. McO'Brien*, 24 Mo. 402, 414, 69 Am. Dec. 435. Such is the holding under a like provision in the Wisconsin Constitution. *Miller v. State*, 25 Wis. 384, 387.

**FACE VALUE.**

"Face value," as used in Act Dec. 22, 1892, § 6, authorizing the Governor and State Treasurer to sell bonds at not less than par or face value, means merely the denomination or amount printed on their face, without including the accumulated interest. *Evans v. Tillman*, 17 S. E. 49, 51, 38 S. C. 238.

The phrase "face value," in Rev. St. 1898, § 664, providing that no county board shall sell any tax certificates at less than the face value thereof, unless certain notice be given, etc., means the amount named in the certificate, and due and unpaid taxes, interest, and charges preceding the tax sale, and does not include interest up to the time of the sale of the certificate. *Olson v. Tanner*, 94 N. W. 305, 306, 117 Wis. 544.

The words "face value," in a by-law of a beneficial association providing that \$2,000 shall be the highest amount paid on a benefit certificate, that the amount paid shall not exceed the amount of the full assessment on each of the members, and "that the face value of the benefit certificate shall be paid so long as the emergency fund \* \* \* has not been exhausted," mean the amount stated in the body of the certificate, so that, the emergency fund not being exhausted at the death of a member whose certificate, issued before the passage of the by-law, provided for payment of \$5,000, all of such sum is payable. *Supreme Council A. L. H. v. Storey* (Tex.) 75 S. W. 901, 905.

"Face value," as used in a will giving certain notes to a legatee, and providing that, if any of such notes were paid at the time of the testator's decease, his executor would pay to the legatee such sum as, with the notes then remaining unpaid, on their face value, should amount to a certain sum of money, means the amount named on the notes. *In re Mowry*, 17 Atl. 553, 554, 16 R. I. 514.

The only meaning of "face value" is the value expressed on the face of the writing. The term is used in this sense in Acts 1889, c. 280, requiring the payment to the holders of the face value of all tickets or scrip issued to laborers for labor done. *Marriner v. John L. Roper Co.*, 16 S. E. 906, 907, 112 N. C. 164.

An agreement to sell at their face value municipal bonds with several months' accrued interest is an agreement to sell them for less than par, and hence void under a statute forbidding such sale. *Village of Ft. Edward v. Fish*, 33 N. Y. Supp. 784, 785, 86 Hun, 548.

## FACILITATE.

The charter of a corporation, stating that it is organized for the purpose of facilitating the driving, hauling, and assorting of logs upon a river, does not authorize a corporation to drive or haul logs, since the latter power is not implied in the word "facilitate." *Northwestern Improvement & Boom Co. v. O'Brien*, 77 N. W. 989, 990, 75 Minn. 335.

## FACILITIES.

Express facilities, see "Express."

The term "facilities" was used in Connecticut in 1815 to designate notes of some of the banks in the state of Connecticut which were made payable in two years after the close of the war. *Springfield Bank v. Merrick*, 14 Mass. 322.

### Of ferries.

In a ferry franchise, providing that no person should be permitted to keep a public ferry within half a mile above or below such ferry, so long as the incorporator or his assigns affords facilities for crossing the river, "facilities" means everything incident to the general prompt and safe carriage of passengers—boats in good repair, appliances answering the purpose, and readiness and willingness to perform throughout the year. Interruptions by ice, floods, or accidents to machinery or employes might often occasion temporary inconvenience to the public; but of these the public would have no right to complain. *Commonwealth v. Sturtevant*, 37 Atl. 916, 917, 182 Pa. 323.

### Of railroads.

"Facilities," as used in the interstate commerce act, requiring roads to afford reasonable and equal facilities for the interchange of traffic, refers only to facilities between connecting lines at terminal points for the interchange of traffic or passengers, and does not embrace car equipment for the transportation of freight over the carrier's own line. *United States v. Delaware, L. & W. R. Co.* (U. S.) 40 Fed. 101, 102.

"Facilities," as used in an act to regulate railroads, which took effect July 1, 1887, providing that the railroads should furnish equal facilities to all, would include the privileges given to the owners of elevators along the railroad's right of way, or, in other words, the railroad company must give equal privileges to all persons who may desire in good faith to erect elevators at a station on its line, in order to ship produce over such road. *State v. Missouri Pac. R. Co.*, 45 N. W. 785, 788, 29 Neb. 550.

In Act March 24, 1887, §§ 1, 4, providing that common carriers shall make no discrimination in charges or facilities for transportation, the term "facilities" is not limited in its meaning to cars and trains only; but a depot, a freight house, or waiting room for passengers is a facility for the transportation of passengers and freight, within the meaning of the statute. If a railway company should at one of its stations permit the use of its depot, yard, pen, or other station facilities to one shipper, and refuse them to another, it would be guilty of an infraction

of the law. *Little Rock & Ft. S. Ry. Co. v. Oppenheimer*, 43 S. W. 150, 155, 64 Ark. 271, 44 L. R. A. 353.

## FACT.

See "Assignee in Fact"; "Collateral Facts"; "Conclusion of Fact"; "Inferential Fact"; "Jurisdictional Facts"; "Material Fact"; "Matter of Fact"; "Ultimate Fact"; "Warranty of Fact."

A fact is something fixed, unchangeable. *Huber v. Guggenheim* (U. S.) 89 Fed. 598, 601.

A fact is an effect produced or achieved. *Gates v. Haw*, 50 N. E. 299, 150 Ind. 370.

Facts are occurrences and events; evidence, the means by which the happening or the character of such events are shown. There are two kinds of facts—evidentiary facts and inferential facts. *Woodfill v. Patton*, 76 Ind. 575, 579, 40 Am. Rep. 269.

The word "facts," as used in Code, § 142, providing that the complaint must contain a plain and concise statement of the facts constituting a cause of action, means the things done; realities, not suppositions; actions; deeds—all of which definitions call for the truth. *Lackey v. Vanderbilt* (N. Y.) 10 How. Prac. 155, 161.

The word "facts," in the rule as to bona fide holders of negotiable instruments taken without notice of facts which impeach the validity of a negotiable instrument, are those facts which of themselves impeach the transaction, and not other facts which tend to prove fraud, or which excite suspicion. *Credit Co. v. Howe Sewing Mach. Co.*, 8 Atl. 472, 476, 54 Conn. 357, 1 Am. St. Rep. 123.

In a criminal prosecution, the court instructed that the defendant pleaded not guilty, which plea put in issue every material fact involved in the crime charged, but, before he could be convicted, the state must establish beyond a reasonable doubt the guilt of the defendant. The court held that the use of the word "fact," as equivalent to allegation, while not accurate, could not have prejudiced the defendant, for the meaning which was intended to be conveyed was reasonably certain. *State v. Harris*, 66 N. W. 728, 729, 97 Iowa, 407.

The word "fact," as employed in the statement of the rule that errors of law can be reviewed, while errors of fact cannot, denotes those conclusions reached by the trier from sifting testimony, weighing evidence, and passing on the credit of the witnesses (conclusions which are not within the jurisdiction of the appellate court, and cannot be reviewed at retrial on appeal), and it does not denote those inferences drawn by the

trial court from the facts ascertained and settled by it. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 125, 70 Conn. 159, 43 L. R. A. 305.

Gen. St. 1894, § 6236, enacts that the statement of claim for a mechanic's lien shall be verified by some one having knowledge of the facts. Held, that what the statute aims at is, by requiring an affidavit of the truth of the statement of facts upon which the claim is founded, to prevent the incumbering of titles by filing unfounded claims, and a verification "that he has knowledge of the facts therein stated" is sufficient. *Nordine v. Knutson*, 64 N. W. 565, 566, 62 Minn. 264.

A recital in the bill of exceptions that, under the facts stated within, the court held and ordered, etc., is not sufficient to show that all the evidence in the case is set out in the record; and this, although it appears that the facts were agreed on by consent. *May v. Lewis*, 41 Ala. 815, 817.

A provision in an insurance policy that it shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured is held to mean that it shall be void if there is any substantial misstatement of any material fact in the application. *Wainer v. Milford Mut. Fire Ins. Co.*, 26 N. E. 877, 879, 153 Mass. 335, 11 L. R. A. 598.

### Circumstance synonymous.

See "Circumstance."

### As event capable of proof.

A "fact," as the term is used in legal proceedings, is an event; a thing done or said; an act or action which is the subject of testimony. The condition or state of mind at a given time is a fact. If any emotion is felt, as joy, grief, or anger, it is a fact. If the operations of the mind produce an effect, as knowledge, skill, intention, this effect on the mind is a fact. When the mental processes lead up to and produce a desire or intention to do a certain thing, such state of mind is a fact. Willfulness is a desire to produce a certain result; hence willfulness is a fact. *Barr v. Chicago, St. L. & P. R. Co.*, 37 N. E. 814, 815, 10 Ind. App. 433.

"Facts constituting a cause of action or defense," in the sense of the Code, are physical facts capable of being established by oral or documentary proof, not propositions which are true as law. *Lawrence v. Wright*, 9 N. Y. Super. Ct. (2 Duer) 673, 674.

### As inferences and conclusions from evidence.

The inferences produced in whole or in part by weighing evidence and the credit to

be given witnesses are called facts, as denoting adjudicated facts, which can only be retried by an appellate court having jurisdiction in the trials of such facts. The conclusions drawn from inferences are also called facts, but with a much broader signification, including all issues that the line separating the province of the jury from that of the judge in a jury trial practically leaves to the jury. The word "fact," used in this broad sense, does not accurately denote matters not reviewable by an appellate court. *Nolan v. New York, N. H. & H. R. Co.*, 39 Atl. 115, 120, 70 Conn. 159, 43 L. R. A. 305.

Revision 1856, p. 543, requiring committees appointed in equity for the establishment of boundaries to "report the facts and their doings to the court," does not require they report all the facts upon which they founded their conclusions as to the true boundary, but only to report their conclusions of fact as to the boundary. *Post v. Williams*, 33 Conn. 147.

#### Law distinguished.

As distinguished from the law, a fact may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law. The true meaning can be better shown by an illustration. The question of negligence as a want of ordinary care is generally a mixed question of law and fact, one for the jury under the instructions of the court. The prudent man, for the occasion, with reference to what he would do, and therefore what the defendant must have done under the circumstances, is formed in the minds of the jury by the light of the facts as they find them to be, under the instructions of the court as to what the law requires him to do in a given or supposed state of facts which there is some evidence tending to prove, and so on through all the complications of the various questions of negligence. The questions of fraud are still more complicated, for they hardly ever occur alone; but, whatever the evidential facts may be, the question whether they make out a case or not is a question of law, so whether the evidence tends to show fraud is a question of law. There being such evidence, fraud is generally said to be a mixed question of law and fact. *Hulings v. Hulings Lumber Co.*, 18 S. E. 620, 627, 38 W. Va. 351.

#### As matters.

A jurat to an answer stated that the defendant swore that the facts stated in the answer were true. Held, that "facts," as here used, was equivalent to "matters," and was a substantial compliance with the rule of court requiring that parties state that "matters" in their pleadings were true.

*Whelpley v. Van Epps (N. Y.)* 9 Paige, 332, 333, 37 Am. Dec. 400.

The word "facts," as used in a verification of an information that the facts therein set forth are true, will be held to be equivalent to "matters," and is used to represent the thing asserted. Hence the verification is not meaningless on the ground that facts are always true. *State v. Grinstead*, 61 Pac. 975, 976, 10 Kan. App. 74.

#### Truth distinguished.

A fact in pleading is a circumstance, act, event, or incident, and widely different from a truth, which is the legal principle which declares or governs the facts and their operation and effect, though in common parlance the terms "fact" and "truth" are often used as synonymous. *Drake v. Cockroft (N. Y.)* 1 Abb. Prac. 203, 205.

#### FACT IN CONTROVERSY.

Fact in issue distinguished, see "Facts in Issue."

#### FACTS DETAILED.

"Facts detailed," as referring to the facts detailed by counsel in drawing up a case, should be construed as synonymous with the word "testimony." *Potter v. Washburn*, 13 Vt. 558, 565, 37 Am. Dec. 615.

#### FACTS IN ISSUE.

"A fact or matter at issue is that on which the plaintiff proceeds by action and which the defendant controverts in his pleadings." *Glenn v. Savage*, 13 Pac. 442, 446, 14 Or. 567; *Garwood v. Garwood*, 29 Cal. 514; *Lillis v. Emigrant Ditch Co.*, 30 Pac. 1108, 1110, 17 Nev. 337.

A fact in issue is a fact which was necessarily and immediately found under the pleadings in the cause. *Potter v. Baker*, 19 N. H. 166, 167.

The expression "fact in issue," as used in the general statement of the rule that a judgment is *res judicata* only as to those facts which were in issue, means that matter on which the plaintiff proceeds by his action and which the defendant controverts by his pleadings; but the facts offered in evidence to establish the matter in fact are not themselves "facts in issue," although they may be controverted. So, when a deed is merely offered as evidence to show a title, whether in a real or personal action, the title is the fact which is in issue. The deed is a fact in controversy; but, so far as the suit is concerned, it is incidental and collateral, not a matter necessary of itself to the finding of the issue. In an action for the conversion of oats, the issue being plaintiff's

title to the oats, and the title set up being by way of a mortgage, which was claimed to be fraudulent, the fact in issue was the title to the oats, and the question as to whether the mortgage was fraudulent or not was not a fact in issue. *King v. Chase*, 15 N. H. 9, 15, 17, 41 Am. Dec. 675.

#### **Fact in controversy distinguished.**

A fact in issue is a fact on which the determination of the court is conclusive, while a fact in controversy is only collaterally adjudicated. It must be a fact immediately found according to the pleadings, not that on which the verdict was merely based. *Caperton v. Schmidt*, 26 Cal. 479, 494, 85 Am. Dec. 187 (cited in *Glenn v. Savage*, 13 Pac. 442, 446, 14 Or. 567, 573).

A fact in issue is a disputed fact raised by the pleadings and on which the decision is conclusive, while a fact in controversy is a fact on which the verdict is based. *Applegate v. Dowell*, 16 Pac. 651, 657, 15 Or. 513.

#### **FACTS OF THE CASE.**

"The expression 'the facts of this case' is equivalent to 'the case,' as used in a rule of court requiring that a party making an affidavit of merits to change the place of trial shall state that he has fairly stated the case to his counsel. To state the case, the party must necessarily state the facts of the case; and, conversely, in stating the facts of the case, he necessarily states the case." *Jordan v. Garrison* (N. Y.) 6 How. Prac. 6, 8.

In an affidavit of merits filed for the purpose of setting aside a default judgment, a recital that the defendant has stated the "facts of his case" is not equivalent to the phrase that he has "stated the case"; and hence the affidavit is insufficient to authorize the setting aside of the default. *Fitzhugh v. Truax* (N. Y.) 1 Hill, 644.

#### **FACTOR.**

See "Home Factor."

A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser. Civ. Code Cal. 1908, § 2026; Rev. Codes N. D. 1899, §§ 4134, 4353; Civ. Code S. D. 1903, § 1487; Civ. Code Mont. 1895, § 2750; *Wisp v. Hazard*, 66 Cal. 459, 461, 6 Pac. 91.

A factor is an agent for the sale of merchandise, and ordinarily has the possession, management, and control of the property, the subject of the agency; but the actual possession is not essential to constitute an

agency which would pass under that name, as it is ordinarily applied to distinguish it from agencies of other descriptions. *Howland v. Woodruff*, 60 N. Y. 73, 80; *Id.* (N. Y.) 16 Abb. Prac. (N. S.) 411, 419.

A factor is a commercial agent employed by the principal to sell merchandise consigned to him for that purpose on behalf of the principal. He may hold them either in his own name or the name of the principal, and he is remunerated by a fixed commission, either expressed or implied. He is intrusted with possession thereof, and authorized to sell and receive payment therefor from the purchaser. In *re Rabenau* (U. S.) 118 Fed. 471, 474.

A factor is generally defined to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called "factorage" or "commission." *State v. Thompson*, 25 S. W. 346, 348, 120 Mo. 12 (citing *Story*, Ag. § 33); *Edgerton v. Michels*, 26 N. W. 748, 750, 66 Wis. 124; *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 605; *Commonwealth v. Keller*, 9 Pa. Co. Ct. Rep. 253, 255.

A factor is one who receives goods from another, usually at a distance, with authority to sell them in his own name, and without disclosure of principal, which he usually does. *Delaume v. Agar* (La.) *McGloin*, 97, 100.

"Jacob, in his Law Dictionary, defines a factor to be the agent of a merchant living abroad. He says a factor is authorized to act by letter of attorney, with a salary or allowance for his care. A factor is then the agent for the sale of goods or merchandise for his principal for a compensation or a commission; nor does it seem to make any difference that he is compensated by a salary or a percentage on the sales." *Winne v. Hammond*, 37 Ill. 99, 103.

A factor is a commercial agent transacting the mercantile affairs of other men in consideration of a fixed salary or certain commission, and principally, though not exclusively, in the buying and selling of goods. *Lawrence v. Storington Bank*, 6 Conn. 521, 527; *State ex rel. Parker v. Thompson*, 25 S. W. 346, 348, 120 Mo. 12.

A factor is one authorized to buy and sell goods for others, and who is entitled to the possession, management, control, and disposition of such goods, and who has a special property therein and a lien thereon. *Graham v. Duckwall*, 71 Ky. (8 Bush) 12, 17; *Edgerton v. Michels*, 26 N. W. 748, 750, 66 Wis. 124; *Kellogg v. Costello*, 67 N. W. 24, 26, 93 Wis. 232; *Higgins v. Moore*, 34 N. Y. 417, 418.

A factor is an agent employed by others to sell or purchase goods, etc., who is in-

trusted with the possession of the goods to be sold, and entitled to receive the possession of the goods to be purchased. *City of Little Rock v. Barton*, 33 Ark. 436, 444.

"Beawes, in his chapter on 'Factors,' says: 'A factor is but a servant to the merchant, and receives from him, in lieu of wages, a commission. \* \* \* A factor should always be punctual in the advices of his transactions in sales, purchases, affreightments, and more especially in drafts by exchange; for if he sells goods on trust without giving advice thereof, and the buyer breaks, he is liable to trouble, \* \* \* and, if he draws without advising of his having done so, he may justly expect to have his bill returned.'" *Hamilton v. Cunningham* (U. S.) 11 Fed. Cas. 322, 328.

A factor is intrusted with the possession of the goods, and may sell the same in his own name. *Delafield v. Smith*, 78 N. W. 170, 173, 101 Wis. 664, 70 Am. St. Rep. 938.

80 Ohio Laws, p. 188, making it the duty of the owner of any factory or workshop more than two stories high, to provide a convenient exit from the upper stories of the building, refers to the proprietor or owner of the factory or workshop, and not the owner of the building in which such business is carried on. *Lee v. Smith*, 42 Ohio St. 453, 459, 460, 51 Am. Rep. 839.

**As acting in fiduciary capacity.**

See "Fiduciary Capacity or Character."

**Bestowal of labor on article as affecting.**

Owners of a sawmill, who contract to transport logs to their mill, saw them into lumber, and sell the lumber, their expenses and commission to be retained out of the purchase price, are not simply brokers for the sale of the lumber. They are agents, who have an interest in the property. Such agents are usually called "factors," and their rights and powers are more extensive than the powers of a mere broker. They have a special property in the goods, and a lien upon them for their commissions. They may sell for the principal in their own names and sue in their names for the price. *Kellogg v. Costello*, 67 N. W. 24, 26, 93 Wis. 232.

The person to whom the property is consigned for sale is none the less a factor because he bestows labor upon it before it is ready for sale; and this is true, though the character of the property be entirely changed, as where milk is converted into butter and cheese, or where hogs are slaughtered and manufactured into meat. *State v. Thompson*, 25 S. W. 846, 848, 120 Mo. 12 (citing *First Nat. Bank v. Schween*, 20 N. E. 681, 127 Ill. 573; *Shaw v. Ferguson*, 78 Ind. 547).

**Broker distinguished.**

See "Broker."

**Collector.**

An attorney, who collects a note, bill, or demand for another, is not a factor. *Lawrence v. Stonington Bank*, 6 Conn. 521, 527.

The term "factor," as used in the Virginia act of limitations, providing that all suits hereafter brought in the name or names of any person or persons residing beyond the seas or out of this country for the recovery of any debt due for goods actually sold and delivered here by his or their factor or factors shall be commenced and prosecuted within the time appointed and limited by this act for bringing like suits and not thereafter, does not include the agent of a foreigner merely appointed for the purpose of collecting debts. *Hopkirk v. Bell*, 7 U. S. (3 Cranch) 454, 458, 2 L. Ed. 497.

**Consignee or commission merchant.**

A "factor" is defined to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called "factorage" or "commission"; hence he is often called a "commission merchant" or "consignee." *Duguid v. Edwards* (N. Y.) 50 Barb. 288, 295.

A factor is an agent employed to sell goods of his principal which are in his possession for a commission. He is often called a "commission merchant" or a "consignee." *Spears v. Loague*, 46 Tenn. (6 Cold.) 420, 422.

The term "consignee" is nearly synonymous with "factor"; a person to whom goods are sent for sale or safe-keeping. *Lyon v. Alvord*, 18 Conn. 66, 80.

A consignee of goods is a factor, within the meaning of embezzlement statutes. *Thompson v. Beacon Valley Rubber Co.*, 16 Atl. 554, 558, 56 Conn. 493.

"The terms 'factor' and 'commission merchant,' in this country, mean the same thing." *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 410.

**As garnishee.**

The term "factor" is used in states in which the word "factorizing" is the distinctive name to designate the proceedings ordinarily known as "garnishment," to designate the person who would be known in the latter states as the "garnishee." *Cross v. Brown*, 33 Atl. 147, 157, 19 R. I. 220.

**Master distinguished.**

If a shipper consigns his goods to the master for sale and return, the master, in proceeding to dispose of them, does not act under any authority derived from his ap-

**FACTORY PRICE.**

"Factory prices," as used in a note given for the payment of a sum of money in specific articles at "factory prices," will be construed as the prices at which such goods are sold at factories, unless there be proof of a different technical sense, universally used by the custom of trade. *Whipple v. Levett* (U. S.) 29 Fed. Cas. 939.

A note made payable in yarn at the "wholesale factory price" means a certain schedule of prices, different from the actual wholesale prices in market. *Avery v. Stewart*, 2 Conn. 69, 73, 7 Am. Dec. 240.

**FACULTY.**

See "Allegation of Faculties."

**FACULTY OF PHYSIC.**

Acts 1812, c. 159, relating to the University of Maryland, the tenth section of which directs how the four faculties of the University shall be constituted, and provides that the professors now appointed and authorized in the college of medicine shall constitute the "faculty of physic," means the medical faculty, one of the four faculties constituting the University, and not the medical and chirurgical faculty, to which it has no relation. *Regents of University of Maryland v. Williams* (Md.) 9 Gill & J. 365, 392, 31 Am. Dec. 72.

**FACULTY TAX.**

A faculty tax is one not levied on the person, without relation to his abilities to pay, but designed to operate on the proceeds of lucrative professions; the amount of the tax being fixed with reference to the amount of the profits. *State v. Gazlay*, 5 Ohio (3 Ham.) 14, 15, 22.

A tax on any faculty, profession, trade, occupation, or employment does not include the salaries of public officers. *City Council of Charleston v. Lee* (S. C.) 1 Tread. Const. 57, 59.

**FAIL.**

"Fail," as used in Rev. St. c. 133, § 12, providing for the punishment of every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration, when applied to larceny from the person by picking the pocket, means fail by reason of there being nothing in the pocket, as well as to fail from any other cause. *Commonwealth v. McDonald*, 59 Mass. (5 Cush.) 365, 366.

"Fails," as used in Rev. St. 1895, art. 5307, declaring that, where a claimant of

property levied on fails to establish his right thereto, judgment shall be rendered against him and his sureties for the value of the property, does not properly describe the default of a claimant who is dead at the time of the trial and for that reason failed to appear. *Muenster v. Tremont Nat. Bank*, 49 S. W. 862, 363, 92 Tex. 422.

"Fails," as used in a deed of trust authorizing the trustee to sell in case of default, and providing that the beneficiary may substitute another trustee in case the trustee named in the deed fails or refuses to execute, implies delinquency, as well as non-action. The trustee could not be said to fail to act until he had been requested to act and had omitted to do so. *Stallings v. Thomas*, 18 S. W. 184, 55 Ark. 326.

**Dishonesty implied.**

A statement that a conductor of a railway company had been discharged for "failing to ring up all the fares collected" does not necessarily imply the fraud or dishonesty of the conductor. It does not import the commission of any crime. A failure to perform the duty required of ringing up the fares might result from mere neglect, or inefficiency, or from motives of dishonesty. *Pittsburg, A. & M. Pass. Ry. Co. v. McCurdy*, 8 Atl. 230, 231, 114 Pa. 554, 60 Am. Rep. 363.

**As insolvency.**

The word "fail," in the indorsement of a promissory note which states that "the indorser shall be liable if the maker fail," was construed not to be used as synonymous with "inability," but in that sense in which mercantile men generally understood it, as conveying an idea of insolvency or a want of resources to meet engagements. *Davis v. Campbell* (Ala.) 3 Stew. 319, 321.

A person is said to "fail" when he is unable to pay his notes or other obligations as they become payable. *Mayer v. Hermann* (U. S.) 16 Fed. Cas. 1240, 1242.

**As refuse.**

Failing to pay a debt when due, and refusing to pay it when due and when demanded, do not mean the same thing. *Rushville Co-op. Tel. Co. v. Irvin*, 59 N. E. 327, 329, 27 Ind. App. 62.

The words "failing to comply" with a condition on which a devise depends may, in general, have the same operation in law as the words, "refusing to comply." Where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal; but where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between refusing and failing to comply with it.

Taylor v. Mason, 22 U. S. (9 Wheat.) 325, 344, 6 L. Ed. 101.

A Georgia statute provided that, if any party plaintiff should fail or refuse to make discovery relative to allegations of usury set up in the plea, the defendant might make affidavit in writing, which could be used on trial. Under this statute it was held that the words "fail" and "refuse" meant substantially the same thing; both contemplating a failure to come up to the requirements of the statute. *Persons v. Hight*, 4 Ga. 474, 497.

#### FAIL TO APPEAR.

In Comp. Laws 1879, providing that judgment may be rendered dismissing the action when plaintiff fails to appear in justice court at the time specified in the summons, the phrase "fails to appear" is synonymous with "default." *Covart v. Haskins*, 18 Pac. 522, 523, 39 Kan. 571.

#### FAIL TO SUE.

Rev. St. §§ 2121-2123, giving minor children of a decedent the right to sue for injuries resulting in decedent's death in case the surviving husband or wife fails to sue within a certain time, does not include a right of action where a surviving widow brought an action within the proper time and had it dismissed, since the widow had not failed to sue within the statute. The words "fail to sue," as here used, mean that the right of the children to maintain the action depends on the failure of the surviving father or mother to sue, and not on his or her failure to sue and recover. *McNamara v. Slavens*, 76 Mo. 329, 331. Nor does the widow fail to sue, within the meaning of the statute, where she instituted suit within six months after the killing of her husband, but suffered nonsuit and brought a second action, though more than six months had elapsed at such time since the killing. *Shepard v. St. Louis, I. M. & S. Ry. Co.*, 3 Mo. App. 550, 553.

#### FAILING CIRCUMSTANCES.

The term "failing circumstances," as used in the Missouri Constitution and acts prohibiting banks in "failing circumstances" from receiving deposits with knowledge of such condition, must be taken to mean a state of uncertainty whether the bank will be able to sustain itself, dependent on favorable or unfavorable contingencies, which in the course of business may occur and over which its officers have no control. Thus, for instance, an individual may be said to be in failing circumstances when he is put to unusual shifts to meet his liabilities, such as borrowing money at unusual rates of interest, or making sacrifices in the disposi-

tion of his property which he would not do but for his condition. Such a condition of things may exist regarding a bank, and when this is the case a bank, like an individual, may be said to be in a failing condition. A bank's funds are supposed to be ready at hand to meet the wants of commercial, trading, and manufacturing communities in which they are located. Anything interfering with the availability of its funds, such as the carrying of large debts on which nothing can be realized, except after long delays, investments in real estate which it may take time to turn into current funds, and all like things, when they occur, may tend to show that the bank is in failing circumstances. *Dodge v. Mastin* (U. S.) 17 Fed. 660, 663.

"Failing circumstances," as used in the statute of 1853, making a deed of a debtor who is in failing circumstances fraudulent and void as to his creditors, "mean more than actual insolvency; for that is consistent with an honest belief of the insolvent debtor of his wealth and prosperity. The words would seem to imply that the insolvent is about failing and closing his affairs, from an inability to continue in business and to meet his payments. We construe the words of the statute in a more specific sense, to wit, the closing of business by an avowed and deliberate failure." *Utey v. Smith*, 24 Conn. 290, 310, 63 Am. Dec. 163; *Bloodgood v. Beecher*, 35 Conn. 469, 483.

"Failing circumstances," as used in Gen. St. § 501, relating to a debtor in failing circumstances, means one who, being insolvent in fact, is acting in contemplation of actually stopping his business, because he is utterly incapable of carrying it on. One largely in debt, without property sufficient to pay debts, who has suffered his notes repeatedly to go to protest, without any provision for their payment or renewal in a single instance being made on their maturity, and who had made a mortgage for a large sum to his daughter, and, though carrying on business, buying and selling, and making contracts, not as one honestly believing himself solvent and in the hope of extricating himself from a temporary embarrassment, but as one knowing he was insolvent and about to fail and close his affairs from an inability to continue in business and meet his business obligations, is in failing circumstances. *Appeal of Millard*, 25 Atl. 658, 62 Conn. 184.

#### FAILING CONDITION.

A "failing condition," in the ordinary acceptance of the term as applied to a bank, means inability to meet liabilities in the usual course of business. It is not expected to be able at once to pay every debt it owes; but it must be able to pay or provide for its



debts as they fall due in the usual course of business. *State v. Burlingame*, 48 S. W. 72, 74, 146 Mo. 207.

### FAILURE.

The word "failure," when used in connection with any enterprise, is used in its ordinary sense of abandonment or defeat. "There may be checks or disappointments, there may be auguries of ill omen, but so long as the enterprise is prosecuted and its results are unascertained, there is no failure." *White v. Pettijohn*, 23 N. C. 52, 55.

"Failure," as used in Laws 1885, c. 342, providing that failure to state the name of the true owner, lessee, or person in possession of property in the notice of a mechanic's lien filed thereunder shall not impair the validity of the lien, means an unsuccessful attempt to name or designate the true owner, lessee, general assignee, or person in possession of the premises against whose interest a lien is claimed. It does not mean that the lienor may name the lessee as the true person against whose interest he claims a lien, and then afterwards proceed against the lessor, against whose interest he did not intend to file notice of a claim. *De Klyn v. Gould*, 59 N. E. 95, 96, 165 N. Y. 282, 80 Am. St. Rep. 719.

### As insolvency.

The word "failure," when used in its commercial sense and as employed in mercantile life, means a suspension of payment or an enforced suspension of business; and the nature of the failure means the kind or distinguishing characteristic of the suspension, whether voluntary or enforced. *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.* (U. S.) 95 Fed. 111, 115, 36 C. C. A. 671.

Failure signifies the situation of a debtor who finds himself in the impossibility of paying his debts. Civ. Code La. 1900, art. 3556, subd. 11; *State ex rel. Hyman v. Lewis*, 8 South. 602, 604, 42 La. Ann. 847; *Kennedy v. New Orleans Sav. Inst.*, 36 La. Ann. 1, 8; *Lea v. Bringier*, 19 La. Ann. 197, 198.

Rev. St. § 1808, which declares "that any debtor who shall have been convicted of having, at any time within the three months next preceding his failure, sold, engaged," etc., "any of his goods and effects," etc., "in order to give preferences to creditors, shall be debarred from benefits of this act," means a failure or insolvency which has been judicially declared, and does not refer to a condition of insolvency which is uncertain and undetermined. *Seixas v. Citizens' Bank*, 38 La. Ann. 424, 441. And such is its meaning as used in Code Prac. art. 279, which allows defendants in sequestra-

tion cases to bond, except in cases of failure. *State ex rel. Hyman v. Lewis*, 8 South. 602, 604, 42 La. Ann. 847.

"Failure," as used in a bank charter, providing that, in case of the failure of the bank, each stockholder having a share in such bank at the time of such failure, or interested therein at any time within 12 months previous to such failure, should be liable individually for any sum not exceeding the amount of such share, means a failure to meet its current obligations at maturity. Insolvency looks to the liability to pay; failure, to the fact of payment. It is not necessary to say that the statute intended that failure, independent of insolvency, should fix the liability of the stockholders. All that need be said is that failure was the outward act that was to stand for evidence that the bank was insolvent. The failure of the bank to pay its bills on presentation in specie was a failure to meet its current obligations at maturity. *Terry v. Calnan*, 13 S. C. 220, 225.

### As neglect.

In Laws 1889, c. 174, § 9, relating to the publication of notices for the removal of county seats, and providing that no failure or refusal of any proprietor of any newspaper to publish the notice shall invalidate any of the proceedings, "failure" is used in the sense of nonperformance of a duty—that is, as the equivalent of neglect; and hence it is only when the omission to publish the notice in all of the newspapers is due to the neglect or willful refusal of the publisher that the omission is excused. *State v. Butler*, 83 N. W. 483, 484, 81 Minn. 103 (citing *State v. Scott County*, 42 Minn. 284, 44 N. W. 64.)

A failure to make the money on a *fi. fa.* when by due diligence it might be made is a failure to execute process, within the meaning of Code, § 2600, for which the sheriff is liable. *Andrews v. Keep*, 38 Ala. 315, 317.

### As refusal.

In a contract for the sale of real estate, providing that, in the event of the grantor's failure to deliver the deed, the grantee should surrender possession of the land and receive back the purchase money paid, together with his expenditures, not exceeding a certain sum, "failure" does not mean mere arbitrary refusal of the grantor to deliver the deed. Failure is the result of action which predicates earnest effort, and not mere inaction and refusal to do. *O'Connor v. Tyrrell*, 30 Atl. 1061, 1063, 53 N. J. Eq. 15.

A refusal to pay a tax is one thing, and failure to pay is another. The former may be the result of willfulness or a denial of the legality of the tax. The latter may be the result of sickness and poverty, and an

utter inability to pay. *Inhabitants of Cape Elizabeth v. Boyd*, 29 Atl. 1062, 86 Me. 317.

The Kentucky election law of October 16, 1900, provides that if any political party, entitled to nominate by convention, shall fail to do so, the names of all nominees by petition, who shall be designated in their petition as members and candidates of such party, shall be printed under the party device. Under this statute it is held that the refusal to nominate is a failure to nominate, and that the clerk is not required to look beyond the records of his office, and if there has not been filed in his office evidence of the action of a party in making a nomination by convention or other party action, and a petition is filed, there is a failure to nominate within the meaning of the statute. *Skidmore v. Hurst* (Ky.) 68 S. W. 841, 842.

The word "failure," in Act Cong. June 28, 1898, § 6 (Ind. T. Ann. St. 1899, § 57v), providing that, if the chief of a tribe refuses or fails to bring suit for land, then any member of the tribe may bring suit, was introduced to cover a case where there was no refusal, but mere laches or failure to comply with the demand to bring suit, and not a failure merely without demand. *Brought v. Cherokee Nation* (Ind. T.) 69 S. W. 937, 940.

#### FAILURE OF CONSIDERATION.

An answer of "failure of consideration" implies that there was a consideration sufficient to support the contract, but that it has subsequently failed in whole or in part without fault of the defendant. *Shirk v. Neible*, 59 N. E. 281, 284, 156 Ind. 66, 83 Am. St. Rep. 150.

The words "failure in the consideration," in Code, c. 126, § 5, allowing failure of consideration to be pleaded at law, refer to contracts where originally there was consideration subsequently failing, not to contracts wholly wanting consideration at their execution. *Crouch v. Davis* (Va.) 23 Grat. 75. An obligation under seal imports valuable consideration, requiring no proof of the consideration, and neither at common law nor under said section 5 of the Code can want of consideration be shown in defense of an action on it, but failure of consideration may be shown under that section, though it could not at common law. *Williamson v. Cline*, 40 W. Va. 194, 206, 20 S. E. 917, 920.

#### FAILURE OF ISSUE.

See "Definite Failure of Issue"; "Indefinite Failure of Issue."

The expressions "if he dies before he has any issue," or "on a failure of issue," or "for want of issue," or "without living issue," have been adjudged again and again to import a general and indefinite failure of issue.

*Vaughan v. Dickes*, 29 Pa. (8 Harris) 509, 514; *In re Miller's Estate*, 22 Atl. 1044, 145 Pa. 561; *Kay v. Scates*, 37 Pa. (1 Wright) 31, 33, 78 Am. Dec. 399.

The failure of issue, on which the estate of the first taker is determined, when construed to mean a definite, and not an indefinite, failure of issue, depends on the language of the will, indicating that the testator intends a definite failure of issue. *Hackney v. Tracy*, 20 Atl. 560, 561, 137 Pa. 53.

"Failure of issue," as used in a will giving property to testator's son for life, with remainder to his issue, if there be any at his decease, in fee simple, and, on failure of issue of the son, or of his deceased child or children, the land should go to testator's heirs at law, should be construed as referring to the son's death without leaving a child or children, or the issue of a child or children, surviving him; the word "issue" being synonymous with "children." *Parkhurst v. Harrower*, 21 Atl. 826, 142 Pa. 432, 24 Am. St. Rep. 507.

A testator devised to his son James all his property, real, personal, and mixed, for and during his natural life, and to his heirs, forever, viz., the children of James, being three in number, and naming them, to be divided by them in the manner stated in the will; and he further provided "that if either of my said grandchildren die before my son James, without leaving lawful issue, then his or their share shall go and be equally divided among the survivor or survivors, and if all three should die without leaving lawful issue, after the death of my son James, then my entire estate to go to my next nearest kin, now living in Ireland, to be divided by them share and share alike." A common recovery was suffered, in which James was defendant, and in which two of his said children were vouched, and who vouched over the common vouchee. Held, that the failure of issue, described by the testator, was not a general one, but a particular one, which would happen, if at all, in the lifetime of James, the son; that the estate limited in severalty to each of the three grandchildren was a qualified or defeasible fee, on which was mounted, by executory devise, a further limitation in fee to the survivor or survivors, at the death of their father; that a common recovery does not bar such a limitation, but, on the principle of estoppel, it passes the estates of the children who were parties to it. *Toman v. Dunlop*, 18 Pa. (8 Harris) 72, 76.

The expression "failing the male issue," in a will, may from the whole context be construed to mean "if there shall be no son then living." *Murray v. Addenbrook*, 4 Russ. 407, 421.

Either of the phrases, "die without issue," or "on failure of issue," or "for want of

issue," or "without leaving issue," when used in a will in which a devise is first made to one in fee, and one of the phrases is then used as fixing a condition which will cause the estate to pass to another, operates to render the estate of the first taker a fee tail, which, if he have issue, passes to them ad infinitum by descent as tenants in tail. *Elchelberger v. Barnitz* (Pa.) 9 Watts, 447, 450.

#### FAILURE OF LINEAL DESCENDANTS.

Section 26 of the act of June 13, 1822, provided that every contingent limitation made to depend upon the dying of any person without heirs, or heirs of the body, or without issue of the body, or without children or offspring or descendant or other relative, "shall be held and interpreted a limitation to take effect when such person shall die not leaving such heir or issue," etc., as the case may be, "living at the time of his death or born to him within ten months thereafter," unless the intention of such limitation be otherwise plainly declared on the face of the deed or will creating it. A certain will provided that M. should "have, possess, occupy, work, and enjoy" certain slaves "during his natural life," and that after his decease they were to go to "the lineal descendants of the said M. to the latest posterity." A limitation over provided that "on failure of lineal descendants" of M., then the property was to go to "the heirs generally," etc. Held, that the devise would have created an estate in fee tail, had it not been for a statute changing such estate to fee simple, and that the words "on failure of lineal descendants," taken in connection with the words "lineal descendants of the said M. to the latest posterity," occurring in the devise, did not, under section 26, change the devise to an estate for life, since the testator clearly intended by such words to create the limitation on an indefinite failure of issue, rather than on a failure of issue at the time of M.'s death, and a limitation over on such indefinite failure of issue was void. *Powell v. Brandon*, 24 Miss. 343, 361.

#### FAILURE TO PROSECUTE.

A failure to produce in the county court a duly certified copy of the docket of the justice of the peace is a failure to prosecute the appeal, within the meaning of the Code provision relative to the dismissal of appeals for failure to prosecute. *People v. Elkins*, 40 Cal. 642, 647.

#### FAILURE TO QUALIFY.

"Failure to qualify," as used in Const. art. 5, § 16, providing that, in case of death, impeachment and notice thereof to the accused, failure to qualify, resignation, ab-

sence from the state, or other disability of the Governor, the powers, duties, and emoluments of the office for the residue of the term, or until the disability shall be removed, shall devolve upon the Lieutenant Governor, means failure to give the bond and take the oath of office required by the Constitution, and applies to a case where a person possessing the constitutional qualifications to hold the office has been elected, but does not qualify. It cannot be said that there has been a failure to qualify where no person has been elected, because of the ineligibility of the person receiving the highest number of votes to the office of Governor. *State v. Boyd*, 48 N. W. 739, 753, 31 Neb. 682.

#### FAIR.

Though etymologically signifying a market for buying and selling exhibited articles, the word "fair" includes a place for the exhibition of agricultural and mechanical products. *State v. Long*, 28 N. E. 1038, 1039, 48 Ohio St. 509.

#### FAIR.

See "Just and Fair."

Average distinguished, see "Average."

Webster gives as a synonym for "fair" the word "reasonable." Thus an instruction that a surgeon was only required to exercise fair and ordinary knowledge and skill was construed equivalent to an instruction that he was required to exercise reasonable and ordinary knowledge and skill. *Jones v. Angell*, 95 Ind. 376, 382.

In Laws 1871-72, p. 813, § 10, providing that street assessment warrants shall be countersigned by the auditor, who before countersigning shall examine the proceedings, "and must be satisfied that the proceedings have been legal and fair," the word "fair" seems very loosely used. In common usage it would convey some idea of justice or equity. But it is not possible that it could have been intended that in a case where the proceedings are legal—that is to say, in accordance with the requirements of the act—the auditor could refuse to sign upon the ground that the law was not just, or upon his own undefined notions of fairness. The word, therefore, adds nothing to the force of the word "legal," but is one of those expressions which are put in for the sake of sound, and which carry no definite meaning. *Wood v. Strother*, 18 Pac. 766, 767, 76 Cal. 545, 9 Am. St. Rep. 249.

Under a statute requiring a railroad to permit other companies to form running connections with it on fair and equitable terms, it is held that the words "fair and equitable" mean at least such terms as are usual in

such cases, whether established by custom or contract. *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.* (U. S.) 51 Fed. 465, 478.

#### FAIR ABRIDGMENT.

A fair and bona fide abridgment of an original work is not a piracy of the copyright of the author. See *Dodsley v. Kinnersley*, 1 Amb. 408; *Whittingham v. Wooler*, 2 Swanst. 428, 430, 481, note; *Tonson v. Walker*, 3 Swanst. 672-679, 681. But then what constitutes a fair and bona fide abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear that a mere selection or different arrangement of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon, and not merely the facile use of the scissors, or extracts of the essential parts constituting the chief value of the original work. *Folsom v. Marsh* (U. S.) 9 Fed. Cas. 342, 345 (citing *Gyles v. Wilcox*, 2 Atk. 141).

#### FAIR AGGREGATE VALUE.

Laws 1890, c. 567, authorizing a consolidation of business corporations, and providing that the amount of the capital stock of the consolidated company will not be larger than the "fair aggregate value" of the property, franchises, and rights of the consolidating companies, means the net value of the property, franchises, and rights of the corporations proposed for consolidation in excess of the respective liabilities of such corporations. *Langan v. Francklyn*, 20 N. Y. Supp. 404, 412, 29 Abb. N. C. 102.

#### FAIR AVERAGE CROP.

A contract with the overseer of a plantation to make a fair average crop means that the crop should be a fair average one, making due allowance for the season and unforeseen events beyond the control of a prudent, faithful overseer, and not that the crop shall be an average one at all events. *Wright v. Morris*, 15 Ark. 444, 449.

#### FAIR CASH VALUE.

Actual cash value synonymous, see "Actual Cash Value."

Generally speaking, when a statute requires the fair cash value of property on a certain day to be ascertained, it refers to the actual judgment of the public, as expressed in the price which some one will pay, and not to what the court at a later time may think would have been a wiser opinion. It means

the highest price that a normal person, not under peculiar compulsion, will pay at that time to get that thing. *National Bank of Commerce v. City of New Bedford*, 56 N. E. 268, 289, 175 Mass. 267.

A fair cash valuation is such a price as honest and impartial men would naturally and reasonably place upon any given piece of property, in view of its useful capabilities and the end to be accomplished by its sale and purchase. *Jones v. Whitworth*, 30 S. W. 736, 737, 94 Tenn. 602.

#### FAIR COMPENSATION.

Where the distributees of an estate agreed with the executor to pay him a fair compensation for his services, such agreement means to allow him such compensation as he may by law be entitled to, to be fixed and allowed by the court having control of the subject, and the fact that each of the distributees, except one, allowed the executor a certain sum, does not give him a right to offset such sum in an action against him by the remaining distributee or her heirs. *Ratiff v. Davis*, 38 Miss. 107, 111, 112.

#### FAIR MARKET VALUE.

Fair market value has never been construed to mean the selling price of property at a forced or involuntary sale. *Walker v. People*, 61 N. E. 489, 490, 192 Ill. 106.

#### FAIR PREPONDERANCE.

"Fair," as used in an instruction that plaintiff was required to prove the allegations of her petition by a fair preponderance of the evidence, means characterized by honesty and impartiality, upright, free from suspicion of bias. *Bryan v. Chicago, R. I. & P. Ry. Co.*, 19 N. W. 295, 296, 63 Iowa, 464.

The phrase "fair preponderance of evidence" does not mean the largest number of witnesses. *Hynes v. Metropolitan St. Ry. Co.*, 64 N. Y. Supp. 382, 383, 31 Misc. Rep. 825.

Where a defendant, prosecuted for an assault with a deadly weapon, claimed that he was irresponsibly drunk at the time of committing the act, an instruction that the burden of proving such drunkenness was on defendant, and he must establish it by a fair preponderance of evidence, was unobjectionable, and meant no more than that the evidence spoken of must fairly preponderate; that is, it must preponderate so that the preponderance can be perceived upon fair consideration of the evidence. *State v. Grear*, 13 N. W. 140, 142, 29 Minn. 225.

"Preponderance of evidence" means greater weight of evidence, or evidence which is more credible and convincing to the mind, or some equivalent expression. Hence an to

struction to a jury: "You are to be satisfied by a fair preponderance of the testimony. That is an expression that may mean considerable, and it may not mean much, depending on how you understand it; but in the final analysis it means this: What do you think about it, having your minds guided by the evidence?"—is not an accurate definition of preponderance of the evidence. It tends to minimize the importance of the rule, and lead the jury to believe that it in fact means little or nothing. *Button v. Metcalf*, 49 N. W. 809, 811, 80 Wis. 193.

#### Preponderance distinguished.

"Fair preponderance," as used in an instruction that plaintiff establish the allegations of her petition by a fair preponderance of evidence, is equivalent to, and does not express something more than, an absolute preponderance. The adjective "fair," in the connection used, means characterized by honesty and impartiality, free from suspicion of bias, and is properly used in qualifying the word "preponderance." *Bryan v. Chicago, R. I. & P. Ry. Co.*, 19 N. W. 295, 296, 68 Iowa, 464.

The word "fair" means "free from clouds; not obscure." So that the use of this adjective in connection with the word "preponderance" places a greater burden than the latter alone, or makes it necessary to establish the facts by more than a simple preponderance of testimony. *De St. Aubin v. Marshall Field & Co.*, 62 Pac. 199, 201, 27 Colo. 414.

In order for a party upon whom the burden may rest to establish an issue, it is only necessary that this be done by a preponderance of the evidence, and the use of the expression "fair preponderance" conveys the idea of something more than preponderance, and the use of the word "fair" in such connection in a charge is improper. *B. Lantry Sons v. Lowrie (Tex.)* 58 S. W. 837, 838.

#### FAIR PROCEEDINGS.

The term "fair and just proceedings," in a statute providing that, on the petition of a debtor for discharge from imprisonment, he shall not be discharged unless his proceedings have been just and fair, is not limited to proceedings in court under the statute, the correctness of the petition, schedule, and account, and the truth of his oath; but the terms "fair and just" involve a more extended inquiry, and therefore conveyances made by the debtor to defraud his creditors will preclude his discharge. *In re Roberts (N. Y.)* 8 Daly, 95, 97.

#### FAIR SALE.

A "fair sale," as the term is used in speaking of a mortgage sale, "is a sale con-

ducted with fairness as respects the rights and interests of the parties affected by it." *Lalor v. McCarthy*, 24 Minn. 417, 419.

#### FAIR TRIAL.

A "fair trial" before an impartial jury means one where the jurors are entirely indifferent between the parties. *Omaha & R. V. R. Co. v. Cook*, 37 Neb. 435, 445, 55 N. W. 943.

Gen. St. c. 66, § 235, providing that a new trial might be granted for any irregularity in the proceedings of the court by which the moving party was prevented from having a fair trial, means that which is a fair trial in contemplation of law, namely, such a trial as the law secures to the party. *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 132, 136 (Gil 99, 102), 18 Am. Rep. 334.

#### FAIR USE.

What constitutes a fair use by a later writer in an art or science of the works of an earlier writer on the subject is often a very difficult question to answer. What would be a fair use in one case might not be in another. In determining this question courts often look more to the value of the matter pirated than to the quantity. *Drone*, p. 394, says: "The fair uses, other than those of legitimate quotation, which an author is privileged to make of a copyrighted work in the preparation of a rival or other publication, are restricted by recent English decisions to very narrow limits. The later compiler of a rival publication may learn from a copyrighted work where to find and how to use materials of which he might otherwise be ignorant. He may derive from it information, hints, suggestions, etc., which otherwise would have escaped his notice. He may use it as a guide in the preparation of his own work, to verify the accuracy and completeness of his own, or to detect errors, omissions, and other faults in his own. But, while he may thus use the copyrighted work as a guide or instructor, he must go to the common sources for materials, and his composition must be the product of his own labor. If to a material extent he copies from the protected work, or appropriates the results there found, it is piracy." *Simms v. Stanton (U. S.)* 75 Fed. 6, 10.

#### FAIR VALUE.

The fair value contemplated by a statute providing that the director of a corporation shall see to it that the purchase price of property does not exceed the fair value is that which the property had at the time of the sale and which constituted the consideration upon which the subscription to the capital stock of the company was satisfied. Then was the time the estimate of the value must

for that purpose be deemed to have been made. It could not be dependent on the subsequent success or failure of the investment, further than such result may have been legitimately within evidential contemplation at the time of the sale, in view of the cases for which it might have had available advantages within itself. *Huntington v. Attrill*, 23 N. E. 544, 548, 118 N. Y. 865.

"Fair and equitable value," as used in an act empowering a city to grant a right to erect and operate waterworks for a period of 20 years, and reserving the right to acquire such works, providing that at the expiration of the 20 years, if the grant should not be renewed, the city should purchase the works and pay therefor the fair and equitable value, cannot be determined by capitalization of the earnings, thereby in effect valuing the franchise which no longer existed; nor should such value be limited to the cost of reproducing the plant, but allowance should be made for the additional value created by the fact of connections with and supply of buildings, although the company did not own such connections. *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 864, 10 C. C. A. 653, 27 L. R. A. 827.

A fair valuation means the present market value of the property. The term has such meaning in the clause of the bankruptcy act providing that a man shall be deemed insolvent only when the aggregate of his property at a fair valuation shall not be sufficient in amount to pay his debts. It is erroneous to add to such meaning a requirement that the debtor must be able to realize from his property a sufficient amount to pay his debts. A man's property at fair valuation may amount to sufficient to pay his debts, although he may not be able to realize at once the amount of this amount. *Duncan v. Landis*, 106 Fed. 839, 45 C. C. A. 666; *Martin v. Bigelow*, 73 N. Y. Supp. 443, 445, 36 Misc. Rep. 298.

#### FAIRWAY.

"A fairway is water on which vessels of commerce habitually move." *The Oliver* (U. S.) 22 Fed. 848, 849.

#### FAIRLY.

In a statute providing for the confirmation of the sale of lands by an administrator when the sale appears "to have been fairly made and in conformity to law," the term "fairly made" refers to and includes the fairness and adequacy of the price, as well as the absence of fraud and unfairness in manner of making the sale. The sale has not been fairly made if it appears that the land has been sold for an unfair or inadequate price. The word "fair," as defined by Webster, is synonymous with "honest; equitable; impartial; reasonable." If, therefore, it appears

that the price at which the land was sold was inequitable or unreasonable, the sale, within the meaning of the law, has not been "fairly made," and should not be confirmed. *Hirshfield v. Davis*, 43 Tex. 155, 161.

If land sold under an administrator's sale was sold for an unfair or inadequate price, the sale was not "fairly made," within the provisions of Rev. St. art. 2144, requiring a judge to inquire into the manner in which sales are made, and, if satisfied that such sale was fairly made, to enter a decree confirming the sale. *James v. Nease* (Tex.) 69 S. W. 110, 111.

#### As equitably.

In a petition representing that land belonging to a decedent could not be fairly divided among his heirs at law without a sale, "fairly" is equivalent to "equitably," as used in Rev. Code, § 2221, providing that lands of an estate may be sold by order of the probate court when the same cannot be equitably divided among the heirs and devisees. *Warnock v. Thomas*, 48 Ala. 463, 465; *Satcher v. Satcher's Adm'r*, 41 Ala. 26, 39, 91 Am. Dec. 498.

#### As just proportion.

"Fairly and equitably," as used in a report of commissioners for laying out an avenue which followed the language of the statute, which stated that they proceeded "to assess the expense of making the improvement fairly and equitably on the owners of any land and real estate on the line of the avenue which in the opinion of the board would be benefited by the improvement," indicate a legislative intent that the burden which might, consistently with established legislative principles, be imposed on the frontage, should be so distributed that each should bear his just proportion of the whole according to, and not in excess of, the benefits received. *Hutton v. Inhabitants of West Orange*, 39 N. J. Law (10 Vroom) 453, 455.

#### Mediocrity implied.

In an instruction that, where the purchaser had no sufficient and reasonable opportunity to inspect the goods before or at the time of the sale, there would be an implied warranty on the part of the seller that they were to be of fairly merchantable quality, "fairly" is well adapted to convey the idea of mediocrity in quality, or something just above that, and does not modify the term "merchantable." *Warner v. Arctic Ice Co.*, 74 Me. 475, 476.

#### As reasonable.

An instruction, in an action for personal injuries sustained by plaintiff while a passenger on defendant railroad, that the jury should allow plaintiff such damages as would "fairly compensate" him for his injuries,

should be construed to mean such damages as are reasonable and necessary, so that it was not error for the court to fail to limit the damages to such as were reasonable and necessary. "The jury would surely understand that unreasonable and unnecessary outlays were not to be the foundation on which to allow fair compensation, and therefore such outlays should be excluded from the consideration." *City of Knoxville v. Chicago, B. & Q. R. Co.*, 50 N. W. 60, 61, 83 Iowa, 636, 32 Am. St. Rep. 321.

#### As substantially.

"Fairly," as used in an insurance policy declaring that it should be void if the material fact or circumstances stated in the application had not been fairly represented by the insured, means that the representation should substantially coincide with the fact. *Ring v. Phoenix Assur. Co.*, 14 N. E. 525, 529, 145 Mass. 426.

#### Truly synonymous.

"Fairly," as used in *Nix*, Dig. p. 925, § 2, requiring a commissioner to take deposition in a foreign state to take oath that he will faithfully, fairly, and impartially execute the commission, is not synonymous with the word "truly," as used in the oath administered that he would truly take the depositions. "They have widely different shades of meaning, and convey entirely distinct ideas. Every day's experience teaches us that language may be truly, yet most unfairly, repeated. The answer of the witness may be truly written down, yet it may convey a meaning quite different from that which the witness intended to convey, and did convey, to the person that heard him speak. On the other hand, language may be fairly reported, yet not in accordance with strict truth." *Lawrence v. Finch*, 17 N. J. Eq. (2 C. E. Green) 234, 239.

#### FAIRLY WORKABLE.

An agreement to work a coal mine so long as it was "fairly workable" did not oblige the obligee to go on working as long as there was any coal to be found, though he might be working at a loss. *Jones v. Shears*, 7 Car. & P. 348.

#### FAITH.

See "Abiding Faith"; "Bad Faith"; "Full Faith and Credit"; "Good Faith."

#### FAITHFUL—FAITHFULLY.

See "Well and Faithfully."

A bond given by a public officer, conditioned "faithfully to discharge his official duties," means "that he has assumed that

measure of responsibility laid on him by law. had no bond been given." *State v. Chadwick*, 10 Or. 465, 468.

Where a bond of a constable was conditioned as required by statute for the faithful performance of his duties or trust as to all processes by him served or executed, the condition must be construed to embrace all those instances of malfeasance and nonfeasance in the execution of his office which would subject a principal to responsibility for similar wrongful acts of his deputy. *Archer v. Noble*, 3 Me. (3 Greenl.) 418, 420.

Where a sheriff by virtue of a writ of execution levied on the goods of other persons than the judgment debtor after receiving notice that they were not his goods, such act was a breach of the sheriff's bond, conditioned for the faithful performance of the duties of his office, for which the owners of such goods may recover. *Carmack v. Commonwealth (Pa.)* 5 Bin. 184, 189.

A bond stipulating "for the faithful performance" of an officer does not in legal effect, however much it may in words, differ from one stipulating that the incumbent will "well and truly, faithfully and impartially, execute and perform" such office. *City of Hoboken v. Evans*, 31 N. J. Law (2 Vroom) 342, 343.

The phrase "faithful performance of the duties of his office" refers to a malfeasance of the sheriff, and any malfeasance amounts to a breach of the condition for faithful performance. *Harris v. Hanson*, 11 Me. (2 Fairf.) 241, 245.

#### As correctly.

In a statute requiring the register of a court of chancery to give bond for the faithful discharge of his office, by the term "faithful discharge" must be understood a stipulation that he shall correctly, with exactness, and according to law, perform his official duties, and if he does an act under color of his office and as an officer so inaccurately and imperfectly as to occasion a loss to a party to the proceeding, such as to issue an injunction to restrain the collection of a fieri facias without an authority therefor, in consequence whereof opportunity to collect the judgment was lost, there is a breach of the condition of the bond. *Governor v. Wiley*, 14 Ala. 172, 180.

#### As diligently and skillfully.

"The word 'faithfully,' as it respects temporal affairs, means 'diligently, without unnecessary delay, as a faithful officer, a faithful servant, in applying to their duties.'" *Perry v. Thompson*, 16 N. J. Law (1 Har.) 72, 73.

A bond by a bank teller that he would "faithfully perform" the duties of his office

should be construed to mean the use of reasonable and competent skill and ordinary diligence in the performance of his office, and is not limited to acting honestly only. It includes a faithful execution of the duties of the office, embracing competent skill and due diligence. The receiving of moneys for which he has not accounted, if not justified or excused, amounts to a forfeiture of the bond. *American Bank v. Adams*, 29 Mass. (12 Pick.) 303, 306.

#### As honestly.

In a bond of a bank teller, the condition that he should "well and faithfully perform his duties" applies to his honesty, and not to his ability in his trust. A mere mistake in overpayment of a check can never be alleged as a breach of trust, for the mistake may happen to a teller of the purest morals and the best capacity for business. *Union Bank v. Clossey* (N. Y.) 10 Johns. 271, 273 (cited with approval (N. Y.) 11 Johns. 182, 183).

#### As impartially.

An oath requiring the "faithful performance of their duties" by persons required by statute to take an oath to perform their duties impartially and according to the best of their judgment does not express the same meaning as the requirement of the statute, and therefore is insufficient. In *re Nice Town Lane* (Pa.) 82 Leg. Int. (Pa.) 28.

The word "faithfully" cannot be substituted for the word "impartially" in a road viewer's oath, which by statute is required to be that the road viewer will impartially discharge his duties. In *re Cambria St.*, 75 Pa. (25 P. F. Smith) 357, 360.

The word "faithfully," as used in a bond conditioned that an officer should well and truly, faithfully, firmly, and impartially execute and perform the duties of his office, comprises in its legal signification the words "well, truly, firmly, and impartially," which are simply redundant. *City of Hoboken v. Evans*, 31 N. J. Law (2 Vroom) 342, 343.

The expression "faithfully, fairly, and impartially," as used in the statute relating to depositions, and providing that the commissioners, before taking the depositions, shall take an oath or affirmation "faithfully, fairly, and impartially" to execute the said commission, means more than the mere word "faithfully," and an oath whereby the commissioners were sworn to "faithfully" discharge the duties assigned to them is insufficient. *Perry v. Thompson*, 16 N. J. Law (1 Har.) 72, 73.

#### FAKIR.

Any person who shall sell or attempt to sell any articles, goods, wares, or merchandise of any kind upon the street or streets

of any city or town by means of any false representations, trick, devise, or lottery, or by means of any game of chance, for the purpose and with intent to procure or obtain a greater or better price for such article or goods than their actual retail price or value upon the market, shall be deemed a fakir. *Mills' Ann. St. Colo.* 1891, § 1400.

#### FALCIDIAN PORTION.

The "falcidian portion" was that which was the fourth which the law formerly authorized the testamentary heir to retain from the succession in case more than three-fourths of it were absorbed by the legacies. *Civ. Code La.* 1900, art. 1616.

#### FALL

The court, in construing a devise which stated that it was testator's will and desire that certain lands fall into the possession of his brother, said: "The land is to fall into his brother's possession; words more expressive than the word 'give' or 'grant.' As the tree falls, so it lieth. It is a word much used in common speech to indicate that lands become the property or estate of a particular person upon the occurrence of a particular event; *exempli gratia*, 'the land falls to him upon the death of his mother.'" *McCullough's Heirs v. Gilmore*, 11 Pa. (1 Jones) 370, 372.

A condition in an insurance policy that "if a building shall fall, except as the result of a fire, the insurance on it or its contents shall immediately cease," means the insurance shall continue only while the building remains standing as a building, and shall cease when the building has fallen and become a ruin. When substantially all the floors and the roof of a building used as a storehouse fall, leaving nothing standing but the outer walls, and perhaps a staircase or an elevator, the building must be deemed to have fallen. *Huck v. Globe Ins. Co.*, 127 Mass. 306, 309, 34 Am. Rep. 373.

#### As season of the year.

The term "fall," applied to the seasons of the year, means the season the leaves fall from the trees, according to Webster; and hence, where a contract provided for a certain fall payment, the time of payment might mean during the months of September, October, or November, but whether September 1st, or the middle of October, or the last day in November, there was no way of determining, and hence the provision was uncertain and ambiguous. *Aultman, Miller & Co. v. Clifford*, 55 Minn. 159, 161, 56 N. W. 593, 43 Am. St. Rep. 478.

A contract of sale of apple and peach trees and grape roots, to be delivered this



fall, means that the trees and roots are to be delivered within the fall season suited to transplanting such trees and usually adopted by nurserymen and the parties planting such trees in the particular latitude, and does not authorize the vendor to deliver at any time within the fall months, regardless of the weather, temperature, etc.; and hence a delivery on the 22d of November and during severe freezing weather, whereby the trees and roots were killed, was not a delivery within the meaning of the contract, etc. *Weltner v. Riggs*, 3 W. Va. 445, 450.

An agreement to extend the time of payment of a promissory note "until the fall" of 1871, means "until the commencement of the fall season, or the 1st of September, of that year." *Abel v. Alexander*, 45 Ind. 523, 528, 15 Am. Rep. 270.

Fall is a period of the year which begins on the 1st of September. The statement in the caption of an indictment as made at the fall term is sufficiently definite. *State v. Haddock*, 9 N. C. 461, 462.

#### FALL THROUGH.

"Fall through," as used in a contract stipulating that, in case a sale should by any means fall through, the party of the first part, in the event of a sale to any other party, agreed to pay a certain sum on the perfection of the second or other sale on the receipt of the money therefor, is broad enough to comprehend failure of a contract of sale through the refusal of the buyer to pay the price, though it is a term not susceptible of a precise definition. *Norris v. Maitland (Pa.)* 9 Phila. 7, 9.

#### FALLS.

As the word is used when speaking of water, "falls," though it is plural in form, usually means only one locality; and as used in the charter of a certain dam company, in which the company was given authority to improve the falls below their dam for the running of logs, etc., means the falls immediately below the dam. The authority so given could not be construed to extend any distance down the stream. *Davis v. Mat-tawamkeag Log Driving Co.*, 19 Atl. 828, 829, 82 Me. 346.

#### FALSE—FALSELY.

Other false and fraudulent means, see "Other."

The word "false," when used "to say of a man that he reasons from false premises, or draws false conclusions from correct premises, is not libelous. In such cases the word 'false' means no more than that the premises were not true, or that the conclusion was erroneous. So, also, to say of an

advocate before a jury that he falsely asserted the guilt or innocence of the accused, that he falsely maintained the affirmative or negative of the issue, is not libelous, inasmuch as it means simply a mistaken view as to the effect of the evidence." *Walker v. Hawley*, 16 Atl. 674, 675, 58 Conn. 559.

#### As corruptly.

An indictment that a person "willfully, knowingly, maliciously, and falsely" said, deposed, and swore on oath, is equivalent to saying that he corruptly swore; for the words used necessarily involved "corruptly." It could not have been willfully, knowingly, maliciously, and falsely, without being corruptly, done. *State v. Bixler*, 62 Md. 354, 356.

#### As fraudulent.

A complaint in an action to recover possession of land claimed to have been taken by plaintiff as swamp and overflowed lands, alleging that defendant has claimed the same as a pre-emption, but that his proof of compliance with the pre-emption act was false and fraudulent, does not mean that what is false is necessarily fraudulent, particularly as to a person who may use the falsehood without being aware of its falsity. The adjectives "false" and "fraudulent" may express different qualities of the noun "proof," and therefore plaintiff's allegation that the defendant's proof of compliance with the pre-emption act was false and fraudulent is not well controverted by a literal denial thereof in his answer, since he has not denied that the proof was "false or fraudulent," but only that it was "false and fraudulent." *Miller v. Tobin (U. S.)* 18 Fed. 609, 614.

A policy provided that it should be void if the proposal for the insurance and answers therein made were false or fraudulent. In the proposal, which was made a part of the policy, the words "untrue or fraudulent" were used. There is no doubt that the words "false or fraudulent," written in the policy, are used in the same sense. Effect should be given to both the words "false" and "fraudulent." If they both mean statements made intentionally and knowingly to deceive, then it was not necessary to use both, as nothing is added to the sense by the use of both. The word "false" is sometimes used in the sense of "fraudulent," and sometimes in the sense of "untrue." The words were inserted for abundant caution. They were intended to cover statements untrue, as well as such as were colorably true but fraudulent in fact. *Foot v. Etna Life Ins. Co.*, 61 N. Y. 571, 578, 577.

#### As intentionally untrue.

"False," as used to indicate the intentional act of a responsible being, implies a

purpose to deceive. *State v. Smith*, 22 Atl. 604, 606, 63 Vt. 201.

"False" means that which is not true; coupled with a lying intent. *Wood v. State*, 48 Ga. 192, 297, 15 Am. Rep. 664.

"Falsely" means something more than untrue. It means something designedly untrue, deceitful, and implies an intention to perpetrate some treachery or fraud; and hence, as used in Acts Gen. Assem. c. 185, § 11, providing that, if any inspector of illuminating oil shall falsely brand any barrel, etc., the inspector is not liable for an inaccurate, erroneous, or faulty test or brand. *Hatcher v. Dunn*, 71 N. W. 343, 344, 102 Iowa, 411, 36 L. R. A. 689 (citing *Putnam v. Osgood*, 51 N. H. 192-206; *State v. Smith*, 63 Vt. 201, 22 A. 604; *Clapp v. Association*, 146 Mass. 519, 16 N. E. 436; *Mason v. Association*, 18 U. C. C. P. 19; *Ins. Co. v. Culver*, 6 Ind. 187; *Cohn v. Neeves*, 40 Wis. 393).

The word "false" does not necessarily involve turpitude of mind. One definition of "false" is "erroneous; untrue." False swearing must be intentional or willful to justify a jury in disregarding the testimony entirely, and hence an instruction that, "if the jury believe that plaintiff has testified falsely, you are entitled to disregard his whole testimony," was properly refused, as leaving out the question of intentional falsehood. *Gerardo v. Brush*, 79 N. W. 646, 647, 120 Mich. 405.

"False," in jurisprudence, usually imports something more than the vernacular sense of "erroneous" or "untrue." The word is often used to characterize a wrongful or criminal act, such as involves an error or untruth intentionally or knowingly put forward. A thing is called "false" when it is done or made with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error. *Ratterman v. Ingalls*, 28 N. E. 168, 169, 48 Ohio St. 468.

"Falsely," as used in an instruction stating that it is for the jury to determine whether defendant falsely represented certain facts, will be construed to mean something more than "mistakenly" or "untruly," and cannot be construed otherwise than to mean something designedly untrue or deceitful, and as involving an intention to perpetrate some fraud. *State v. Brady*, 69 N. W. 290, 294, 100 Iowa, 191, 36 L. R. A. 693, 62 Am. St. Rep. 560.

The word "falsely," as used in an indictment for having sworn feloniously, willfully, falsely, and corruptly in a civil suit, is not an equivalent to scienter on the part of the defendant. It does not show that the defendant swore to a fact, knowing it to

be false. *State v. Brown*, 34 South. 698, 700, 110 La. 591.

#### As untrue.

"False," as used in an instruction charging that one of two inconsistent defenses must be false, is equivalent to the word "untrue," and cannot be construed as an accusation of perjury or willful false statement. *McGowan v. Larsen* (U. S.) 66 Fed. 910, 914, 14 C. C. A. 178.

"False," as used in Laws 1875, c. 11, § 21, providing that, if any certificate or report made by an officer of certain business corporations shall be false in any material representation, the officers signing it shall be liable for all the debts of the corporation contracted while they are officers thereof, should be so construed that the certificate or report need not have been known to be false by the officer. It is sufficient that it was false. *Huntington v. Attrill*, 23 N. E. 544, 545, 118 N. Y. 365; *Torbett v. Eaton*, 1 N. Y. Supp. 614, 616, 49 Hun, 200.

When used with reference to the testimony of a witness, "falsely" ordinarily means something more than that the testimony is untrue, and implies that it is intentionally untrue; but the word is also sometimes used in the sense of "mistakenly" or "erroneously," and hence an instruction which fails to state the direct significance of the word is misleading. *State v. Henderson*, 74 N. W. 1014, 1015, 72 Minn. 74.

#### Willfully distinguished.

See "Willful—Willfully."

#### As willfully false.

The word "falsely," as used in the statutory provision that if the witness has, in the opinion of the jurors, sworn falsely in any material respect, his testimony is not to be accepted and acted on without great caution, is not the equivalent of "mistakenly," and the omission or insertion of the word "willfully" before the words "sworn falsely" would not change the effect of the language in a charge. *People v. Righetti*, 4 Pac. 1063, 1185, 66 Cal. 184. *People v. Luchetti*, 51 Pac. 707, 709, 119 Cal. 501 (citing *People v. Sprague*, 53 Cal. 493).

#### FALSE ACCOUNT.

Rev. St. c. 184, § 18, providing that a creditor of a mortgagor may attach property and demand of the mortgagor an account on oath of the amount due upon the debt or demand secured by the mortgage, and if such account is not given in 15 days, or if a false account is given, the property may be held discharged of such mortgage, will be construed to mean an intentional false account, and not an account which is incor-

rect through mistake. "It is quite obvious that the term 'false account' may be construed to include an account which is false, known to be untrue; and this, we think, is the more common and ordinary meaning of the term." *Putnam v. Osgood*, 51 N. H. 192, 204.

#### FALSE AFFIDAVIT.

Rev. St. U. S. § 5438, making it criminal to obtain the payment of any claim by any false affidavit, does not require that such affidavit be made before a person authorized to take affidavits, but it is sufficient, if in the form of an affidavit, though the person purporting to have administered the oath had no authority so to do, or his jurat is forged thereto. *United States v. Ingraham* (U. S.) 49 Fed. 155, 157.

#### FALSE ALARM.

"False alarm," as used in Act Feb. 25, 1871, providing for the punishment of any person giving or causing to be given a false alarm by the fire alarm telegraph in the city of Mobile, knowing the same to be such, does not mean a false alarm of fire, and it is not necessary that the bells should have been rung in the regular manner which would have indicated the place of the fire, nor that the firemen should have been deceived by the false alarm and induced by it to turn out with their engine, but includes any alarm caused by an intermeddling with the wires. *Koppersmith v. State*, 51 Ala. 6, 7.

#### FALSE ANSWER.

The words "false" and "sham" are synonymous. *Howe v. Elwell*, 67 N. Y. Supp. 1108, 57 App. Div. 357.

"False answer" is synonymous with "sham answer," as used in Code Civ. Proc. § 538, providing that a sham answer may be stricken out by the court on motion. *Robert Gere Bank v. Inman*, 5 N. Y. Supp. 457, 458, 51 Hun, 97.

A false answer is one which is false in the sense of being a mere pretense set up in bad faith and without color of fact. *Farnsworth v. Holstead*, 10 N. Y. Supp. 763, 18 Civ. Proc. R. 227.

An answer which denies the complaint, but does not assert anything, being a negative pleading, cannot be stricken as false. *Livingston v. Finkle* (N. Y.) 8 How. Prac. 485, 486.

#### FALSE CHECKS.

The term "false or bogus checks," within the meaning of the statute making it criminal for any person to obtain or attempt to

obtain from any other person or persons any money or property by means of the use of any false or bogus checks, does not include a note or order given by defendant and signed by himself. *Pierce v. People*, 81 Ill. 98, 101.

#### FALSE ENTRY.

"A false entry in the books or reports of a bank," which is punishable under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], prohibiting the president or officers of any banking association from making any false entries, etc., is an entry that is knowingly and intentionally false when made. It is not the purpose of a statute to punish an officer who through honest mistake makes an entry on the books or reports of the bank which he believes to be true when it is in fact false. *United States v. Allis* (U. S.) 73 Fed. 163, 170; *Cochran v. United States*, 15 Sup. Ct. 628, 633, 157 U. S. 286, 39 L. Ed. 704; *United States v. Graves* (U. S.) 53 Fed. 634, 644; *United States v. Allen* (U. S.) 47 Fed. 696, 697. It follows that, in order to convict, the jury must find not only that defendant made a false entry in one of the books or records of the bank, but also that he knew the entry to be false when he made it. *Dorsey v. United States*, 101 Fed. 746, 748, 41 C. C. A. 652.

An entry in the books of a bank which is intentionally made to represent what is not true or does not exist, with the intent either to deceive its officers or to defraud the association, is a false entry, within the meaning of the statute making it a criminal offense to make such entries in the books of a national banking association. It may be done personally or by direction. Therefore the entry of a slip upon the books of the bank, if the matter contained in that deposit slip is not true, is a false entry. If the statement made upon the deposit slip is false, the entry of it upon the books of the bank is false. *Agnew v. United States*, 17 Sup. Ct. 235, 241, 165 U. S. 30, 41 L. Ed. 624. The circumstance that the intent to deceive by making the false entry was not done in an adroit or skillful manner does not relieve the act of its criminal character; nor will the fact that the falsity of the entry could be easily exposed or detected by inquiry, or examination of other books of account, render such an entry any less false and criminal, if made to deceive or defraud. *United States v. Harper* (U. S.) 33 Fed. 471, 480.

A false entry, punishable under an indictment for a making of false entries in the books of a bank, must be an entry made in the books or report of the bank by the accused, or by some person under his control or acting under his direction, which was false and known to be so by the defendant when it was made, and designed and intended by

him to deceive the bank examiner. *United States v. Peters* (U. S.) 87 Fed. 984, 985.

The intention to deceive is essential to a violation of the statute. *Cochran v. United States*, 15 Sup. Ct. 628, 633, 157 U. S. 286, 39 L. Ed. 704.

A mistake in the amount of an item, growing out of accounts in bookkeeping, would not make a man guilty under the law. The law intends to punish an intentional misstatement in regard to the affairs of the bank. *United States v. Allen* (U. S.) 47 F. 696, 697.

If an overdraft is made and allowed under circumstances justifying it, it cannot be said that the entry on the books of the bank of the checks constituting the overdraft is a false entry; and, on the other hand, if an overdraft is in fact made and allowed under circumstances which make the transaction a fraud upon the bank, the entry of the transaction just as it occurred is not a false entry. *Dow v. United States*, 82 Fed. 904, 909, 27 O. C. A. 140.

"False entry," as used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], is in contradistinction to the words "correct entry," and the words "false entry" should not be construed to mean only a forged or fictitious entry. *United States v. Potter* (U. S.) 56 Fed. 83, 91.

The word "entries," when used in reference to books of account, reports, and statements, means the act of making or entering a record—that is to say, the act of making a record of the fact of the transaction; but, as used in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], providing that every president, director, etc., of every national banking association who shall make a false entry in any book, report, or statement of the association, with the intent to injure or defraud the association, etc., it is used to denote the result of the act, rather than the act itself. It signifies that which is written, be it words or figures; and if that which is written misrepresents the facts or the transaction which it was intended to authenticate, then it is a false entry within the meaning of the statute. Thus an entry is made notwithstanding that a previous entry is altered, so that one is guilty who erases one or more figures from a number already written in a book of account and writes others in lieu thereof. *United States v. Credilius* (U. S.) 84 Fed. 30, 31.

#### FALSE IMPRISONMENT.

"False imprisonment," as defined in *Cooley, Torts*, p. 196, is "a wrong akin to the wrongs of assault and battery, and consists in imposing by force or threats an unlawful restraint upon a man's freedom of

locomotion." *Gillingham v. Ohio River R. Co.*, 14 S. E. 243, 245, 35 W. Va. 588, 14 L. R. A. 798, 29 Am. St. Rep. 827; *Efroymsen v. Smith*, 63 N. E. 323, 329, 29 Ind. App. 451.

False imprisonment consists in the wrongful detention of the person of another for any length of time, whereby he is deprived of his personal liberty. Civ. Code Ga. 1895, § 8851.

Cr. Code, § 95, declares that false imprisonment is any unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. *Brewster v. People*, 183 Ill. 143, 146, 55 N. E. 640.

False imprisonment is the unlawful arrest or detention of a person without warrant, or by an illegal warrant or a warrant illegally executed. *Miller v. Fano*, 66 Pac. 183, 134 Cal. 103. It consists in an unlawful restraint upon a man's person or control over the freedom of his movements by force or threats, and every such restraint or confinement is unlawful where it is not authorized by law. *Petit v. Colmary* (Del.) 55 Atl. 344, 345.

False imprisonment is an unlawful restraint of a person, contrary to his will, either with or without process of law. *Reynolds v. Price* (Ky.) 56 S. W. 502, 503; *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 15 Misc. Rep. 663; *Thorp v. Carvalho*, 36 N. Y. Supp. 1, 4, 14 Misc. Rep. 554; *Johnson v. Bouton*, 53 N. W. 995, 997, 35 Neb. 898.

The gravamen of an action for false imprisonment is the act of trespass committed by one man against the person of another by unlawfully arresting and detaining him without legal process. *Snead v. Bonnoil*, 166 N. Y. 325, 59 N. E. 899. If the arrest or imprisonment is caused or procured on a charge made to some public authority, no action for false imprisonment will lie against the person who made the charge on the mere ground that the charge was false. *Pease v. Freiwald*, 80 N. Y. Supp. 402, 403, 39 Misc. Rep. 549 (citing *Cousins v. Swords*, 14 App. Div. 338, 43 N. Y. Supp. 907).

It is a trespass to the person, committed by one against another, by unlawfully arresting and detaining him against his will. *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 15 Misc. Rep. 663; *Snead v. Bonnoil*, 59 N. E. 899, 900, 166 N. Y. 325. In order for a complaint to state a cause of action under the above definition, it would have to show that the defendant unlawfully arrested the plaintiff without legal authority. *Davis v. Pacific Telephone & Telegraph Co.* (Cal.) 57 Pac. 764, 765.

False imprisonment is the willful detention of another against his consent, and where it is not expressly authorized by law.

whether such detention be effected by an assault, by actual violence to the person, by threats, or by any other means which restrain the party so detained from removing from one place to another as he may see proper. *Pasch. Dig. art. 2169; Giroux v. State, 40 Tex. 97, 102; Herring v. State, 3 Tex. App. 108, 111.*

To stop a man from going in any direction he sees proper, though without detaining him in a particular spot, may constitute false imprisonment. *Harkins v. State, 6 Tex. App. 452, 455.*

False imprisonment consists in restraining another of his liberty without sufficient authority; but an arrest under legal authority does not constitute false imprisonment, although made by virtue of a warrant issued irregularly and from bad motives. If the imprisonment is extrajudicial and without legal process, the action for false imprisonment may lie. *Marks v. Sullivan, 33 Pac. 224, 226, 9 Utah, 12.*

Though a person be arrested and imprisoned without warrant, and for an alleged crime of which the officer arresting him has no personal knowledge, and the person so arrested is in fact innocent, it is not false imprisonment if the officer acted on information received from one on which he had reason to rely. *Filer v. Smith, 96 Mich. 347, 351, 55 N. W. 999, 35 Am. St. Rep. 603; White v. McQueen, 96 Mich. 249, 55 N. W. 843.* It is an essential element of an action to recover damages for false imprisonment that the imprisonment or detention must be unlawful; for when the law has been appealed to, and there has been no abuse of its process, there can be no basis for alleging that a legal wrong has been committed. *Van v. Pacific Coast Co. (U. S.) 120 Fed. 699, 701.*

The gist of false imprisonment is unlawful detention. *McCarthy v. De Armit, 99 Pa. 63, 71.*

- The principal element of the offense is the unlawful act of the defendant; but it has been held that it is not necessary for the plaintiff in his petition to aver that the imprisonment was unlawful. *Burch v. Franklin, 7 Ohio Dec. 519, 520, 7 Ohio N. P. 155.*

An action for false imprisonment is in the nature of a trespass, and only lies in that form where the imprisonment is either by force wholly illegal, or only colorably legal. In either event the action of trespass is the proper remedy, but the action of malicious prosecution can only be maintained as a special action on the case for the improper and malicious instigation of the proceedings. *Ferguson v. Lambert (U. S.) 8 Fed. Cas. 1151.*

Under Pen. Code, § 236, defining false imprisonment to be the unlawful violation

of the personal liberty of another, the imprisonment being proven, the law presumes it unlawful, and it is for the defendant to show that it was not lawful. *People v. McGrew, 20 Pac. 92, 77 Cal. 570.*

The defendant must either prove that he did not imprison the party or he must justify the imprisonment. *Floyd v. State, 12 Ark. 43, 47, 44 Am. Dec. 250.*

Under Act Assem. Pa. March, 1772, made to secure justices of the peace from vexatious suits for anything done in the execution of their office, and requiring that notice be given of an intended writ of process on account of anything so done, which should contain clearly and explicitly the cause of action the party claims to have against the justice, a notice that the plaintiff will bring an action of false imprisonment is insufficient. In law there is no action of this description. "Trespass and false imprisonment" is the style of the action. *Kennedy v. Shoemaker (Pa.) 1 Browne, 61, 65.*

#### Arrest or detention to enforce a civil claim.

If a person is arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest was thereby to extort money or property from him, or to enforce a settlement of the civil claim, such arrest would be a false imprisonment. *Hackett v. King, 88 Mass. (6 Allen) 58, 60.*

Where an administrator had made a report of insolvency to the court of probate, and commissioners had reported the estate to be insolvent, one having a claim which had been allowed against the estate caused the arrest and imprisonment of the administrator under a capias in another state for such debt. *Ellsworth and Sherman, JJ.,* were of the opinion that in such a case false imprisonment would not lie, as not being a proper remedy; *Pitkin, J.,* thought that the process was illegal and the suit unwarranted, but expressed no opinion as to whether false imprisonment was a proper remedy; and *Law, C. J., and Dyer, J.,* thought that while there might be other remedies, yet false imprisonment was a proper remedy under the circumstances, and it was so ordered. *Stoddard v. Bird (Conn.) Kirby, 65, 69.*

#### Force required.

No actual force is necessary to constitute a false imprisonment. If a man is restrained of his personal liberty by fear of a personal difficulty, that amounts to a "false imprisonment," within the legal meaning of such term. *Smith v. State, 26 Tenn. (7 Humph.) 43.* See, also, *Reynolds v. Price (Ky.) 56 S. W. 502, 503.*

Starkie says that in ordinary practice words are sufficient to constitute an imprison-

ment, if they impose a restraint upon the person, and plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence is used. Neither does it seem necessary that there should be any very formal declaration of arrest. If the officer goes for the purpose of executing his warrant, and has the party in his presence and power, and if the party so understands it, and in consequence thereof submits, and the officer in execution of the warrant takes the party before a magistrate, or receives money or property in discharge of his person, it is in law an arrest, although he did not touch any part of the body. *Pike v. Hanson*, 9 N. H. 491, 498.

#### **Manner or place of imprisonment.**

False imprisonment is any unlawful restraint of one's liberty, whether in a place set apart for imprisonment generally, or used only on the particular occasion, and whether between walls or not, and effected either by physical force actually applied, or by words and an array of such force. *Eberling v. State*, 35 N. E. 1023, 1024, 136 Ind. 117 (citing 1 Bish. Cr. Law, p. 553). See, also, *Comer v. Knowles*, 17 Kan. 436; *Garnier v. Squires*, 62 Pac. 1005, 1006, 62 Kan. 321.

False imprisonment is an unlawful arrest or detention of a person either in a prison or place used temporarily for that purpose, or by force and complaint without confinement. *Miller v. Fano*, 66 Pac. 183, 134 Cal. 103.

Every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the streets. *Floyd v. State*, 12 Ark. 43, 47, 44 Am. Dec. 250.

False imprisonment is the unlawful restraint of a man's liberty by imprisonment, or by words and an array of force. *Tomlin v. Hildreth*, 47 Atl. 649, 652, 65 N. J. Law, 438.

False imprisonment is the unlawful violation of the personal liberty of another. Thus, where a tract of land was claimed by the defendant without right, and, while at work on a part not inclosed, cleared, or cultivated by him, plaintiff was seized, thrown down, bound, and carried away by the defendant, the defendant was properly convicted of false imprisonment. *People v. Wheeler*, 14 Pac. 796, 798, 73 Cal. 252.

False imprisonment is necessarily a wrong interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence, or by both. It is not necessary that the individual be confined within a prison or within

walls, or that he be assaulted or even touched. It is not necessary that there shall be any injury done to the individual person, or to his character or reputation; nor is it necessary that the wrongful act be committed with malice or ill will, or even with slightest wrongful intention; nor is it necessary that the acts be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts which he fears to disregard. *Comer v. Knowles*, 17 Kan. 436. Thus, where a person went to the business place of another and accused such person of having stolen money, and detained him by pointing at him a loaded revolver, and the purpose of the detention was to forcibly compel the payment of money, and not to accomplish the prosecution and punishment of the person by legal methods, the restraint amounted to false imprisonment. *Garnier v. Squires*, 62 Pac. 1005, 1006, 62 Kan. 321.

It is not necessary, in order to constitute false imprisonment, that the party be restrained after a successful attempt to escape from custody. It is enough if the restraint be put upon a person by force or fear. *Moore v. Thompson*, 52 N. W. 1000, 1001, 92 Mich. 498.

On a trial under an indictment charging false imprisonment, complainant testified that he claimed a certain farm under a rental contract, and went upon it to plow, when the defendants, armed with pistols, forbade his plowing on the land. They did not forbid his going where he pleased, except that he could not plow there. He was not afraid of them, and did not think they would hurt him. After talking an hour or so, he gave up trying to plow and came away. The court charged: "It is sufficient imprisonment to stop a man from going in any direction he may see proper; and it is not necessary that he be detained in any particular spot, so he is prevented from moving from place to place or in the direction he wishes to go." This charge expresses the same idea as that embraced in the statute, to wit, that false imprisonment is committed by the use of any "means which restrains the party detained from moving from one place to another as he may see proper." *Woods v. State*, 3 Tex. App. 204, 206.

#### **Malice or probable cause.**

The term "false imprisonment" includes any unlawful detention of a citizen, by either an officer of the law or a private person, no matter what may have been the motive or purpose of the party so detaining the other. *Newburn v. Durham*, 32 S. W. 112, 113, 10 Tex. Civ. App. 655.

Two things are requisite in order to constitute the offense: (1) Detention of the per-

son; (2) the unlawfulness of such detention. A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 15 Misc. Rep. 663; *Thorp v. Carvalho*, 36 N. Y. Supp. 1, 4, 14 Misc. Rep. 554; *Reynolds v. Price* (Ky.) 56 S. W. 502, 503; *Rich v. McInerny*, 15 South. 663, 665, 103 Ala. 345, 49 Am. St. Rep. 32.

In order to make a cause of false imprisonment, malice and want of probable cause are not necessary ingredients. There may be false imprisonment without the existence of malice or want of probable cause. These are necessary in law for malicious prosecution, but not for false imprisonment. *Dougherty v. Snyder*, 71 S. W. 463, 465, 97 Mo. App. 495 (citing *Monson v. Rouse*, 86 Mo. App. 102).

In false imprisonment it is the general rule that malice will be inferred from the want of probable cause for the prosecution. *McCarthy v. De Armit*, 99 Pa. 63, 71.

The question of malice in an action for false imprisonment is immaterial, except so far as it affects the measure of damages. *Johnson v. Bouton*, 53 N. W. 995, 997, 35 Neb. 898; *Thorp v. Carvalho*, 36 N. Y. Supp. 1, 4, 14 Misc. Rep. 554.

Where the detention is illegal, the action will lie, without regard to the innocence of the defendant in his intention. *Snead v. Bonnoil*, 59 N. E. 899, 900, 166 N. Y. 325.

Malice is not material, except in aggravation of damages; nor is probable cause of guilt on the part of the party imprisoned, when the imprisonment is under a criminal charge, material, except as it may be rendered so by the provisions of Code, §§ 4262, 4266, in cases to which these sections are applicable. If the imprisonment is under legal process, but the prosecution has been commenced and carried on maliciously and without probable cause, terminating in the discharge of the defendant, it is malicious prosecution, and not false imprisonment. *Rich v. McInerny*, 15 South. 663, 665, 103 Ala. 345, 49 Am. St. Rep. 32.

An action for false imprisonment is for the defendant having done that which upon the stating of it is manifestly illegal. *Lord Mansfield*, in *Johnstone v. Sutton*, 1 Term R. 544. Thus a complaint charging that plaintiff was arrested on complaint of the defendant; that each of the statements in the defendant's complaint was false, and was known to be false at the time he made it; that the complaint was made without probable cause and maliciously, with intent on his part to injure the plaintiff and to cause him to be arrested; that the plaintiff was taken before a police justice, and subsequently before the court of special sessions, and upon a false statement made by the defend-

ant that it would benefit the plaintiff so to do, and would terminate the proceedings against him, and would secure the plaintiff's release from arrest and imprisonment, the plaintiff, believing these statements, and under duress and threats of a long imprisonment, and not knowing the consequences of his so doing, did formally plead guilty of the alleged crime, though he was not guilty, as the defendant well knew, whereupon the plaintiff was sentenced to imprisonment, and remained imprisoned about 10 months—does not state an action for false imprisonment. *Johnson v. Girdwood*, 28 N. Y. Supp. 151, 152, 7 Misc. Rep. 651.

#### Malicious prosecution distinguished.

False imprisonment, more especially in civil actions, is sometimes termed in legal language "malicious arrest"; and an action for this precise form of injury requires the same allegations of proof of malice and want of probable cause as an action for malicious prosecution. The distinction between false imprisonment and malicious prosecution is well established. When the arrest is upon valid process by a court having jurisdiction, trespass for false imprisonment will not lie, though such arrest is maliciously procured by the prosecutor without probable cause. *Seeger v. Pfeifer*, 85 Ind. 13, 15.

There is a marked distinction between malicious prosecution and false imprisonment. At common law the former was a subject of an action of trespass on the case, while for the latter trespass *vi et armis* was the remedy. If the imprisonment is under legal process, but the action has been commenced and carried on maliciously and without probable cause, it is malicious prosecution. If it has been extrajudicial, without legal process, it is false imprisonment. In *Turpin v. Remy* (Ind.) 3 Blackf. 210, it was said by *Stevens, J.*: "An action for malicious prosecution can only be supported for the malicious prosecution of some legal proceeding before some judicial officer or tribunal. If the proceedings complained of are extrajudicial, the remedy is trespass, and not an action on the case for a malicious prosecution." *Colter v. Lower*, 35 Ind. 285, 286, 9 Am. Rep. 735.

An action for malicious prosecution, and not an action for assault and false imprisonment, is the proper remedy when an arrest is made by a duly qualified officer, under process fair on its face and issued from a court of competent jurisdiction; the suit being based on a failure to enter the writ in court. *Lisabelle v. Hubert*, 50 Atl. 837, 23 R. I. 456.

#### Participation by defendant.

Where a person was arrested under a legal warrant and by a proper officer, yet if one of the objects of the arrest was to extort money or property, or enforce settlement of

a civil claim, such arrest is a "false imprisonment" by all who have directly or indirectly procured the same, or participated therein for any such purpose. *Hackett v. King*, 88 Mass. (6 Allen) 58, 60.

If a party authorizes, encourages, directs, or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in the unlawful arrest or imprisonment, such party is liable. *Miller v. Fano*, 66 Pac. 183, 184 Cal. 103.

It is a direct wrong or illegal act, in which the defendant must have participated, or which must have been of his direct or indirect procurement. *Limbeck v. Gerry*, 89 N. Y. Supp. 95, 15 Misc. Rep. 663.

#### **As personal injury.**

See "Personal Injury."

### **FALSE INSTRUMENT.**

According to the ordinary and proper meaning of the word "false," as applied to a note or other instrument in writing, "we always understand one that is counterfeit, and not genuine; an instrument by which some one has attempted to imitate another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another, which does not profess to be the other's personal act, but that of the doer thereof, who claims by the act itself to be authorized to obligate the individual for whom he assumes to act." *State v. Wilson*, 9 N. W. 28, 29, 28 Minn. 52.

An indictment charging that the defendant feloniously uttered a certain false, forged, and counterfeit treasury note necessarily implies that the instrument so characterized is not genuine, but only purports to be, or is in the similitude of such an instrument. The argument that the phrase "false, forged, and counterfeit treasury note" can have no meaning, because, if the instrument be false and forged, it is not a treasury note, and, if it is a treasury note, it cannot be false or forged, is without foundation, because good usage justifies such a form of expression, and every one readily understands that what is meant is a forged paper in the similitude of a bank note, or which on its face appears to be such a note. *United States v. Howell*, 78 U. S. (11 Wall.) 432, 436, 20 L. Ed. 195.

A false, forged and counterfeited bank note is defined by Mr. Justice Miller as "a forged paper in the similitude of a bank note, or which on its face appears to be such a note." *United States v. Owens* (U. S.) 37 Fed. 112, 115.

### **FALSE JUDGMENT**

See "Writ of False Judgment."

### **FALSE MAKING—FALSELY MAKE.**

The word "falsely," as used in 4 Stat. 121, providing a penalty against any one who shall falsely make, forge, or counterfeit any silver coin, etc., implies that there must be a fraudulent or criminal intent in the act. The statute contemplates no other intent in the act of making, as necessary to constitute the crime, but that of disposing of or passing the spurious coin as true and genuine. If made for any other purpose, though that purpose is not a justifiable or defensible one in a moral aspect, the party does not incur the legal guilt contemplated by the statute. *United States v. King* (U. S.) 26 Fed. Cas. 787; *United States v. Otey* (U. S.) 31 Fed. 68, 69.

A statute making it criminal to falsely make, forge, or counterfeit the coin of the United States, means to make something in the resemblance or similitude of such coin. *United States v. Otey* (U. S.) 31 Fed. 68, 69.

#### **Alteration or addition to instrument.**

A false making has been said, in *East*, P. C. 852, in defining forgery as a false making, etc., of any written instrument, to include every alteration of or addition to a true instrument. *United States v. Watkins*, 28 Fed. Cas. 419, 445.

#### **As making false statement.**

The word "falsely" means in opposition to the truth. Rev. St. § 5421 [U. S. Comp. St. 1901, p. 3667], making it an offense to falsely make, etc., any deed or writing for the purpose of obtaining money from the government, the words "falsely make," mean to state in the certificate that which is not true, and not merely relating to the technical execution of the instrument itself, so that the making of an affidavit or certificate which is genuine in itself, but contains false statements, is within the statute. *United States v. Hartman* (U. S.) 65 Fed. 490, 491.

"False making," as used in Rev. St. § 5421 [U. S. Comp. St. 1901, p. 3667], providing a punishment for the false making of a writing, may be said to be synonymous with forging. *United States v. Staats*, 8 How. 41, 12 L. Ed. 979. Making or procuring to be made an affidavit with the false statements that a pension claimant and identifying witnesses appeared before a notary, and that the alleged affiants subscribed their names and were sworn in his presence, where all the signatures are given, and no part has been altered, forged, or counterfeited, is not indictable under such statute. *United States v. Moore* (U. S.) 60 Fed. 738, 739.

#### **As making fictitious instrument.**

The Supreme Court, in *State v. Young*, 46 N. H. 266, 88 Am. Dec. 212, said that to forge or counterfeit is to falsely make, and



an alteration of a writing must be falsely made to make it a forgery in common law or by our statute. The term "falsely," as applied to making or altering a writing, in order to make a forgery, has reference, not to the contents or tenor of the writing, or to the facts stated in a writing, because a writing containing a true statement may be forged or counterfeited, as well as any other; but it implies that the paper or writing is false, not genuine, and fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. *People v. Bendit*, 43 Pac. 901, 902, 111 Cal. 274, 31 L. R. A. 831, 52 Am. St. Rep. 186; *Rohr v. State*, 38 Atl. 673, 675, 60 N. J. Law, 576.

The term "falsely," as applied to making a promissory note, in order to constitute forgery, has reference, not to the contract or tenor of the instrument, in the fact stated in the writing, because a note or writing containing a true statement may be forged or counterfeited, as well as any other, but it implies that the writing is false, not genuine, and fictitious, not a true writing, without regard to the truth or falsehood of the statement it contains. The note in itself must be false, not genuine; a counterfeit, and not the true statement which it purports to be. A person may falsely make a note, yet the note be true in point of fact, or he may make a note which is false in fact. It is the former, the false making of the note with the intent to defraud, which is the essential ingredient of the crime of forgery. *State v. Wheeler*, 25 Pac. 394, 395, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119.

#### FALSE MEASURE.

See "False Weight."

#### FALSE PACKED.

Car loads of corn were "false packed" where upon the surface the corn was sound and came up to the description of the seller, but beneath, beginning at a depth of some two feet, the corn was musty and blue-eyed. *Miller v. Moore*, 83 Ga. 684, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329.

#### FALSE PERSUASION.

The term "false or fraudulent persuasion" is equivalent to the terms "inducement," "promise," "artifice," or "deception." *Graham v. McReynolds*, 18 S. W. 272, 273, 90 Tenn. (6 Pickle) 673.

#### FALSE PLEA.

"False," as used in Sup. Ct. Rule 79, providing that false and frivolous pleas will be stricken out on motion, has the same meaning as the word "sham" when used in reference to pleadings. "Neither term neces-

sarily includes the idea of an artificial construction of the plea, or doubt as to the legal character of the defense upon its face. The defense may be entirely clear in form, but nevertheless sham, for the sole reason that it is false." *People v. McCumber*, 18 N. Y. 315, 321, 72 Am. Dec. 515.

A false plea is one that sets up new matter in avoidance of the action which defendant fails in supporting, or one which subjects a plaintiff to an expense additional to what otherwise would be necessary to show his right of recovery. The plea of the general issue cannot be considered a false plea, and, where the pleas of "non assumpsit" and "non assumpsit infra" are pleaded by administrators, they are not false pleas. *Pierson v. Evans* (N. Y.) 1 Wend. 30, 31.

#### FALSE PRACTICE.

Act March 3, 1863, § 1, providing that, if any owner, consignee, or agent of any goods shall enter or attempt to enter such goods by means of any false or fraudulent practice or appliance, such goods shall be forfeited, does not mean that any false practice with reference to the goods that he sells would warrant a forfeiture, but that the party must make the entry by means of such false practice or appliance, and, where an oath is requisite and necessary as a means and condition precedent to admitting the goods to entry, a false and fraudulent statement in such oath as to the character of the goods constitutes an entry by false practice or appliance within the meaning of the statute. *United States v. Cargo of Sugar* (U. S.) 25 Fed. Cas. 288.

#### FALSE PRETENSE.

See "Under False Pretenses."  
Other false pretense, see "Other."

If the expression "false pretenses" be taken in its most extensive sense, it might at first view be doubted whether a fraud could be committed without a false pretense, for falsehood and deceit are the essence of fraud; but the phrase "false pretenses" has become familiar to the lawyer's ear, and ever since St. 30 Geo. II, c. 24, which made certain frauds upon individuals indictable which were not indictable by the common law, the phrase has acquired a technical character, and has generally been understood as descriptive of such false pretenses as were punishable by that statute, and as would make those frauds indictable which were not so before. *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 428.

A false pretense is defined to be a representation of some facts or circumstances calculated to mislead, which are not true. *Commonwealth v. Drew*, 36 Mass. (19 Pick.)

179; *People v. Jordan*, 4 Pac. 773, 775, 66 Cal. 10, 56 Am. Rep. 73. It is an essential element that the pretense must be false. If it is not false, though believed to be so by the person employing it, it is not sufficient. *People v. Reynolds*, 38 N. W. 923, 925, 71 Mich. 343.

False pretenses are false representations and statements, made with a fraudulent design or a representation of some fact, calculated to mislead, which is not true. *State v. Grant*, 53 N. W. 120, 121, 86 Iowa, 216.

"A false pretense is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." *State v. Vandimark*, 35 Ark. 396, 400 (citing 2 Bish. Cr. Law, § 415); *People v. Jordan*, 4 Pac. 773, 775, 66 Cal. 10, 56 Am. Rep. 73; *People v. Wasservogle*, 19 Pac. 270, 77 Cal. 173; *State v. Knowlton*, 39 Pac. 966, 968, 11 Wash. 512; *State v. Fooks*, 21 N. W. 561, 65 Iowa, 196; *Commonwealth v. Henry*, 22 Pa. (10 Harris) 253, 256; *Jackson v. People*, 18 N. E. 286, 290, 126 Ill. 139; *State v. Lynn* (Del.) 51 Atl. 878, 882, 3 Pennewill, 316; *Taylor v. Commonwealth*, 15 Ky. Law Rep. 49, 51, 22 S. W. 218, 94 Ky. 281, 283; *Winnett v. State*, 10 O. C. D. 245, 249; *State v. Haines*, 23 S. C. 170, 173. And such is its use in Rev. Code, § 7489, providing the punishment for obtaining the signature or property of another by color or aid of any false token or writing or other false pretense. *State v. Stewart*, 83 N. W. 869, 870, 9 N. D. 409.

An allegation that one obtained the goods of another by false pretenses or by cheating is not in the legal sense a charge of a crime; for it may be true, and yet no crime may have been committed. *People v. Brady*, 56 N. Y. 182, 188.

The word "pretense," as used in statutes in relation to obtaining property by false pretenses, has not been regarded by the courts in its lexicographic sense, but they have attached to it a legal and technical meaning. *McKenzie v. State*, 11 Ark. 594.

#### Constituent elements.

To constitute the offense of obtaining money by false pretenses several things must concur. There must be an intention to cheat or defraud some person. For that purpose some false pretense must be designedly obtained, and the fraud must be accomplished by means of the false pretense, or, if not wholly by that means, it must have had such a material effect on the mind of the party defrauded that without it he would not have parted with the money or property alleged to have been fraudulently obtained. *Wyman v. Wilmarth*, 46 N. W. 190, 191, 1 S. D. 172.

To constitute the offense of obtaining money on false pretenses four things must concur: (1) There must be an intent to defraud. (2) There must be an actual fraud committed. (3) False pretenses must be used for the purpose of perpetrating the fraud. (4) The false pretenses must be the cause which induced the owner to part with his property. *People v. Jordan*, 4 Pac. 773, 775, 66 Cal. 10, 56 Am. Rep. 73 (citing 2 Bish. Cr. Law, § 415).

The facts which constitute the crime of false pretenses are, first, the pretenses; second, their falsity; third, the fact of obtaining the property by reason of the pretenses; fourth, the knowledge on the part of the accused of their falsity; fifth, the intent to defraud. *Haines v. Territory*, 13 Pac. 8, 12, 3 Wyo. 167.

A false pretense, within the meaning of Rev. St. § 70, must relate to a past event or an existing fact. Any representation or assurance in relation to a future transaction is not sufficient. *Winnett v. State*, 10 O. C. D. 245, 249.

A false pretense must not only be predicated of an existing fact, but the false representation must be made with intent to defraud, and the person must rely on it. *People v. Ward*, 3 N. Y. Cr. R. 483, 504.

A representation, in order to constitute a false pretense, must be one of a material fact calculated to deceive. *Commonwealth v. Stevenson*, 127 Mass. 446, 448.

#### Deception of ordinarily intelligent person.

"False pretense," as used in 2 Rev. St. 1876, p. 436, § 27, providing for the punishment of any person who by any false pretense obtains the signature of any person to any written instrument or obtains anything of value, does not mean every false pretense, but such a false representation of alleged existing facts as might deceive a man of common intelligence. *Clifford v. State*, 56 Ind. 245, 248. Or must be a pretense of some existing fact, made for the purpose of inducing the person to part with his property, and to which a person of ordinary caution would give credit. *Bonnell v. State*, 64 Ind. 498, 503. See, also, *Commonwealth v. Hutchinson* (Pa.) 2 Pars. Eq. Cas. 309, 315.

False pretense, sufficient to authorize an indictment for swindling, "need not be such an artificial device as will impose upon a man of ordinary prudence and caution, nor need it be such as cannot be guarded against by ordinary caution; but if the pretense was absurd or irrational, or if the injured party knew its falsity, or had the means of instantly detecting it, he could not have believed it or been deceived by it, and it does not constitute a false pretense." *Buckalew v. State*, 11 Tex. App. 352.

The pretense need not be such as will impose on a man of ordinary caution, and need not be calculated to deceive a person of ordinary prudence and caution. If the false pretenses were made with the design of deceiving, and thereby obtaining credit or property, and have that effect, the guilty party cannot escape on the ground of the weak credulity of his victim. *State v. Fooks*, 21 N. W. 561, 65 Iowa, 196; *State v. Knowlton*, 39 Pac. 966, 968, 11 Wash. 512.

Under *Burns' Ann. St. 1894*, § 2352 (*Horne's Ann. St. 1897*, § 2204), declaring guilty of an offense one who, with intent to defraud another, designedly by a false pretense obtains from any person any money, the false pretense need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence. *Lefler v. State*, 54 N. E. 439, 440, 153 Ind. 82, 45 L. R. A. 424, 74 Am. St. Rep. 300.

In the earlier cases it was said that the false pretenses, to warrant an indictment for obtaining money by false pretenses, must be such as would deceive a person of ordinary intelligence and prudence. *State v. Magee*, 11 Ind. 154; *Leobold v. State*, 33 Ind. 484; *Bonnell v. State*, 64 Ind. 498. And the later cases of *Shaffer v. State*, 100 Ind. 365, *Wagoner v. State*, 90 Ind. 504, and *Miller v. State*, 79 Ind. 198, held that whether or not the false pretenses are such as are calculated to deceive a person of ordinary caution and prudence is a question of fact for the jury; and again in *State v. Burnett*, 119 Ind. 392, 21 N. E. 972, it was held, on a motion to quash the indictment, that the false representations must be of such a character that a man of ordinary intelligence is justified in relying on them. But in England and many of the states the rule is that any pretense which deceives the person defrauded is sufficient to sustain an indictment. 2 Russ. Crimes (9th Am. Ed.) 619-700; *Rosc. Cr. Ev.* (7th Am. Ed.) 487, 488; 2 Bish. Cr. Law, §§ 433-436; *Reg. v. Woolley*, 1 Denison, Cr. Cas. 559, 4 Cox, C. C. 191; 3 Car. & K. 98; 2 East, P. C. c. 8, pp. 827-831; *Reg. v. Jessop, Dears & B. Crown Cas.* 442, 7 Cox, C. C. 399; *Reg. v. Giles, Leigh & C.* 502, 10 Cox, C. C. 44; *Johnson v. State*, 36 Ark. 242; *State v. Montgomery*, 56 Iowa, 195, 9 N. W. 120; *People v. Pray*, 1 Mich. N. P. 69; *State v. Williams*, 12 Mo. App. 415; *Colbert v. State*, 1 Tex. App. 314; *In re Greenough*, 31 Vt. 279-290; *Watson v. People*, 87 N. Y. 561; *People v. Court of Oyer and Terminer of New York Co.*, 83 N. Y. 436-449; *People v. Cole* (Sup.) 20 N. Y. Supp. 505; *People v. Rice*, 128 N. Y. 649, 29 N. E. 146; *State v. Mills*, 17 Me. 211; *Smith v. State*, 55 Miss. 531; *Watson v. State*, 84 Tenn. (16 Lea) 604; *Bowen v. State*, 68 Tenn. (9 Baxt.) 45, 40 Am. Rep. 71; *Commonwealth v. Henry*, 22 Pa. (10 Harris) 258; *Thomas v. People*, 113

Ill. 531; *Cowen v. People*, 14 Ill. (4 Peck) 348; *Bartlett v. State*, 28 Ohio St. 669, 670. Bishop says that, with due regard to the facts of human life, a court cannot direct a jury to weigh a pretense and argument or an inducement to action in any other scale than that of its effect. 2 Bish. Cr. Law (7th Ed.) §§ 433, 438. The simple and credulous, according to Dr. Wharton, are as much under the shelter of the law as are the astute. 2 Whart. Cr. Law (10th Ed.) §§ 118, 1192. Under these authorities the court decided, and in so doing definitely overruled the earlier cases, that the false pretenses necessary to warrant an indictment under *Burns' Ann. St. 1894*, § 2552, declaring guilty of an offense one who, with the intent to defraud, designedly by a false pretense obtains from any person any money, need not be such that a man of ordinary caution and prudence would give it credit, or that it could not be guarded against by ordinary care and prudence. *Lefler v. State*, 54 N. E. 439, 440, 153 Ind. 82.

"False pretenses," as used in Act July 12, 1842, abolishing imprisonment for debt unless the debt was one created by false pretenses, meant any pretense sufficient to impose on the individual to whom it was made, and thereby induce him to part with his property. If the statement was made or pretense used with the intent to cheat and defraud, the false pretense creates the credit given to the vendee. *Commonwealth v. Poulson* (Pa.) 2 Pars. Eq. Cas. 326, 328.

It is not the policy of the law to punish criminally mere private wrongs, and the statute may not regard naked lies as false pretenses. It requires some artifice, some deceptive contrivance, which will be likely to mislead a person or throw him off his guard. He may be weak and confiding, and his very imbecility and credulity should receive all practical protection. But it would be inexpedient and unwise to regard every private fraud as a legal crime. It would be better for society to leave them to civil remedies. *Commonwealth v. Drew*, 36 Mass. (19 Pick.) 179, 184. The representation, however, must be an artfully contrived story, which would naturally have an effect on the mind of the person addressed; an ingenious contrivance or unusual artifice against which common sagacity and the exercise of ordinary caution would not be a sufficient guard. *People v. Crissie* (N. Y.) 4 Denio, 525, 527.

#### **Defendant must derive benefit.**

A circuit clerk, who issued a series of false and fraudulent witness certificates and placed them in the hands of a third person to sell, cannot be convicted of receiving money under false pretenses, where the third person acts honestly in selling them, and where no part of the money received by such third person was ever turned over to the

clerk, though the purchaser relied on the clerk's representation that the certificates were all right. In order to convict him of the offense charged, it was necessary that the money obtained or some part thereof shall have been obtained by him or for him. *Bracey v. State*, 8 South. 165, 64 Miss. 26.

#### **False representation distinguished.**

See "False Representation."

#### **Intent or purpose.**

If a man tells a positive lie, the fact of lying alone is not a pretense, within the statute punishing false pretenses; but the moment he uses that lie to effect an object to the disadvantage of another it is a false pretense. *State v. Newell*, 1 Mo. 248, 252.

To constitute the offense of obtaining goods on false pretenses there must be an intent by false representations to swindle a party who is intended to be the victim of such false representations. There must be an intent to cheat or defraud. This may be inferred from false representations, however. The pretenses must consist of the statement of some pretended existing fact, made for the purpose of inducing the prosecutor to part with his property. It is not necessary that the false pretenses should be the sole inducement which moved the prosecutor to part with his property. It is sufficient that they materially contribute to this end, without which he would not have parted with his property. *Cowan v. State*, 56 S. W. 751, 752, 41 Tex. Or. R. 617.

A false representation by which a man may be cheated into his duty is not within the statute against obtaining property by false pretenses. *People v. Thomas* (N. Y.) 3 Hill, 169. Thus, where an agent obtained personal property belonging to his principal by means of false statements from another, but did not intend to defraud such other, the false statement being made merely to enable the principal to obtain the immediate possession, to which he was entitled, he was not guilty of obtaining property by false pretenses. *In re Cameron*, 24 Pac. 90, 91, 44 Kan. 64, 21 Am. St. Rep. 262.

In a penal statute false pretenses include every species of fraudulent pretenses, and the nature of the transaction is immaterial, if it be for money to be obtained in the manner indicated in the statute. If there is a false representation designedly made with the intent to cheat and defraud, it is enough to satisfy the requirement of the law. *Watson v. People*, 87 N. Y. 561, 564, 41 Am. Rep. 397.

A pretense is not indictable. It must be a false pretense with intent to cheat and defraud, and which does cheat and defraud; and an indictment will lie against one who sells land for a price, falsely representing it

to be free from incumbrances, when it is in fact mortgaged, to the knowledge of the defendant. *State v. Munday*, 78 N. C. 460.

To constitute a false pretense, punishable under the statute, the pretense must not only be false, but must be made with the design to obtain money or property. *Bowler v. State*, 41 Miss. 570, 578; *Commonwealth v. Drew*, 36 Mass. (19 Pick.) 179, 184; *People v. Crissie* (N. Y.) 4 Denio, 525, 527.

#### **Larceny distinguished.**

A distinction between the crimes of larceny and obtaining money by false pretense is sometimes very narrow, but yet it is well-defined. Where by means of fraud, conspiracy, or artifice possession of property is obtained with felonious intent, and the title still remains in the owner, larceny is established; while the crime is false pretense when the title, as well as possession, is absolutely parted with. *People v. Rae*, 6 Pac. 1, 2, 66 Cal. 423, 56 Am. Rep. 109; *Commonwealth v. Eichelberger*, 13 Atl. 422, 426, 119 Pa. 254, 4 Am. St. Rep. 642; *Smith v. People*, 53 N. Y. 111, 114, 13 Am. Rep. 474; *State v. Kube*, 20 Wis. 217, 224, 91 Am. Dec. 390.

In view of this distinction, where an express agent was induced by false pretenses to part with a package, supposing that he was delivering it to the husband of the consignee, the offense was obtaining goods on false pretenses, rather than larceny. *State v. Kube*, 20 Wis. 217, 224, 225, 91 Am. Dec. 390.

In order to constitute the offense of obtaining money under false pretenses, it is essential that the owner shall have intended to part with the property; and it is this which distinguishes the offense from the crime of larceny. In case of a constructive taking to convert the goods to his own use, obtaining the goods by some trick or artifice, by which he obtained possession, we believe has not the effect of transferring any right of property in the goods from the owner to the party thus obtaining possession. *State v. Vickery*, 19 Tex. 326, 331.

#### **Pretense must be false.**

False pretense "means not only a false representation as an existing fact, but it must be a willful misrepresentation, or, in other words, the party must know that he is making a false representation." Such is its meaning in a statute making it criminal to knowingly and designedly, by false pretense, obtain from any person any money, goods, chattels, or other effects with intent to defraud or cheat. *People v. Conger* (N. Y.) 1 Wheeler, Cr. Cas. 448, 461.

A pretense, as applied to a charge of obtaining property under a false pretense, is "the holding out or offering to others something false and vain." This may be done

either by words or actions which amount to false representations. In fact, false representations are inseparable from the idea of a pretense. Without a representation which is false, there can be no pretense. *State v. Joaquin*, 43 Iowa, 131, 132.

#### **Pretense.**

The pretense must refer to an existing fact, and must not be promissory in its character, but a representation of something which at the time is untrue. *State v. Tomlin*, 29 N. J. Law (5 Dutch.) 13, 20; *Blum v. State*, 20 Tex. App. 578, 592, 54 Am. Rep. 530; *Commonwealth v. Drew*, 36 Mass. 179, 184, 185.

False pretense is the representation of some fact or circumstance, calculated to mislead, which is not true. A mere naked lie—a promise to do something in the future, or that something will happen in the future—is not a false pretense. *Commonwealth v. Mullen*, 4 Pa. Dist. R. 656, 657.

A mere promise to do something in the future, as, for example, to pay for goods purchased at a future time, even if false, is not such a pretense as will come within the terms of the offense. A person obtaining advances from a factor under a statement that he is then planting cotton, and under a promise to ship his cotton, when made, to such factor, cannot be convicted of obtaining goods under false pretense, unless he was not at that time planting cotton. *State v. Haines*, 23 S. C. 170, 173.

The term "false pretense," when used in a criminal statute, must be taken in its legal, and not its literal, sense, because in law it has a well-defined and appropriate meaning. Roscoe says (Cr. Ev. [7th Ed.] 478): "The false pretense laid in the indictment must be of some existing fact, and not of some future event or mere promise." Bishop, 2 Cr. Law, § 415, defines it as such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. The pretense must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. *People v. Hart*, 71 N. Y. Supp. 492, 493, 35 Misc. Rep. 182 (citing *Russ. Crimes*, 81).

A pretense that a party will do an act, which he does not mean to do, as a pretense to pay for goods on delivery, is not a false pretense, but a mere promise for future conduct. *State v. Mills*, 17 Me. 211, 217. See, also, *State v. King*, 34 Atl. 461, 463, 67 N. H. 219; *Commonwealth v. Moore*, 99 Pa. 570, 572, 574.

To constitute an indictable false pretense there must be at least a direct and positive false assertion as to some existing matter, by which the victim is induced to

part with his money or property. The offense is not established where the material thing was the promise of the accused to employ the person defrauded and to pay him for his services. False representation, promissory in its nature, cannot be the foundation of a criminal charge. *Ranney v. People*, 22 N. Y. 413, 416.

A false pretense is defined by Bishop as such "a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." A promise is not a pretense. The essentials of the crime of obtaining money or property by false pretense should be of a past event or of a fact having a present existence. *State v. De Lay*, 5 S. W. 607, 609; 93 Mo. 98 (citing *State v. Evers*, 49 Mo. 542; *State v. Vorback*, 66 Mo. 168; *Stocking v. Howard*, 73 Mo. 25).

A false pretense, within the meaning of Code 1886, § 3811, is a false representation as to existing or past facts. A mere promise, not meant to be kept, is not a false pretense. *Colly v. State*, 55 Ala. 85. But one who falsely represented himself a pension agent, and that he would obtain a pension for prosecutor, and thereby obtained money from her, was liable to conviction for obtaining money under false pretense. *Pearce v. State*, 22 South. 502, 503, 115 Ala. 115.

#### **Reliance on pretense.**

The essence of the crime of obtaining money under false pretenses is that the false pretenses should be of a past event, or of a fact having a present existence, and not of something to happen in the future, and that the prosecutor shall believe that the pretense was true, and, confiding in the truth of the pretense, part with his money or property. *State v. Vorback*, 66 Mo. 168, 172.

To sustain the charge of false pretense it is not only essential to show that the false representation and pretense were made, but it must appear that those pretenses were relied upon and that money was obtained by reason thereof. *State v. Metsch*, 15 Pac. 251, 252, 37 Kan. 222.

It is not necessary to a conviction for obtaining goods by false pretenses that the pretenses proven to be false should be the sole or only inducement to the credit or delivery of the property. It is enough if they had so material an effect in procuring the credit or inducing the delivery of the property that, without their influence upon the mind of the party defrauded, he would not have given the credit or parted with the property. *People v. Haynes* (N. Y.) 11 Wend. 557, 565.

Under 2 Rev. St. p. 677, § 53, providing that every person who, with intent to cheat or defraud another, shall by color of any

false token of right or by any other false pretense, etc., it is held that the phrase "any other false pretense" does not mean any false assertion, but means such false pretense as would naturally have an effect on the mind of a person to whom it was addressed, equivalent to that of a false token. Hence it is held that where defendant seeks to purchase merchandise on credit, and, being asked if he was in any way embarrassed, replied that he was not, such statement was not a false pretense within the meaning of the statute. In this connection the court observed that an authorized definition of a pretense is "a delusive appearance produced by false representations," and that this definition comes much nearer to the statutory meaning of the term than any definition which confounds the term with a mere naked falsehood. *People v. Haynes* (N. Y.) 14 Wend. 546, 571, 28 Am. Dec. 530.

The term "false pretense," as used in the various statutes for obtaining money, etc., by false pretense, extends to every case where a party has obtained goods by falsely representing himself to be in a situation in which he was not, or by falsely representing any occurrence that did not happen, to which persons of ordinary caution might give credit. The principle of the cases, though no rule can be laid down which will apply to all cases, seems to be that, whenever an exercise of common prudence and caution on the part of him from whom the goods are obtained would have enabled him to avoid being imposed upon by the pretense alleged, the case is not within the statute; otherwise, it is. *McCorkle v. State*, 41 Tenn. (1 Cold.) 333, 336.

Rev. St. c. 34, § 67, imposing a penalty for obtaining all goods for false pretenses, means a false allegation of some existing fact, calculated to deceive and which does deceive. *State v. Phifer*, 65 N. C. 321, 325.

#### **Representation as to character or solvency.**

A representation that the person was a chaplain in the army, just returned therefrom, and wanted money with which to get home, by which he induced and obtained a loan of money, the representation being false, was a sufficient false pretense to sustain a conviction of obtaining money under false pretenses. *Thomas v. People*, 34 N. Y. 351, 352.

Obtaining goods by representing that a person was agent for another and directed by such other to obtain the goods is a false pretense, and one, too, very naturally calculated to deceive and impose upon the seller. *People v. Johnson* (N. Y.) 12 Johns. 292, 293.

The term "false pretense," in a statute punishing obtaining goods by means of

false pretenses, must be taken in its legal, and not in its literal, sense; so it is held that not every falsehood or pretense would constitute an offense, and more specifically that the obtaining of a quart of whisky by falsely pretending to be sent for it by another is not sufficient to constitute an offense. *Chapman v. State*, 39 Tenn. (2 Head) 36, 41, 42.

False representations in regard to the pretender's responsibility and solvency, being representations as to alleged existing facts, are false pretenses. *Clifford v. State*, 56 Ind. 245, 248.

Obtaining money by means of letters begging for charity on false pretenses is within the statute punishing persons for obtaining money by false pretenses, with intent to defraud. *Commonwealth v. Whitcomb*, 107 Mass. 486, 487.

#### **Representations as to value or quality.**

"A 'false pretense' may relate to quality, quantity, nature, or other incident of the article offered for sale, whereby the purchaser, relying on such representation, is defrauded. A mere false affirmation or expression of an opinion will not render one liable. It must be the false assertion of a material fact with knowledge of its falsity. *State v. Stanley*, 64 Me. 157, 159.

A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adopted to induce the person to whom it is made to part with something of value. A false pretense may relate to quality, quantity, the nature, or other incidents of the article offered for sale, whereby the purchaser, relying on such false representation, is defrauded. While in a negotiation for the sale of property statements may be a mere expression of opinion, by which the seller seeks to enhance the price of the property, and justifiable, yet when it is made and intended as an assertion of a fact material to the negotiation, as a basis on which the sale is to be made, if it be false and known to the seller to be so, the seller is guilty of the offense, if he thereby induces the buyer to part with his property. Thus representations as to a horse, as: "Try that horse. That horse will work. He is a good horse and will do everything"—will amount to a false pretense. *Jackson v. People*, 18 N. E. 286, 290, 126 Ill. 139.

Statements by the owner of certain lots, while negotiating a sale, that the lots were nicely located and worth from \$1,200 to \$1,500, are not such representations as could be made the subject of a criminal prosecution as a false pretense. Such statements could not convey, or be understood as conveying, any definite idea at all. *People v. Jacobs*. 85 Mich. 36, 38.

A false and fraudulent representation that a certain recipe in writing, combining certain articles, would produce as a compound a nonexplosive burning fluid and camphene of great value, is a false pretense. Every false assertion is not a false pretense; but if it requires something to be done, by the application of tests or otherwise, to ascertain whether the representation is false, it then becomes a false pretense. The representation, to constitute a false pretense, must be of an existing fact; but it is no objection that it has relation to a future event. *In re Greenough*, 31 Vt. 279, 290.

The presentation of a check upon a bank in which defendant knew he had no funds was a false pretense, when done for the purpose of obtaining money or goods on the faith of such worthless check. *Commonwealth v. Collins* (Pa.) 8 Phila. 609; *Belden v. Meeker*, 47 N. Y. 307; *Morgan v. State*, 31 Ind. 198.

#### Token or writing.

The term "false pretense," as used in a statute making it a crime to obtain property by color of any false token or writing, or any false pretense, need not be in the nature of a token or writing, but a mere wicked lie is sufficient. *State v. Reiff*, 45 Pac. 318, 320, 14 Wash. 664.

The false pretense may consist of oral or written representations, and, when written, it is not necessary, as in a prosecution for a forgery, that such writing shall purport to create a right or obligation. It is sufficient if it is adapted to deceive the person to whom presented, and in fact does deceive him. *State v. Stewart*, 83 N. W. 869, 870, 9 N. D. 409.

"False pretense," as used in *Nix*, Dig. p. 170, § 53, providing punishment for obtaining money by false pretense, does not involve the use of a visible token, but means any verbal pretense sufficient to impose on the individual to whom it is made, with an intent to cheat and defraud, and which may induce him to part with his property or give credit if the pretense used is not absurd and incredible in itself. A false representation is a false pretense. *State v. Vanderbilt*, 27 N. J. Law (3 Dutch.) 328, 332; *State v. Tomlin*, 29 N. J. Law (5 Dutch.) 13, 20.

"Such false pretense may consist in any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or other personal property." *State v. Lynn* (Del.) 51 Atl. 878, 882, 3 Pennewill, 316.

Acts, as well as words, constitute a false pretense, within the meaning of the

law. *Musgrave v. State*, 133 Ind. 297, 306, 32 N. E. 885.

#### Warranty of title.

A false covenant of warranty of title to a slave is not a false pretense, within the statute punishing the obtaining of money by false pretenses. *State v. Chunn*, 19 Mo. 233, 235, 236.

Where, upon an exchange of personal property, one of the parties fraudulently pretends that the property with which he is parting belongs to himself and is unincumbered, and at the same time affirms that he will warrant it against incumbrances, an indictment may be sustained against him, if the false pretense, and not the warranty, was the inducement which operated upon the other party to make the exchange. *State v. Dorr*, 33 Me. 498.

#### FALSE REPRESENTATION.

See "Material Representation."

A false representation in law is one known to be false, or not known to be true, by the party making it, and must have been to the gain of the one making it or the loss of another. *Dormitzer v. Greve*, 8 Mo. App. 593.

The gist of actions for false representations being fraud, in order to maintain them it is necessary to aver and prove, first, that the representations made were false; second, that the defendants knew them to be false; third, that they were made with an intent to defraud; and, fourth, that plaintiff, relying upon the representations, was induced to enter the contract. *Rolfes v. Russel*, 5 Or. 400. An affirmative allegation of an intent to deceive is not necessary. It may be implied. *Schoellhamer v. Rometsch*, 38 Pac. 344, 345, 26 Or. 394.

To constitute a good cause for false representations three circumstances must combine: First, the falsity of the representation; second, the knowledge of the maker of its falsity; and, third, that the false representation induced the purchaser to buy. *Lunn v. Shermer*, 93 N. C. 164, 168.

A false representation is one made with knowledge of its falsity; made scienter, in law phrase. *State v. Berkeley*, 23 S. E. 608, 609, 41 W. Va. 455.

An allegation that a representation is false is no more than an allegation that it was untrue. So a false representation, in order to sustain a judgment, must be made with knowledge of its falsity and intention to deceive. *Inderlied v. Honeywell*, 84 N. Y. Supp. 333, 334, 88 App. Div. 144.

False representations, to be actionable, must be as to a past or existing fact sub-

stantially or materially affecting the interests of the party and relating to a matter as to which he may be presumed to confide, and is thereby in fact deceived. *Speed v. Hollingsworth*, 38 Pac. 496, 498, 54 Kan. 436.

If a vendor knows the purposes for which an article is intended by the purchaser, and so represents to him, and also knowingly and fraudulently represents that he knows the purchaser's business and that the article is well fitted for it, and the purchaser relies on such representation in making the purchase, and it is untrue, it is a false representation. *Hanger v. Evans*, 38 Ark. 334, 343.

A false representation by one of the parties to a contract does not necessarily put the other on inquiry as to its truth. If a party makes a statement of a material fact, which he knows to be untrue, for the purpose of inducing the other party to act, and the one to whom it is made believes it to be true, and relies and acts upon it, the party making the statement is guilty of actual fraud. *Hartman v. International Building & Loan Ass'n*, 62 N. E. 64, 65, 28 Ind. App. 65.

#### Acts or words.

False representation includes a suppression of the truth as well as an assertion of a falsehood. *Allen v. Addington* (N. Y.) 7 Wend. 9, 22.

A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone or external acts. Whenever the purpose is to induce belief in the existence of a fact which does not exist, every word and act intended to produce conviction and induce action becomes a misrepresentation, if through their instrumentality the party upon whom they are practiced was induced to act. Thus, in the sale of a mine, the salting of the ore from which samples were taken to determine its mineral value constitutes false representation. *Mud-sill Min. Co. v. Watrous* (U. S.) 61 Fed. 163, 168, 9 C. C. A. 415.

#### False pretense distinguished.

A representation of what will or will not happen cannot be considered as a false pretense, and therein lies the distinction between a false representation and a false pretense; the former being promissory in its character, and the latter being a representation as to what is then presently true. The term "false pretense" does not involve the use of a visible token. *State v. Vanderbilt*, 27 N. J. Law (3 Dutch.) 328, 334.

#### Intent.

The gist of an action for "false representation" is deceit. To sustain it, a fraud-

ulent intent or its legal equivalent must appear. *The Normannia* (U. S.) 62 Fed. 469, 472.

An action for false and fraudulent representations requires for its foundation a false statement knowingly made, or a false statement made in ignorance of and in reckless disregard of its truth or falsity and of the consequences such a statement may entail. The evil intent, the intent to deceive, is the basis of the action. Such an intent, if true, may be inferred from the positive statement as of his own knowledge of a fact concerning which one knows he has no knowledge at all, because such a statement shows such a contempt for the truth and such a reckless disregard of the rights of others who may rely upon it that it is deemed sufficient evidence of an evil intent to warrant a recovery when damages have resulted from the falsehood; but the action can never be maintained upon a promise or a prophecy. *Union Pacific R. Co. v. Barnes* (U. S.) 64 Fed. 80, 83, 12 C. C. A. 48.

In order to render a sale void by reason of false representations, there must be proof, not only that they were false, but made with a design to deceive, and that the other party was deceived. *McDonald v. Trafton*, 15 Me. (3 Shep.) 225, 227.

In the case of *Anderson v. Fitzgerald*, 2 Big. 341, in construing an insurance policy in which it was provided that the policy would be void if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully or fairly disclosed and communicated to the company, etc., Baron Parke said, in speaking of the false representations, that "a doubt may possibly exist whether the word 'false' is to be understood as false in point of fact or morally false, though I believe most of us think it is not to be limited to moral falsehood; but there seems to us to be no doubt that, if the statements are false in whatever sense we understand that word, being used in effecting the insurance, the proviso operates." *Day v. Mutual Ben. Life Ins. Co.* (D. C.) 3 Mackey, 41, 51.

"A representation in procuring an insurance policy, to be false, presupposes that the subject insured was substantially different from the description furnished at the time the risk was taken; and it must be a substantial difference, one that affects the contract, and so changes the character of the agreement that the thing actually insured is not that which was intended to be. *Columbian Ins. Co. v. Lawrence*, 27 U. S. (2 Pet.) 25, 49, 7 L. Ed. 335; *Alston v. Mechanics' Mut. Ins. Co.* (N. Y.) 4 Hill, 829, 334; *Ætna Fire Ins. Co. v. Tyler* (N. Y.) 16 Wend. 385, 30 Am. Dec. 90. The cases seem to fully establish the doctrine that a representation need not be willfully or designedly



made. If voluntarily made, whether the party believed it to be true, or carelessly made it through error or mistake, the result is the same." *Merchants' & Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.* (Ohio) 1 Cln. R. 408, 419.

#### **Opinion or promise.**

A false representation, within the meaning of the law, must be a representation as to an existing or past fact, and not merely a promise to do an act in the future. A failure to comply with such promise does not constitute fraud. *Murphy v. Murphy*, 59 N. E. 796, 797, 189 Ill. 360.

A mere promise to perform an act in the future is not in the legal sense a representation, nor does a failure to perform such promise convert it into a false representation; but if the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated "representations," and, if falsely made, are grounds of avoiding the contract, though the thing promised lies wholly in the future. But, while a mere promise is not a representation, a promise made with the intention of not performing it constitutes a fraud, for which the contract may be rescinded or avoided. *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.*, 52 Pac. 995, 998, 120 Cal. 521, 65 Am. St. Rep. 186.

A false representation by one of the parties to a contract does not necessarily put the other on inquiry as to its truth. If a party makes a statement of a material fact, which he knows to be untrue, for the purpose of inducing the other party to act, and the one to whom it is made believes it to be true and relies and acts upon it, the party making the statement is guilty of actual fraud; and as a general rule such misrepresentation must relate to some existing fact. A statement of intention merely, or simply an expression of an opinion held by the party making it, cannot be a misrepresentation amounting to fraud. A party to whom an opinion is expressed is presumed to be equally able to form his own opinion, and the expression of an intention is no more in effect than a statement that a present opinion exists. In neither case is there any affirmation of an external fact. *Hartman v. International Building & Loan Ass'n*, 62 N. E. 64, 65, 28 Ind. App. 65.

#### **FALSE RETURN.**

##### **By officer.**

"False return" was simply the specific name, probably derived from the form of the original writ, for one of the numerous

classes of actions on the case. It was not an action in rem, for the purpose of canceling or setting aside an order, to pave the way for another action for damage, but was itself an action for damages founded upon the official misconduct of the sheriff; so that to say that the remedy of the plaintiff was by an action for a false return meant merely that they must proceed by action not necessarily in the form of a common-law action. *Raker v. Bucher*, 34 Pac. 849, 850, 100 Cal. 214.

A false return is a return made by the sheriff or other ministerial officer to a writ in which is stated a fact contrary to the truth and injurious to one of the parties, or to some one having an interest in it. *State ex rel. McLain v. Jenkins*, 70 S. W. 152, 154, 170 Mo. 16.

#### **Of taxable property.**

To constitute a false return, within the meaning of Rev. St. § 2781, providing a remedy against individuals for false returns of taxable property, there must appear, if not a design to mislead or deceive on the part of the taxpayer, at least culpable negligence. A willful undervaluation placed by an owner on property returned by him for taxation, when fairly established, should be held to constitute a false return, within the meaning of such section. A mistake, not culpable in respect of its value, would not constitute such false return. *Ohio Farmers' Ins. Co. v. Hard*, 52 N. E. 635, 638, 59 Ohio St. 248; *Ratterman v. Ingalls*, 28 N. E. 168, 48 Ohio St. 468; *Lander v. Mercantile Nat. Bank* (U. S.) 118 Fed. 785, 787, 55 C. C. A. 523.

#### **FALSE STATEMENT.**

A statement recklessly made, without knowledge of its truth, but which is really false, is a false statement knowingly made, within a settled rule. *Trimble v. Reid*, 97 Ky. 713, 720, 31 S. W. 861, 863 (citing *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382).

An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false. *Ballinger's Ann. Codes & St. Wash.* 1897, § 7191.

#### **FALSE SWEARING.**

See "Sworn Falsely."

Fraud synonymous, see "Fraud."

Perjury distinguished, see "Perjury."

False swearing is a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding, as distinguished from perjury, which is a false statement in an oath required by law. *O'Bryan v. State*, 11 S. W. 443, 444, 27 Tex. App. 322; *Langford v. State*, 9 Tex. App. 283, 285.

False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement, intentionally and knowingly or fraudulently made, certainly constitutes fraud, and the statement of a fact as true which a party does not know to be true, and which he has no reasonable grounds for believing to be true, is fraudulent. Thus, in an instruction in an action on a fire policy, in which fraud and false swearing is set up as a defense, it is immaterial whether the court employs the language "fraud and false swearing," or "fraud or false swearing." The significance of these expressions is the same, when taken in connection with the issue. *Linscott v. Orient Ins. Co.*, 34 Atl. 405, 88 Me. 497, 51 Am. St. Rep. 435.

"False swearing," as used in an insurance policy providing that, for any fraud or "false swearing" in his statement of loss, he should forfeit all claim under the policy, means that the false statement must be willfully made with respect to a material matter and with the intent to deceive the insurer. *Marion v. Great Republic Ins. Co. of St. Louis*, 35 Mo. 148, 149; *Franklin Ins. Co. v. Culver*, 6 Ind. 137, 139.

"False swearing," in a fire policy providing that false swearing in reference to claims or losses shall be a forfeiture of such claims, means an attempt to defraud the company by swearing intentionally and of bad motives to the existence of property which the insured had never lost, or by greatly overcharging the property which had been destroyed, or by not acknowledging that which had been saved, or the statement of any material or substantial facts, or the omission to state material facts, in the knowledge of insured, with intent to defraud or mislead the insurers. *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 284, 49 Am. Dec. 74.

"False swearing," as used in an insurance policy which contained a condition that any fraud or false swearing will forfeit all claims under it, means a verified false assertion, fitted and likely to, or which does, deceive. A verified statement by the insured, which was false, and which the insurer knew to be false at the time it was made, would not be false swearing within the meaning of the term as here used. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283, 292.

#### FALSE TOKEN.

A false token, to render a cheat or fraud indictable at common law, must be such as indicates a general intent to defraud, and therefore is an injury to the public. "A mere privy token or counterfeit letters in other men's names seems not to come within the meaning of the term 'false token' as used at common law." *People v. Stone* (N. Y.) 9 Wend. 182, 183.

A bank check may be a false token, and would be such if the drawer knew, when he gave it payable to a person other than himself, that he had neither funds to meet it nor credit at the bank upon which he drew it. *People v. Donaldson*, 11 Pac. 681, 682, 70 Cal. 116.

Where defendant, a married man, pretended, under a fictitious name to an unmarried woman, that he was single, and by this means, together with his promise to marry her, obtained money from her, he was not a false token, and hence was not guilty of obtaining money by false pretenses by means of a false token; the word "token" being taken to denote a false mark or sign, forged object, counterfeit letter, key, ring, etc., used to deceive persons, and thereby fraudulently get possession of property. Mere words are not symbols or tokens. *State v. Renick*, 33 Or. 584, 590, 56 Pac. 275, 44 L. R. A. 266, 72 Am. St. Rep. 758.

#### FALSE WEIGHT.

A false weight or measure is one which does not conform to the standard established by the laws of the United States of America. Pen. Code Cal. 1903, § 552.

A false weight or measure is one which does not conform to the standard established by the laws of the United States of America and of this state. Pen. Code Idaho 1901, § 5003.

#### FALSE WRITING.

"False writing," as used in a statute providing for the punishment of every person who, with intent to cheat or defraud another, shall designedly, by color of any false writing, obtain the signature of any person to a written instrument or obtain any valuable thing, means some letter or instrument purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauded, and embraces, not only counterfeit letters made in other men's names, but any false instrument purporting on its face to be a genuine instrument of any description. "Writing," as used in the statute, means some instrument, or at least letter, something in writing, purporting to be the act of another, or certainly of some person, and cannot mean anything written on paper not purporting to be of some force or efficacy, but some instrument in writing, or written paper purporting to have been signed by some person, which writing must be false. *People v. Gates* (N. Y.) 13 Wend. 311, 320.

Rev. St. 1881, p. 413, § 2204, providing for the punishment of any one who, with intent to defraud another, designedly, by color of any false token or writing, obtains the

signature of any person to any written instrument or obtains anything of value, cannot be construed to mean an unwarranted or false use of writings conceded to be genuine, but only means the use of a false writing. *Shaffer v. State*, 82 Ind. 221, 225.

### FALSEHOOD.

The word "falsehood" is defined in *Bouvier's Law Dictionary* to be a willful act or declaration contrary to truth. *Putnam v. Osgood*, 51 N. H. 192, 204.

### FALSIFY—FALSIFICATION.

Falsification is the showing, in an action of account, that entries made in the account rendered are wrong. *Phillips v. Belden* (N. Y.) 2 Edw. Ch. 1, 23.

An account stated is not absolutely conclusive, but, if any of the parties can show an omission for which credit ought to be, that is a surcharge, or, if anything is inserted that is a wrong charge, he is at liberty to show it, and that is a falsification. *Pit v. Cholmondeley*, 2 Ves. Sr. 565; *Rehill v. McTague*, 7 Atl. 224, 228, 114 Pa. 82, 60 Am. Rep. 341.

Falsifying applies to such items of a debit causing it to be wholly false or in part erroneous. When items are falsified and go out of the account, gaps are made in it, and, in order to make the account a consistent whole, it is necessary to restate the account according to the new state of facts. *Kennedy v. Adickes*, 15 S. E. 922, 923, 37 S. C. 174.

### FALSUS IN UNO, FALSUS IN OMNIBUS.

A witness who testifies falsely in one thing is to be disbelieved in all things. It applies only to cases where a witness willfully testifies falsely, and does not apply to cases where the witness is innocently mistaken. *People v. Strong*, 30 Cal. 151.

The use of the maxim, "Falsus in uno, falsus in omnibus," in an instruction in which the court states that when a party in law in a civil case deliberately swears falsely in one material part of his testimony, and the jury are satisfied that he has so sworn intentionally falsely, they are not only at liberty to reject it, but it is sometimes their duty to reject it; that the maxim is, "Falsus in uno, falsus in omnibus"—is not erroneous, as an instruction that the jury must reject all of the testimony of such a witness. *Moett v. People*, 85 N. Y. 373, 377.

The maxim, "Falsus in uno, falsus in omnibus," is not to be construed as authorizing a court to charge that, if a witness perjures himself in respect to one or more particulars, the jury must reject all his testi-

mony. The rule is that the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; that is to say, the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but willfully and with the design to deceive, must treat all of his testimony with distrust and suspicion, and reject all unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth. *White v. Disher*, 7 Pac. 826, 67 Cal. 402 (citing *People v. Sprague*, 53 Cal. 494).

"False in one thing, false in all"—the maxim embodying the principle that a witness shown to have testified falsely in one portion of his testimony is to be disregarded as to all thereof. It is said by *Starkie*: "As the credit due to a witness is founded on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any, according to the legal maxim, 'Falsus in uno, falsus in omnibus.' The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional. When any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony is to be credited or rejected." It is thus explained that the falsity of the evidence must result from design, and not from mere mistake or infirmity, which affects only the character of the witness for accuracy. Nor is it applied to evidence favorable to the party against whom the witness may be called. *Grimes v. State*, 63 Ala. 166, 168 (quoting 1 *Starkie*, Ev. [1 *Sharswood's Ed.*] 873).

An instruction that, if a witness testifies falsely as to one issue, the jury may, if they see fit, disregard all his testimony, is not erroneous as requiring them to disregard it, if at all, in entirety. The instruction was clearly within the rule of cases arising under the maxim, "false in one, false in all." *Wilson v. Coulter*, 51 N. Y. Supp. 804, 809, 29 App. Div. 85.

### FAME.

"Fame," says *Orabb*, "has a reference to the thing which gives birth to it. It goes about of itself, without any apparent instrumentality. \* \* \* Hearsay refers to the receivers of that which is said, and hence it is limited to a small number of reporters or speakers. Fame serves to establish a character, either to a person or thing. There is a distinction, therefore, between hearsay and evidence of repute." *Commonwealth v. Murr* (Pa.) 42 Wkly. Notes Cas. 268.

## FAMILIA.

The "familia," among the Romans, was the body of household servants, and they were called "familiares" and "famuli" or "famulae," men or maid servants. *Ex parte Meason* (Pa.) 5 Bin. 167, 179.

## FAMILY.

See "Immediate Family"; "Wife's Family"; "Head of a Family."  
Member of, see "Member."

"Lexicographers derive the word from the Latin word 'familia,' which means the whole of the slaves of a household. 'Familus' means a slave." *Race v. Oldridge*, 90 Ill. 250, 252, 32 Am. Rep. 27.

"Family," at law, is a collective body of persons who live in one home, under one head or manager. *Tyson v. Reynolds*, 3 N. W. 469, 470, 52 Iowa, 431; *Arnold v. Waltz*, 6 N. W. 40, 53 Iowa, 708, 36 Am. Rep. 243; *Linton v. Crosby*, 9 N. W. 311, 312, 56 Iowa, 386, 41 Am. Rep. 107; *Menefee v. Chesley*, 66 N. W. 1038, 1040, 98 Iowa, 55; *Neasham v. McNair*, 72 N. W. 773, 103 Iowa, 695, 38 L. R. A. 847, 64 Am. St. Rep. 202; *Duncan v. Frank*, 8 Mo. App. 286; *Ridenour-Baker Grocery Co. v. Monroe*, 43 S. W. 633, 634, 142 Mo. 165; *Leake v. Lucas*, 93 N. W. 1019, 1020, 65 Neb. 359, 62 L. R. A. 190. Including parents, children and servants, and as the case may be, lodgers or boarders. *Dorrington v. Myers*, 9 N. W. 555, 556, 11 Neb. 388; *Zimmerman v. Frank*, 9 Pac. 747, 750, 34 Kan. 650; *Barney v. Leeds*, 51 N. H. 253, 265; *Poor v. Hudson Ins. Co.* (U. S.) 2 Fed. 432, 437; *Jones v. Gray* (U. S.) 13 Fed. Cas. 956; *Blythe v. Ayres*, 31 Pac. 915, 927, 96 Cal. 532, 19 L. R. A. 40; *In re Jessup's Estate*, 22 Pac. 742, 745, 81 Cal. 408, 6 L. R. A. 594; *Pearson v. Miller*, 14 South. 731, 732, 71 Miss. 379, 42 Am. St. Rep. 470; *Bair v. Robinson*, 108 Pa. 247, 249, 56 Am. Rep. 198; *Stuart v. Stuart*, 18 W. Va. 675, 682, 684; *Town of Cheshire v. Town of Burlington*, 31 Conn. 326, 329; *Regan v. Zeeb*, 28 Ohio St. 483, 485; *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727; *Race v. Oldridge*, 90 Ill. 250, 252, 32 Am. Rep. 27. The relation existing between such persons must be of a permanent and domestic character, not abiding together temporarily as strangers. The court quotes with approval the following general rules to determine when the relation of a family, as contemplated by law, exists: (1) It is one of social status, not of mere contract; (2) legal or moral obligation on the head to support the other members; (3) corresponding state of dependence on the part of the other members for this support. *Rotator v. King*, 73 Pac. 291, 292, 13 Okl. 87; *Roco v. Green*, 50 Tex. 483, 490; *American Nat. Bank v. Cruger*, 71 S. W. 784, 788,

31 Tex. Civ. App. 17. The elements of the family thus consist of certain persons in certain relations. The loss of any member by death, or severance by other means of these relations, must affect the collective body in its composition and constitution. *Cole v. Bentley*, 26 Ill. App. 200, 262. It by no means follows that there are children in the body. *Valentine v. Lloyd* (N. Y.) 4 Abb. Prac. (N. S.) 371, 373.

The word "family," in one of its broadest meanings, includes all those who are descended from one common progenitor—those of the same blood. In a less comprehensive sense, it means a collective body of persons living together, and constituting one household, and, in a still more limited sense, it means father, mother, and children. *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131; *Bellstein v. Bellstein*, 45 Atl. 73, 74, 194 Pa. 152.

The word "family" has several meanings. Its primary meaning is a collective body of persons who live in one house and under one head or management. Its secondary meaning is those who are of the same lineage, or descend from one common progenitor. Unless the context manifests a different intention, the word "family" is usually construed in its primary sense. *Dodge v. Boston & P. R. Corp.*, 28 N. E. 243, 244, 154 Mass. 299, 18 L. R. A. 318; *Peeler v. Peeler*, 8 South. 392, 393, 68 Miss. 141; *Galligar v. Payne*, 34 La. Ann. 1057, 1058.

Taken in its broad sense, the word "family" would indicate a group of persons closely related in blood; but, in a statute authorizing a provision for the support of the family of a decedent, the provision being confined to the widow and children, members of his family at his death, the word is manifestly used in its restricted sense, as a collective body of persons who form one household under one head and one domestic government. *Goss v. Harris*, 43 S. E. 734, 735, 117 Ga. 345.

The word "family" is used in various significations, the exact meaning of the word in the particular case depending upon the context. It may mean the whole body of persons who form one household, thus including also servants; the parents, with their children, whether they dwell together or not; or a whole group of persons closely related by blood. Another definition is that it may mean a man's household, consisting of himself, his wife, children, and servants, or his wife and children, or his children, excluding his wife, or, in the absence of wife and children, it may mean his brothers and sisters or next of kin, or it may mean the genealogical stock from which he may have sprung. *Norwegian Old People's Home Soc. v. Wilson*, 52 N. E. 41, 43, 176 Ill. 94; *Spencer*

cer v. Spencer (N. Y.) 11 Paige, 159, 160; Whelan v. Reilly, 3 W. Va. 597, 610.

In a general sense, the family may be said to consist of father, mother, and children; all the individuals who live under the control of another, including the servants of the family. *Poor v. Hudson Ins. Co.* (U. S.) 2 Fed. 432, 437; *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727.

The word "family" is one of variable meaning, and, when used in a will as descriptive of the beneficiaries of a legacy, its legal import will be determined by the intention of the testator expressed in the language of the whole instrument, read in the light of relevant circumstances existing at the time of execution. The primary meaning of "family" is the assembly of persons under the rule of the head of one household, including wife, children, and servants or slaves; but the word is frequently used in common speech without reference to any established household, and merely for the purpose of indicating the individuals related as husband and wife or parents and children. As used in a bequest to testator's nephew and family, it should be construed in the latter sense. *Cosgrove v. Cosgrove*, 38 Atl. 219, 221, 69 Conn. 416.

Code 1886, § 4031, providing for the punishment of any person who enters into or goes sufficiently near the dwelling house of another, and, in the presence or hearing of the family of the occupant thereof, uses abusive and insulting language, etc., does not necessarily mean the entire family, but the provision of the statute is satisfied though part of the members composing the family may be absent at the time. *Bones v. State*, 23 South. 485, 117 Ala. 146.

"Family," as used in Rev. Code, p. 479, § 3, providing that a wife may receive the wages of her personal labor not performed for the family, has no technical meaning, but means the household, or collection of persons, including husband, wife, children, lodgers, and servants, residing together, and receiving diet, lodging, etc., from a common source of supply, and subject to rules for their government as members of such household, with respect to such membership. *Hogg v. Lobb's Ex'r* (Del.) 82 Atl. 631, 632, 7 Houst. 399.

"Family," as used in a constitution protecting the homestead of a family from forced sale, should be given a comprehensive meaning, and embraces a collective body of persons living together in one house, or within the curtilage. In legal phrase, this is the generic description of a family. It embraces a household composed of parents or children, or other relatives, or domestics and servants. In short, every collective body of persons living together within the same curtilage, sub-

sisting in common, and directing their attention to a common object—the promotion of their mutual interests and social happiness. This is the most popular acceptation of the word. Lexicographers tell us that the word "family," in its origin, meant servants; that this was the signification of the primitive word. *Wilson v. Cochran*, 31 Tex. 677, 679, 98 Am. Dec. 553. And such is its meaning in Rev. St. art. 4583, forbidding the sale of estrays unless there be present three persons besides the family of the taker up. *Goode v. State*, 16 Tex. App. 411, 414.

In the residuary clause of a will, devising the residue to the most destitute of testator's relatives, not to extend beyond the children of his brothers and sisters and their families, by the words "their families" was meant the testator's brothers and sisters, their wives and husbands, and his nephews and nieces, their wives, husbands, and children. *Gafney's Ex'r v. Kenison*, 10 Atl. 706, 708, 64 N. H. 354.

The word "family" is a noun of multitude, and is capable of various significations, according to the context, when used in a will. In a will bequeathing a sum of money to testator's son for the support of himself and family, and for no other purpose, the term includes the wife and children of testator's son, and the bequest operates as creating a trust for their benefit, which will preclude its being attached for the son's debts. *White's Ex'r v. White*, 30 Vt. 338, 343.

In a will devising a farm to the wife and children of a certain person, and providing that such person shall have the management of the farm, and a home thereon during his life, for the support of himself and his family and his children, the word "family" must be regarded not as a limitation of the estate already granted, but to declare those for whom the trust was to be conducted, viz., for those who composed the person's immediate household; that is, his then or any future wife, himself, and his children. The word "family" is often a word of doubtful import. *Downes v. Long*, 29 Atl. 827, 828, 79 Md. 382.

A man's family may be considered as his household at a particular period, or his race or generation. A family, in its collective or aggregate capacity, can have no heirs. *McCullough's Heirs v. Gilmore*, 11 Pa. (1 Jones) 370, 373.

To constitute a family, within the meaning of the law giving the homestead exemption, the persons who dwell together must not, in the fact of so doing, be violators of the law of the land. *Gordon v. Stewart* (Neb.) 96 N. W. 624, 630.

The word "family," as used in the chapter relating to use and habitation, is to be understood of the wife and children and

servants of the person to whom the right of use or habitation is granted. Civ. Code La. 1900, art. 642.

Every person residing in the state at the time of his death, dying testate or intestate, and leaving a widow or a child or children, who shall reside in his family at his death, him surviving, shall be deemed and taken to have left a family entitled to the benefits of certain exemptions. Gen. St. N. J. 1895, p. 2367, § 53.

"Family," in a limited sense, signifies the father, mother, and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the father of the family. It is also employed to signify all the relations who descend from a common root. Civ. Code La. 1900, art. 3556, subd. 12.

The admission by a person, or statement, that he had a family, does not imply or prove that he had a wife living, for it may have referred only to his children, or to a family of children surviving his wife. The word "family," in common discourse, is frequently applied to children alone. *People v. Fellen*, 58 Cal. 218, 225, 41 Am. Rep. 258.

A testator bequeathed the residuary estate to his only surviving sister of the whole blood, and provided that, in case of the death of any of the legatees before distribution, the portion bequeathed to such legatee should revert to the children of the family of which such legatee was a member. The meaning which is to be given to the word "family" is to be determined by the context, and also from a consideration of the subject-matter to which it relates. It is sometimes used to include parents, with their children, whether dwelling together or not. The word has also a broader and secondary meaning, which includes all the offspring or descendants of a common progenitor, but is not to receive this construction unless such intention is manifested from the context. The testator having no family of his own, and his father, mother, stepmother, and all his brothers and sisters of the whole blood being dead, his father's family had ceased to exist, and was not the family referred to in the will; and his sister, to whom he had bequeathed property, having become the head of a new family, it was her family referred to in the will. *In re Bennett's Estate*, 66 Pac. 370, 371, 134 Cal. 320.

#### As determined by dependent condition.

The term "family" is one of a very comprehensive and varied signification, and, as said in *Lister v. Lister*, 73 Mo. App., loc. cit. 104, "it may be of narrow or broad meaning, as the intention of the parties using the word, or as the intention of the law in using

it, may be made to appear." It may be seen by reference to the Standard Dictionary of the English Language that this word comes from the Latin "familia," the definition of which is "household." Where a son and his wife lived with his father, being dependent upon him for their support during the son's final illness, who took out a certificate for the benefit of his wife and his father, subsequently dying without changing the relation between himself and father, the latter was a member of the family, and entitled to his share of the policy. *Ferbrache v. Grand Lodge*, 81 Mo. App. 268, 271.

The word "family," when used in the exemption laws, would include all of those who were dependent on one person (the head) for support, and hence would include an infant brother, sister, or aged and helpless parent of the debtor. *Bell v. Keach*, 80 Ky. 42, 46; *Seymour, Sabin & Co. v. Cooper*, 26 Kan. 539, 543.

The word "family," in its ordinary meaning, includes a collection of persons, consisting of a single man, his widowed mother, and his sister, neither of whom had any other home, and who were supported from the earnings of such man. *Barry v. Hale*, 21 S. W. 783, 784, 2 Tex. Civ. App. 668.

The word "family," as used in the constitution of a benefit society, declaring its purpose to be to provide for members "and their families," should not be construed to embrace all kindred of the same degree, but the family therein intended to be benefited, where one exists, is the family understood in its usual sense; that is, such persons as habitually reside under one roof and form one household, or to such as are dependent on each other for support, or among whom there is a legal or equitable obligation to furnish support. *Hofman v. Grand Lodge Brotherhood Locomotive Firemen*, 73 Mo. App. 47.

As used in a membership certificate of a beneficial corporation, providing that the benefit shall be paid to the member's family, the word "family" cannot be construed to include persons not dependent upon a member. *Supreme Council Catholic Benev. Legion v. McGinness*, 53 N. E. 54, 56, 59 Ohio St. 531.

As used in laws providing for certain exemptions to persons with a family, the term "family" includes a married woman who actually supports the other members of the family, and without whose exertions they would be without support. *Wilson's Assignee v. Wilson*, 42 S. W. 404, 101 Ky. 731; *Hamilton v. Fleming*, 41 N. W. 1002, 1004, 26 Neb. 240.

Where a will gave property to trustees, to apply the funds for the support, in their discretion, of the family of G., the persons included were G., his wife, and such of their

children as lived with him as part of his household, and were legally dependent upon him for support. *Smith v. Wildman*, 37 Conn. 884, 387.

**As determined by obligation to support.**

The word "family" is of flexible meaning; hence the diversity of opinion as to who compose the members of a family. The question has often arisen in exemption or homestead cases. Some cases incline to a strict meaning, and limit the members of the family to those whom a person is under legal or moral obligation to support. Among these are *Mullins v. Looke*, 27 S. W. 926, 928, 8 Tex. Civ. App. 138, and *Roco v. Green*, 50 Tex. 483. *Carmichael v. Northwestern Mut. Ben. Ass'n*, 51 Mich. 494, 16 N. W. 871, fairly represents the other line of decisions. The Supreme Court said that the word "family" may mean the husband and wife, having no children, and living alone together, or it may mean children, or wife and children, or blood relations, or any group constituting a distinct domestic or social body; and the term, as used in the statutory provision authorizing a mutual benefit society to provide for the relief of families of deceased members, embraces those whom a member is equitably bound to support. *Grand Lodge A. O. U. W. v. McKinstry*, 67 Mo. App. 82, 87.

The family relation, within the meaning of the constitutional provision that the homestead of a family shall be exempt, depends either on the fact of marriage, or, in default of marriage, upon the charge and protection of others adopted as children, or of those who, by reason of kindred, have some interest in or claim to the premises of the person with whom they reside. An unmarried man may, from charity or other motives, take into his house and maintain any number of children not related to him in any manner, and yet he would not have such a family as contemplated by the Constitution, in order to entitle him or them to a homestead exemption. In *re Summers* (U. S.) 23 Fed. Cas. 379, 380.

To constitute a family, within the meaning of the homestead statutes, something more is required than the mere aggregation of individuals residing in the same house. The cases seem to unite upon this test: That there must be an obligation upon the head of the house to support the others, or some of them, and a corresponding state of dependence on the part of the members so supported. *Harbison v. Vaughan*, 42 Ark. 539; *Carter v. Adams*, 4 S. W. 36, 37, 9 Ky. Law Rep. 91; *Holuback v. Wilson*, 42 N. E. 169, 171, 159 Ill. 148; *Town of Landgrove v. Town of Pawlet*, 20 Vt. 309, 312; *Town of Manchester v. Town of Rupert*, 6 Vt. 291, 294.

Under a statute giving the probate court authority to make a reasonable allowance

out of an estate for the support of a family, it was intended to embrace the immediate family of the deceased—those who were by law entitled, up to his death, to look to him for support and protection. This will include the wife, minor children, and perhaps, in exceptional cases, helpless parents and other relatives. In *re Byrne's Estate* (Cal.) Myr. Prob. 1, 8.

That children reside with a debtor under no natural or legal obligation to support them—they being strangers in blood to him—does not constitute him a housekeeper, with a family, so as to entitle him to the benefits of the homestead exemption law. "An infant brother or sister, an aged or helpless parent, or even a bastard child, may and have been held to constitute a family. \* \* \* But the construction and operation of the homestead law must be determined by some well-defined rule, that is reasonable and just, and not according to the mere will or caprice of the debtor." *Bosquett v. Hall*, 13 S. W. 244, 90 Ky. 566, 9 L. R. A. 351, 29 Am. St. Rep. 404.

"Family," as used in a statute exempting from forced sale six months' provisions, for a householder and his family, should be construed to mean the actual family of the householder, though there might be members for whom he would not be lawfully bound to provide. *Stilson v. Gibbs*, 18 N. W. 815, 816, 53 Mich. 280.

A man who has living with him several persons, to whom he is not related, and who are not dependent on him, is not a householder having a family, within the homestead laws. *Holnback v. Willson*, 42 N. E. 169, 171, 159 Ill. 148.

The word "family," as used in a constitution exempting a homestead occupied by a family from forced sale, cannot be construed to include a widower and a female relative. A person supporting and maintaining persons having no legal claim on him, though prompted to do so by the strongest motives of gratitude or affection, or the mere temporary and indifferent union of persons in one household, directing their attention to a common object—the promotion of their mutual interest and social happiness—does not constitute a family; nor can it be said that because a party may, in consideration of the services of hirelings or of persons permissively residing with him, pay them wages or contribute in whole or in part to their support, there is a family. *Whitehead v. Nickelson*, 48 Tex. 517, 528.

A family may consist of a wife and children or of other persons who may stand in a state of dependence in the family relation, or it may consist of persons standing in either of these relations to the head of the family, whether the father, the mother, the brother or sister, or other relation, is

the head; but they must be persons who are dependent in some measure on the head for support, who have an interest in his holding his property exempt, and who would be prejudiced by its seizure and sale under execution and other process, and who would be benefited by its exemption. The duty to support is always a test as to the family. He upon whom the law imposes such a duty, growing out of the status, and not out of contract, and the persons to whom he owes this duty, if dwelling together in a domestic establishment, constitute a family. *Calhoun v. Williams* (Va.) 32 Grat. 18, 22, 34 Am. Rep. 759. See, also, *Town of Manchester v. Town of Rupert*, 6 Vt. 291, 294.

Taken, in its broad sense, the word "family," as used in a statute allowing a year's support to be set aside for the family of a decedent, would indicate a group of persons closely related by blood. The provision is confined by the statute to the widow and children who are members of the family of the deceased at the time of his death, and the word is manifestly used in its restricted sense of a collective body of persons who form one household, under one head and one domestic government. We do not mean to intimate that it is absolutely essential, under the statute, that the minor children should be living in the father's house, and under his management and control; but we think it was intended to provide a support for the widow and those of the children whom the father was under a legal duty to support while he lived. "In common parlance," said Lord Kenyon, "the family consists of those who live under the same roof with the paterfamilias—those who form, if I may use the expression, his fireside." *Goss v. Harris*, 48 S. E. 734, 735, 117 Ga. 345 (citing *Rex v. Inhabitants of Darlington*, 4 Term R. 800).

#### As determined by relationship.

The word "family," in its broadest sense, will include all the dwellers in a house under the common control of one person, and it is in this respect synonymous with "household"; but it has a narrower signification—a very limited one—and is used to represent the progeny of common ancestors. This seems to be the significance the word bears in the constitutional clause exempting a homestead to every head of a family. In *re Lambson* (U. S.) 14 Fed. Cas. 1047, 1048.

The phrase "family or person dependent on him," in the constitution of a life association, providing that the benefits were to be paid on behalf of a member to such member or members of his family, or person or persons dependent on him, as he should direct and designate by name, was construed not to include any persons who were not actual relatives, or standing in place of relatives in some permanent way, or in some actual de-

pendence on the member. *Supreme Lodge Knights of Honor v. Narin*, 26 N. W. 826, 828, 60 Mich. 44.

A statute exempts from levy and sale on execution the tools and implements of trade belonging to heads of families. Held, that to constitute a family, within the meaning of the act, the relation of parent and child, or that of husband and wife, must exist. There must be a condition of dependence in the one or the other of these relations, but it is not necessary that all the dependents should reside under the same roof, together. It is the relation, and the dependence on that relation, not the aggregation of individuals, that constitutes a family. *Sallee v. Walters*, 17 Ala. 482, 488.

"Family," as used in the Constitution, exempting a homestead from forced sale so long as a surviving family may continue to occupy it as a homestead, does not mean a family composed of persons neither related by blood nor connected by marriage, but means a family composed of husband, wife, and children. *Howard v. Marshall*, 48 Tex. 471, 476.

Children not shown to be related or connected with the head of the family, but, on the contrary, strangers to such head, in blood, and the orphans of persons who died in her service, or that of some member of the family, are not a portion of the family, within the homestead law. *Gallinger v. Payne*, 34 La. Ann. 1067, 1058.

The term "families," when used in the colonization laws, means "a collection of persons having association by reason of marriage." *Hill v. Moore*, 19 S. W. 162, 164, 85 Tex. 335.

#### As determined by residence together.

In common parlance the family consists of those who live under the same roof with the paterfamilias—those who form his fireside. *Dodge v. Boston & P. R. Corp.*, 28 N. E. 243, 244, 154 Mass. 299, 13 L. R. A. 318; *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727.

While usually importing a household including parents, children, and servants, it is not necessary, to sustain the family relation between parents and children, that they should reside together. *Putman v. Southern Pac. Co.*, 27 Pac. 1033, 1037, 21 Or. 230.

The word "family," within the meaning of an exemption statute, does not import that all the members thereof reside in one house. *State, to Use of Coddington, v. Finn*, 8 Mo. App. 261, 264.

Under a statute providing that every householder having a family shall be entitled to an estate of homestead, a person and



his or her children, permanently separated, cannot constitute a family. A residence together is essential to constitute a family. *Rock v. Haas*, 110 Ill. 528, 532.

The term "family," in the by-laws of a beneficial association, requiring the payment of benefits to the family of members, is not limited to resident members of his family, but means the kindred of the member, and will include his mother, although she does not reside with him. *Young Men's Mut. Life Ass'n v. Harrison* (Ohio) 23 Wkly. Law Bul. 360.

The term "family," as used in the charter of a fraternal order, providing for the payment of a sum of money upon the death of a member to such person of his immediate family as the member should designate, cannot be construed to include the father of an adult child, married and living apart from the parent. *Knights of Columbus v. Rowe*, 40 Atl. 451, 452, 70 Conn. 545.

Where a deed to a railroad company of a right of way over lands contained a condition that the grantor and his family should have free passage over the road in the cars of the company, the word "family" means those living in the grantor's house, and under his management; but the right could not be construed to include the grantor's granddaughter, who does not live with him. *Dodge v. Boston & P. R. Corp.*, 28 N. E. 243, 154 Mass. 299, 13 L. R. A. 318.

A sister who does not live with her brother, and is not dependent upon him for support, is not a member of his family, within St. 1882, c. 224, § 1, authorizing beneficial associations organized under such statute to pay benefits to members and their families. *Smith v. Boston & M. R. Relief Ass'n*, 46 N. E. 626, 627, 168 Mass. 213.

In a will providing a certain sum for the "maintenance of my family" until a certain time, "family" should be construed to include only the testator's widow and such children as were living with her at home, and not to include a son nearly grown, and not residing with the widow or the other children. *Andrews v. Andrews*, 54 Tenn. (7 Helsk.) 234, 243.

A will devised property in trust to be held during the natural life of testator's nephew J. S. for the benefit of the said J. S., so that, at the discretion of the trustee, the net income might be applied to the comfort and support of the said J. S. and his family, and to relieve them from suffering and distress. J. S. afterwards separated from his family, and it was said, in construing the will, that the word "family" was used to designate the persons intended, and not for the purpose of imposing as a condition that those persons should reside with, or be entitled to support from, the nephew,

and that the question of whose fault caused or continued the separation could not affect the rights of the beneficiaries, except so far as it should influence the judgment of the trustee in the application of the trust funds, which discretion, if honestly exercised, would not be interfered with by the court, and therefore that the nephew was not entitled to receive the whole net income of the trust estate. *Kehoe v. Ames*, 51 Atl. 870, 871, 96 Me. 155.

Code Civ. Proc. § 1466, provides for the setting apart of certain property of a decedent for the maintenance of decedent's family. It is held that a wife, who, after being married six weeks, entered into an agreement for separation, whereby she was given a certain allowance, which she agreed to receive in satisfaction of all marital claims and support, and who continued to live apart from her husband, without any effort to set aside the agreement, or any demand for further support, until his death, was not within the meaning of the statute, as constituting a family. The court said: "We are not to be understood as saying that, in every instance where the husband and wife have separated, the widow should be denied an allowance. She may have been driven from her home by the cruelty of her husband, and in such case the superior court may perhaps make an allowance, although the widow made no effort during the lifetime of the deceased to reassume matrimonial relations with him. It is enough to say that, under the circumstances of the case under consideration, the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased. In *re Noah's Estate*, 15 Pac. 287, 290, 73 Cal. 583, 2 Am. St. Rep. 829.

In Laws 1842, c. 157, as amended by Laws 1889, c. 406, which provides that when a man having a family shall die, leaving a widow or minor child or children, there shall be set apart for such persons property of a certain value, "family" includes a widow and a daughter who had lived apart from the testator for 10 years preceding his death, without contribution from him for the wife's support, or expenses paid by him for the daughter's support, except for her clothing, and though at the time of the testator's death he did not keep house, and had no servants. In *re Shedd's Estate*, 30 N. E. 1147, 133 N. Y. 601; *Id.*, 14 N. Y. Supp. 841, 842, 60 Hun, 367; *Id.*, 11 N. Y. Supp. 788, 789.

In a will providing that the rents and income of the estate should be applied equally by trustees to the maintenance, support, and comfort of testator's sons and daughters, in equal shares, and their families, if they have any, during their natural lives, the word "family" includes the testator's sons and daughters, together with their respective

children, so long as they live together and form a portion of the same household, or, from their tender years, be entitled to be treated as its members. *Bradlee v. Andrews*, 137 Mass. 50, 52.

#### Boarders or lodgers.

"Family," as used in a statute exempting from attachment the household furniture of a debtor essential to his personal comfort and that of his dependent family, cannot be construed to include mere boarders. *Weed v. Dayton*, 40 Conn. 293, 296. So, also, under a statute allowing to the widow furniture necessary for herself and family. *Strawn v. Strawn*, 53 Ill. 263, 274.

The word "family," as used in the chapter relating to executions, does not include strangers or boarders lodging with the family. *Code Iowa 1897*, § 4012; *Coffy v. Willson*, 21 N. W. 602, 65 Iowa, 270.

The term "family," in *Code 1887*, § 8207, providing that notices shall be served by delivering a copy to the person to be notified, or a member of the family, does not include a mere boarder, not related to the defendant. *Fowler v. Mosher*, 7 S. E. 542, 543, 85 Va. 421.

The word "family," in the rule that a man's dwelling house cannot be broken into in the execution of civil process against the occupier or any member of the family, includes not only the children and the domestic servants of the occupier, but also permanent boarders, or those who have made the house their home. "The purpose of the law is to preserve the repose and tranquillity of families within the dwelling house, and these may be as much disturbed by a forcible entry to arrest a boarder or a servant who had acquired by contract, express or implied, a right to enter the house at all times, and to remain in it as long as they pleased, as if the object were to arrest the master of the house or his children. A stranger, or perhaps a visitor, would not enjoy the same protection, for, as they have acquired no right to remain in the house, if the occupant should refuse admission to the officer after his purpose and his authority were made known, the law would consider him as conspiring with the party pursued to screen him from arrest. *Oystead v. Shed*, 13 Mass. 520, 523, 7 Am. Dec. 172.

#### Brothers and sisters.

A family is a collective body of persons who live in one house, under one head or management. The relations between them must be of a permanent or domestic character, not that of those abiding temporarily together as strangers. It is not necessary that it should consist of a husband and wife and children. Thus a brother who, with his sister, keeps house for his younger brothers and

sisters, partly contributing to their support, is the head of a family, though neither a husband nor a father, and though the children be not wholly dependent on him. *Duncan v. Frank*, 8 Mo. App. 286, 289.

The word "family" is of an indefinite nature. It may consist of a man and his wife alone, or of the man and his wife and any number of children, and even grandchildren. Where it was contended that a person was to take care of a place for the living of himself and family, the word "family" could not be construed to include brothers and sisters of the person who was the petitioner. *Rhodes v. Turpin (Tenn.)* 57 S. W. 351, 357.

The term "family," in the meaning of the exemption statutes, includes the relation existing by the act of the debtor, an unmarried person, in keeping house with an unmarried sister and two brothers, all under 21 years of age, whose parents are dead, and whose support and education are assumed by the debtor. *McMurray v. Shuck*, 69 Ky. (6 Bush) 111, 99 Am. Dec. 662.

"The accepted definition of the word 'family,' as given by lexicographers, and approved in many cases, seems to be the collective body of persons who live in one house under one head or manager. The number of persons thus living together is not at all important, except that there must be more than one, as it is quite certain that two persons may constitute a family, e. g., husband and wife, father and child. It is well settled that it is not necessary that the relation of husband and wife, nor that of parent and child, should exist, in order to constitute a family." As used in a statute exempting a homestead to the head of a family, it includes a brother and an invalid sister living with him, and who is dependent on him for support. "As was said by *Simpson, C. J.*, in *Rollings v. Evans*, 23 S. C. 816, the term 'family' is not to be taken in a restricted sense, but in its ordinary sense, which includes persons living in one house, and under one head or manager; and, as was said by *Moses, C. J.*, in *Garaty v. Du Bose*, 5 S. C. (5 Rich.) 493, the exemption was intended not alone as the benefit to the head of a family, but to those whose relations to the head demand, on the one hand, support and protection, and, on the other, require a contribution, by the aid of their labor, to the maintenance and conduct of the general establishment to which they belong." *Moyer v. Drummond*, 10 S. E. 952, 32 S. C. 165, 7 L. R. A. 747, 17 Am. St. Rep. 850.

It is not necessary that the relation of husband and wife, or father and child, or mother and child, should exist in every case, to constitute a family. The man who controls, supervises, and manages affairs about the house is the head of the family, and such a man need not necessarily be a husband or a

father. Thus a defendant living with his widowed sister and her children, and supporting them, while his sister kept house for him, will be held to be the head of the family. *Wade v. Jones*, 20 Mo. 75, 78, 61 Am. Dec. 584.

Where a bachelor lived on a farm owned by him, a widowed sister living with him, making the farm her home, and having her furniture there, and paying no board, they constituted a family, though she, owing to ill health, spent much of her time visiting with other relatives; and he was entitled to the farm as a homestead exempt from seizure for his debts, as the head of a family, under the Missouri homestead exemption laws. *Bailey v. Comings* (U. S.) 2 Fed. Cas. 367, 368.

The phrase "head of a family," as employed in the Constitution, relative to homesteads, does not include one who supports a brother, he being unable to support himself. *National Bank of Lancaster v. Slavin's Trustee*, 1 Ky. Law Rep. 315.

Where a husband separated from his wife without a divorce, and thereafter, until his death, lived with his sister, paying no board, and was nursed and cared for by her as a member of the family, a policy on the brother's life issued in favor of the sister by a company organized under an act authorizing the insured to name the beneficiary, who might be one of the family, or an heir, was valid, though the wife of deceased survived him. *Hosmer v. Welch*, 107 Mich. 470, 475, 67 N. W. 504.

#### Children.

The primary meaning of the word "family" is "children," and it must be so construed in a statute, unless the context shows that it was used in a different sense. *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727.

The meaning of the word "family" is, *prima facie*, "children," and that construction ought to be adhered to unless some reason be found in the context of the will for extending or altering it. *Gregory v. Smith*, 9 Hare, 708, 710; *Whelan v. Reilly*, 3 W. Va. 597, 610. In a will providing that the property shall be applied to the support of "said Samuel and his family in such sums, in such manner, and at such times as the trustee may think proper, support in this clause being meant to include education as to the children," it is apparent that the testator means children, in the use of the word "family," and that the will must be construed to mean Samuel and his children. *Whelan v. Reilly*, 3 W. Va. 597, 610.

In a will providing that certain property should be divided among his sisters and their respective families, the word "family" should

be construed to mean such as it does in common parlance, and means children. In *re Parkinson's Trust*, 1 Sim. (N. S.) 242, 243.

A will giving property to be divided between testator's brother and sister's families means children, and excludes their parents. *Barnes v. Patch*, 8 Ves. 604, 607.

The word "family" as used in the constitutional provision relating to homestead exemption, has not been limited in its general and ordinary meaning as defined by Webster. "The Constitution has not given any definition of the term 'family,' nor indicated any of its necessary ingredients. The term must therefore be taken in its ordinary sense. In this sense, it is not essential that it should include children." *Bradley v. Rodelsperger*, 3 S. C. (3 Rich.) 226, 227. The term, in its ordinary sense, includes persons living in one house, and under one head or manager. Defendant's wife was dead, and his son, living with him as a part of his family, being a married man, was, no doubt, entitled to have his wife and children with him, if he had any children. Certainly this constituted a family, of which the defendant was the head. *Rollings v. Evans*, 23 S. C. 316, 327.

A will directing the application of money for the benefit of testator's son and his family should be construed to mean the children of such son, rather than the wife and children. *Raynolds v. Hanna* (U. S.) 55 Fed. 783, 786.

As used in a will bequeathing certain sums to the brother of testator, to be used to support himself and family, it includes his two children, and hence is not void for indefiniteness. *First Nat. Bank v. Miller*, 49 N. Y. Supp. 981, 982, 24 App. Div. 551.

In a will giving property to the testator's children, and providing that, in case either of them should marry into a certain person's family, such child should only receive a nominal sum, the word "family" should be construed in its primary meaning of children. The word "family" is not a technical one, but is one of flexible meaning. Its primary meaning, however, is children, and so it must be construed in all cases unless the context shows that it was used in a different sense. *Phillips v. Ferguson*, 8 S. E. 241, 243, 85 Va. 509, 1 L. R. A. 837, 17 Am. St. Rep. 78.

The word "family," as used in an order for the removal of a pauper widow and her family, is *prima facie* her children. *Overseers of Chillisquaque v. Overseers of Lewisburg* (Pa.) 2 Penny. 487, 490.

In a notice that S. and his family had become chargeable as paupers, the word "family" cannot be construed to include the children of S. *Inhabitants of Bangor v. In-*

habitants of Deer Isle, 1 Me. (1 Greenl.) 329, 332.

"Family," as used in a will, under a power to give to any of the male descendants of the family of the testator bearing his surname, the word "family" means children of the testator; they being the stock of descent, and their male descendants of the testator's surname the objects of the trust. *Dominick v. Sayre*, 5 N. Y. Super. Ct. (3 Sandf.) 555, 569, 8 N. Y. Leg. Obs. 278, 279.

The word "family" is a collective noun, necessarily including two or more persons. As used in a will placing property in the possession of testator's wife for the family, and for the education and support of his daughter, and in trust for his son, it includes the wife and daughter, but excludes the son. *In re Simons' Will*, 11 Atl. 36, 37, 55 Conn. 239.

The expression "increase in the family," in common parlance, means the addition of a child, and, in a will, indicates that the word "family" was used in the sense of "children." *White v. Briggs*, 15 Sim. 17, 30.

Where trustees were directed to pay \$700 annually during his life, and to increase his annuity to \$1,200 if he should marry and have a family, the term "marry and have a family" was used in its ordinary sense, and meant that, if S. should get married and have issue of such marriage, the annuity should be increased, and that, if S. should get married and have a family by being a housekeeper, the trustees were not authorized to pay the increase until there should be children born to S. either by his present wife or a future marriage. *Spencer v. Spencer* (N. Y.) 11 Paige, 159.

Const. art. 2, § 32, declares that the family homestead of the head of each family residing in the state shall be exempt from attachment and levy or sale on any mesne or final process issued from any court, etc. Held, that the word "family" is used in the ordinary sense, and that it is not necessary that it should include children. Hence it is not necessary, in order that persons be the heads of families, that they should have children. *Bradley v. Rodelsperger*, 3 S. C. (3 Rich.) 226, 227.

#### Same—Adopted children.

An informally adopted daughter and her husband, residing with a childless widower, do not constitute his family, so as to enable him to retain a homestead. *Johnson v. Fletcher*, 54 Miss. 628, 28 Am. Rep. 388; *Hill v. Franklin*, 54 Miss. 632, 636.

"Family," as used in Comp. Laws, c. 94, providing for the organization of mutual benefit associations to secure to the family or heirs of any member on his death a certain

sum of money, should be construed to include the insured and the beneficiary, who were an old man and a young woman, not related, but who lived for many years in the same household, and had treated each other as father and daughter. The word "family" is an expression of great flexibility. It is applied in many ways. It may mean the husband and wife, having no children, and living alone together, or it may mean children, or wife and children, or blood relatives, or any group constituting a distinct domestic or social body. It is often used to denote a small, select corps attached to an army chief, and has even been extended to whole sects, as in the case of the Shakers. *Carmichael v. Northwestern Mut. Ben. Ass'n*, 16 N. W. 871, 51 Mich. 494.

The phrase "head of the family," as employed in the Constitution, relative to homesteads, does not include one who supports a nephew whom he has adopted, and whose parents were unable to support him. *National Bank of Lancaster v. Slavin*, 1 Ky. Law Rep. 315. See, also, *In re Lambson* (U. S.) 14 Fed. Cas. 1047, 1048.

#### Same—Adult children.

The term "family" does not include adult children living separately, and not forming a part of the same household. *Wood v. Wood*, 28 Atl. 520, 521, 63 Conn. 324 (citing *Smith v. Wildman*, 37 Conn. 384; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. 452; *Andrews v. Andrews*, 54 Tenn. [7 Helak.] 234).

The term "family," as used in the constitutional provision that the homestead of a family, after the death of the owner thereof, shall be exempt from the payment of debts, etc., refers only to the widow and minor children of the deceased, and does not refer to the adult heirs of the deceased. *Weber v. Short*, 55 Ala. 311.

Under the Constitution, and the laws in obedience thereto, defining a "homestead," and securing it to the family, children, when they arrive at the age of majority, and especially where they leave the family of their father and mother and become a separate family, are not included in the term "family." They are not any longer a part of the old family, and cannot force a partition of the homestead as against the mother and minor children. *Hoffman v. Neuhaus*, 30 Tex. 633, 636, 98 Am. Dec. 492.

Code 1873, § 2214, providing that the expenses of the family are chargeable on property of both husband and wife, cannot be construed to include necessities furnished an adult child who lives at its parents' home as a member of the family; the necessities being furnished on the request of such child. *Blachley v. Laba*, 18 N. W. 658, 659, 63 Iowa, 22, 50 Am. Rep. 724.

A son or daughter of a parent, residing with the parent, does not cease to be a member of the family when he or she respectively arrives at the age of 21 or 18, from that fact alone. They must have ceased to reside with their parents in order to break the family relation. *Chicago & N. W. Ry. Co. v. Chisholm*, 79 Ill. 584, 587; *Strawn v. Strawn*, 53 Ill. 263, 274.

A widow occupying a house and lot as her homestead, with two adult children living with her, constitutes a family, so as to render the house not liable for her debts. The evident purpose of the law in placing homestead property beyond the reach of creditors was to enable the supporter of the household to provide for those living with him, and dependent upon him for support; and the debtor, being a bona fide housekeeper, and occupying the lands as a homestead with his wife or children, adults or infants, or with his brothers and sisters, father and mother, grandfather or grandmother, or those dependent upon him, and whom, by reason of his relation to or connection with, he is under obligation to maintain, must be regarded as a housekeeper with a family. *Brooks v. Collins*, 74 Ky. (11 Bush) 622, 626.

#### **Same—Children by former marriage.**

An insurance policy providing that the amount shall be payable to the family of the said deceased will be construed to include the wife and children, though one of the children was a son by a former wife. *Hutson v. Jensen*, 85 N. W. 689, 693, 110 Wis. 26.

"Family," as used in a will empowering a trustee to maintain testator's son or his family out of the income of the trust estate, includes any wife, child, or children of such son, though one of the children is merely a stepbrother of the others, and does not live with them and their mother, the widow of the son. In wills the word "family" ordinarily means next of kin. *Smith v. Greeley*, 30 Atl. 413, 414, 67 N. H. 377.

The term "family," as used in Acts 1837, c. 13, authorizing the setting apart of a yearly support for the widow and her "family," included children who, being under age, resided with the parent, and constituted part of the family. It made no difference, as to the sense of the word, whether the children were offspring of a former marriage, or of the children of the intestate. In every case they constituted a part of the widow's family, and should be considered in making the allowance. *Sanderlin v. Sanderlin's Administrator*, 31 Tenn. (1 Swan) 441, 443.

#### **Same—Grandchildren.**

The word "family" is an uncertain term. It may extend to grandchildren as well as children. *Robinson v. Waddelow*, 3 Sim. 134, 137.

"Family," as used in St. 8 & 9 Wm. III, c. 30, providing that the parish to which a pauper's certificate is granted is obliged to receive the certificated person, together with his or her family, includes the person's wife and those children who live with him, but does not extend to grandchildren. In common parlance, the family consists of those who live under the same roof with the paterfamilias—those who form his fireside. But when they branch out and become the heads of new establishments, they cease to be part of the father's family. *Rex v. Inhabitants of Darlington*, 4 Term R. 797, 800.

The term "family," as used in the treaty between the United States and the Creek tribe of Indians, entered into on March 24, 1832, providing that, when certain land was surveyed, 90 principal chiefs of the Creek tribe should select one section each, and every other head of a Creek family should select one half section each, which tracts should be reserved from sale for their use for the term of five years, unless sooner disposed of by them, should be construed to include a grandmother and her grandchildren. *Ladiga v. Roland*, 43 U. S. (2 How.) 581, 588, 11 L. Ed. 387.

A will provided that, after the payment of debts and certain legacies, the remainder should be equally divided between the families of certain persons. It is held that, if by the term "families" the testator meant their children, then the grandchildren are excluded; if he meant their descendants or issue or heirs living at his death, then, according to the principle of our decisions, grandchildren must also be excluded, as their father was then living, and the descendants' issue or heirs would take by right of representation. *Townsend v. Townsend*, 31 N. E. 632, 633, 156 Mass. 454.

In construing a will by which testator bequeathed to his son James 100 of his negro slaves, "to be drawn by lot in families from among those usually residing on the plantations, in which number shall be particularly included the nurse, Murriah, and her children and her sister, and their children, and the drivers, Ben, Cato, and their families," the court said with respect to the construction of the word "families": "We think it best to restrain it to the wives and children of the slaves Ben and Cato, living in the house with them, for as much as testator has himself, in the foregoing part of the bequest of Murriah and her sister, confined it to their children, and not extended it to their grandchildren." *Pringle v. McPherson* (S. C.) 2 Desaus. 524, 544, 545.

#### **Same—Married children.**

"Family," as used in a will directing that a certain place, when no longer occupied by any member of testator's family, should be

sold, cannot be construed to include testator's married son. *Wood v. Wood*, 28 Atl. 520, 521, 63 Conn. 324.

In the statute providing that actions may be maintained against a married woman on any contract made by her for the benefit of her family, the term "family" refers to those living with her as a part of her household; and a contract for groceries to be furnished a married woman's son and his family, living by themselves, was not within the meaning of the statute. *Hart v. Goldsmith*, 51 Conn. 479.

In a will making a residuary devise and bequest to the children of testator's son, and providing that the use and improvement of such legacy should be appropriated during his son's life to the maintenance and support of his family, the term "family" should be construed to include a son of such son, though having a family of his own. *Whiting v. Whiting*, 70 Mass. (4 Gray) 236, 241.

The term "family," as used in Code 1873, § 3072, exempting certain debts due the head of a family from liability to garnishment, means the collective body of persons who live in one house, under one head or manager. The relations existing between such persons must be of a permanent and domestic character, not an abiding together temporarily as strangers. There need not of necessity be dependence or obligation growing out of the relation. It includes persons living in the family who are not boarders. Where a son and his wife live with the father, who provides for them as for children or dependents, together with his domestics, they together constitute a family. *Tyson v. Reynolds*, 3 N. W. 469, 470, 52 Iowa, 431.

The term "family," within the meaning of the homestead law, was held not to include a married daughter who upon the death of her husband returned to her mother's homestead. *Trammell v. Neil* (Tex.) 1 Posey, Unrep. Cas. 51, 54.

A family, within a homestead exemption statute authorizing such exemption to the head of a family, consists of those members of the household who are dependent on the householder for support, or to whom the householder owes some duty, and does not, therefore, include a married son engaged in cultivating a separate estate, so as to entitle him to homestead exemption in his interest in the estate of his deceased father, held as a homestead by his mother. *Brokaw v. Ogle*, 48 N. E. 394, 397, 170 Ill. 115.

Under the probate law of 1870, providing that the property reserved over for sale, or its value, does not form any part of the estate of the decedent where a constituent of the family survives, the nature of the family intended is left undefined by the Constitution, but the framers thereof had in view a

family composed of a head, a wife and children. The law contemplated, as a general rule, that, as the older members of the family grew up and left the parental roof, the legal relations of the family as it had formerly existed ceased, and that other and new relations and families would spring up. A mere aggregation of individuals under one common roof, though devoting their attention to a common object—the promotion of their mutual interests and social happiness—as the inmates of a boarding house, or persons employed in the capacity of servants, does not constitute a family. The following general rules determine when the relation of a family, as contemplated by law, exists: (1) It is one of social status, not of mere contract; (2) legal or moral obligation on the head to support the other members; (3) corresponding state of dependence on the part of the other members. So a married daughter, with her child, residing with her mother, formed no constituent member of the family, such as to entitle her or her child to the homestead on the death of the mother. *Roco v. Green*, 50 Tex. 483, 490.

In common parlance, the family consists of those who live under the same roof with the paterfamilias—those who form the fire-side—but, when they branch out and become the heads of new establishments, they cease to be part of the father's family. Hence it is held that, under a statutory provision for the support of a family of a decedent, a minor daughter married at the time of her father's death, and not a member of his household, but living with and supported by her husband, is not entitled to a year's support, as a member of the family. *Goss v. Harris*, 43 S. E. 734, 785, 117 Ga. 345.

#### Same—Stepchildren

"Family," as used in a statute providing that a man, in order to gain a settlement in a town, must reside therein for seven years, and during such residence support himself and family, includes those only whom the pauper is under legal obligation to support. A man is not bound to support the children of his wife by a former husband. *Town of Manchester v. Town of Rupert*, 6 Vt. 291, 294.

Testator's will directed that a house be purchased, to be held in trust for the benefit of a servant during his life, and to revert to his family on his decease. Held, that the servant's "family" meant his widow and children, and did not include his stepson. *Bates v. Dewson*, 128 Mass. 334, 335.

"Family," as used in the Constitution and by-laws of the Supreme Council of the Royal Arcanum, permitting benefits to be made payable to the members of the family of the member—designating them—should be construed to include stepchildren of the

member who had been brought up in his household, even though they had married and left such household. The word "family" is as broad as the word "relatives," which includes relatives by affinity as well as by blood. *Tepper v. Supreme Council of Royal Arcanum*, 47 Atl. 460, 461, 61 N. J. Eq. 638, 88 Am. St. Rep. 449.

#### **Descendants.**

The term includes such relatives as are descendants of a common ancestor. *Marsh v. Supreme Council A. L. of Honor*, 21 N. E. 1070, 1072, 149 Mass. 512, 4 L. R. A. 382 (citing *Worcester Dict.*; *Webster Dict.*)

As used in a codicil of a will which was in the form of a letter to testator's wife, saying, "I should be unhappy if I thought it possible that any one not of your family should be the better for what, I feel confident, you will so well direct the disposal of," the word "family" is not confined to children only, but would include descendants in every degree. The words "of your family" are equivalent to "of your blood"; that is, "your posterity," "your descendants." The word "family" is one of doubtful import, and may, according to the context, mean children or next of kin. *Williams v. Williams*, 1 Sim. (N. S.) 358, 371.

The word "family" has been judicially construed as meaning heir apparent, relations, or next of kin, according to the subject-matter of the devise. 2 Jarm. 27, 28, 30, 31. In *Tolson v. Tolson* (Md.) 10 Gill & J. 159, 174, it was said that the word "family," as used in that will, did not designate any individual persons with sufficient certainty. Although, standing alone, the word "family" may be insufficient to point out with certainty the persons to be benefited by the devise, the word in a will devising certain property in trust to W., and that the trustee should receive the rents, issues, and profits, and pay the same for the support of said W. and his family, and, upon his death, that the land shall pass to his children and heirs, was said to indicate that the testator designed his bounty should flow in the broadest stream among the descendants of W. *Taylor v. Watson*, 35 Md. 519, 527.

In a clause of a conveyance excepting and reserving one-half acre of land of the tract granted, being the old family graveyard of the grantor, together with the right of way to the said graveyard, "family" should be construed as including the grantor's lineal descendants, and not as limited to the immediate members of his household. *Brown v. Anderson*, 11 S. W. 607, 608, 88 Ky. 577.

#### **Heir at law or issue.**

In Act May 24, 1807, providing "that, whereas by the law as it now stands, the issue of an ancestor by one venter cannot in-

herit to the issue of such ancestor by a different venter, whereby the real estate of an ancestor in some instances goes out of the family, to the great injury of the remaining issue of such ancestor," and prescribes a remedy therefor, the word "family" must be taken in that sense in which the law uses it when speaking of descents; and, in that restriction, it will comprehend only the descendants of such ancestor—those who have his blood running in their veins—and in that sense is nearly, if not quite, of the same import as the word "issue." *Pierson v. De Hart*, 3 N. J. Law (2 Penning.) 481, 487.

In a will devising property over in case a beneficiary should die without leaving a family, the word "family" means issue or heirs of the body. *Beilstein v. Beilstein*, 45 Atl. 73, 74, 194 Pa. 152, 75 Am. St. Rep. 692.

The word "family," it seems, is restricted to mean the heir at law, as in a devise to A. for life, with remainder to his family, A.'s heir at law will be entitled. *Heck v. Clippenger*, 5 Pa. (5 Barr) 385, 389.

In a will devising land to a certain person and her heirs forever, in fullest confidence that after her decease she would devise the property to testator's "family," such term means heir at law. *Wright v. Atkins*, 17 Ves. 255, 261, 1 Turn. & R. Ch. 143, 158, 19 Ves. 299.

#### **Husband and wife together.**

A husband and wife living together constitute a family, within the meaning of the word as used in Const. 1868, art. 9, § 1, providing for the exemption of a homestead held by the head of a family from execution. *Miller v. Finegan*, 7 South. 140, 26 Fla. 29, 6 L. R. A. 813. So, also, under the Illinois exemption law (Rev. St. c. 52, § 13). *Berry v. Hanka*, 28 Ill. App. 51, 55; *Kitchell v. Burgwin*, 21 Ill. (11 Peck) 40, 44.

For some purposes, a husband and wife may be regarded as a family. *Kitchell v. Burgwin*, 21 Ill. (11 Peck) 40; *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727.

#### **Husband or wife as member.**

Under *Sayles' Ann. Civ. St. arts. 2375, 4963, 4967*, requiring that, on sale of an estray, at least three persons besides the family of the person estraying the animal must be present, that party and two persons not members of his family do not fulfill the requirement, he himself being a member of his own family. *Floyd v. State* (Tex.) 68 S. W. 690, 691.

While ordinarily in a devise or bequest for the benefit of a granddaughter of testator and her family the word "family" would not be held to mean her husband, it may by the context and other provisions of the will

be made to appear that the husband was intended to be included, and, where that so clearly appears to be the intent of testator, the word "family" should be so construed as to include the husband. *MacLeroth v. Bacon*, 5 Ves. 159, 167.

"Family," as used in a will giving to a certain person and his family certain tracts of land, should be construed to include the person named, and his wife and children. *Hall v. Stephens*, 65 Mo. 670, 672, 27 Am. Rep. 302.

The word "family," in a will giving property in trust for testator's sons and daughters and their families, would include the wife of a son, if she continued to reside with him, or be entitled to support from him. *Bradlee v. Andrews*, 137 Mass. 50, 52.

"Family," as used in a will directing that testator's business should be carried on by his wife and son for the mutual benefit of the family, should be construed to include the wife. The word "family" is capable of many applications. Under different circumstances, it may mean a man's household, consisting of himself, his wife, children, and servants; it may mean his wife and children, or his children, excluding the wife; or, in the absence of wife and children, it may mean his brothers and sisters, or his next of kin; or it may mean the genealogical stock from which he may have sprung. All these applications of the word and some others are found in common parlance. *Blackwell v. Bull*, 1 Keene, Ch. 177, 181.

A bequest to a man "in trust for the use and benefit of his wife and family during his life" does not include an allowance for the benefit of such man. The word "family" is narrowed or enlarged in some instances to include near kindred; in others, heirs, or to express relations by marriage. But we can find no case where the husband is properly included within the description. *Wallace v. McMicken's Ex'rs*, 13 Ohio Dec. 345, 347, 2 Dism. 564.

The husband, while living with his wife, is part of the family, and medical attendance of which he stands in need is a family necessity. *Leake v. Lucas*, 93 N. W. 1019, 1020, 65 Neb. 359, 62 L. R. A. 190.

#### Kindred or next of kin.

The phrase "of her own family" as used in a devise to testatrix's sister, stating that it is testatrix's desire that the sister bequeath such property to those of her own family, is equivalent to "of her own kindred," or "her own relations." "The word 'family' may, according to the context, have different significations in different wills. It may be restrained to mean only the children. On the

other hand, in *MacLeroth v. Bacon*, Lord Alvanley thought it might be extended to mean the husband, so as to include him as one of the family. But in this will it is clear that by "those of her own family" the testatrix means her own kindred." *Cruwys v. Colman*, 9 Ves. 319, 324.

Where a donor recommends that the donee at her death shall give his personal property to such of his family or his relations as he shall think fit, and the donee does not exercise the power, the word "relations" or the word "family" will be construed "next of kin," in the absence of special expressions conveying a different import. *Grant v. Lyman*, 4 Russ. 292, 297.

The word "family" has been judicially construed as meaning the heir apparent, relations, or next of kin, according to the subject-matter of the devise. *Taylor v. Watson*, 35 Md. 519, 527.

#### One person.

"Family," as used in the Code, providing for an exemption of homestead of the family, means a collective body of persons who live in one house, and under one head or manager; and a lone individual does not come within this definition. *Fullerton v. Sherrill*, 87 N. W. 419, 420, 114 Iowa, 511 (citing *Rock v. Haas*, 110 Ill. 528; *Keiffer v. Barney*, 31 Ala. 192; *Emerson v. Leonard*, 65 N. W. 153, 154, 96 Iowa, 311, 59 Am. St. Rep. 372 (citing *Tyson v. Reynolds*, 52 Iowa, 431, 3 N. W. 469).

The term "family," in Comp. Laws, §§ 2449, 2467, exempting homesteads from judicial sale, and providing that every family, whether consisting of one or more persons, in actual occupancy of a homestead, shall be deemed and held to be a family, includes a single person in the actual occupancy of a homestead; and hence a contention that a widower without children could only be deemed a family in case he and his wife had resided on the land, as a home, before her death, could not be sustained. *Hesnard v. Plunkett*, 60 N. W. 159, 161, 6 S. D. 73.

Under the statutes of Utah Territory, declaring that the homestead of every family resident in the territory should be exempt, and declaring that a widow or widower, though without children, shall be deemed a family while continuing to occupy the house used at the time of the death of the husband or wife, and that every family, whether consisting of one or more persons, in actual occupancy of a homestead, as defined, shall be deemed and held to be a family, within the meaning of such statute, a single man, who never had a wife or child, does not constitute a family, and is not entitled to the homestead exemption. *McCanna v. Anderson*, 71 N. W. 769, 770, 6 N. D. 482.



A woman who has never been married and has no children is not a family, or head of a family, so as to be entitled to hold a homestead. *Woodworth v. Comstock*, 92 Mass. (10 Allen) 425.

A divorce destroys the existence of that which gave the right of exemption, and destroys the right of homestead as to that family. Two new families may be created by a divorce dissolving the bans of matrimony, or they may be created by the subsequent marriage of the parties. The words "homestead of the family" have a well-defined meaning, and are not open to a construction which would include the homestead of a single person without a family; and where the homestead is set apart to the wife for life, and she continues to occupy it as a homestead, she, having no family, is not entitled to a homestead therein. Her interest as a wife in the homestead—for such it may be called—was destroyed when she ceased to be a wife by decree of divorce. At the point of time at which she acquired it, she became a single woman, and was no longer a constituent of the family. *Bahn v. Starcke*, 34 S. W. 103, 105, 89 Tex. 203, 59 Am. St. Rep. 40.

#### Same—Husband or wife alone.

The term "family," as used in Code, §§ 2463, 2464, providing for an exemption from execution, to a certain amount, of the property of a person having a family, does not include a married woman residing in Alabama who has no children, and whose husband is a nonresident. This object of the statute is to reserve property from liability to the payment of debts for the use of families within the state, and not for the use of isolated individuals without any dependencies. *Keiffer v. Barney*, 81 Ala. 192, 196.

Under the exemption law (Rev. St. c. 52, § 13), prescribing the personal property which shall be exempt to the head of a family, and (section 15) providing that "when the head of the family shall die, or desert or not reside with the same, the family shall be entitled to all the benefits conferred on the head of the family residing with the same," when the family consists only of the husband and wife, and he deserts her, she constitutes the family, and she is entitled to the exemption. The husband, being the head of the family when residing with the same, is entitled to the exemption. The husband and wife then constitute a family. *Berry v. Hanks*, 28 Ill. App. 51, 55.

Under Civ. Code, § 34, subsec. 4, providing that, if a husband desert his wife, she may bring or defend for him any action which he might bring or defend, and St. 1899, § 1697, exempting from attachment certain property of persons with a family resident in this commonwealth, a wife abandoned by

her husband can maintain an action for the wrongful attachment of property so exempted to the husband; it being held that, in spite of the abandonment, the parties constitute a family, within the meaning of the statute. *Baum v. Turner*, 76 S. W. 129, 130, 25 Ky. Law Rep. 600.

The term "family," within the meaning of a statute exempting certain property from execution for the benefit of every family of the state, does not include a father in the state having a family in another state, although he is accompanied by a son not shown to be dependent on the father. *Allen v. Manasse*, 4 Ala. 554, 556.

Under Const. art. 15, § 9, and Comp. Laws 1879, p. 437, § 1, exempting from forced sale property which is occupied as a residence by the family of the owner, it was held that the family did not necessarily consist of the husband and wife and children, and might sometimes consist of persons who did not sustain any such relation to each other; that even one person might hold property as a homestead, where the homestead right had first been obtained, within the meaning of the homestead laws, and then all the persons of the family, except one, died or abandoned the homestead; but that the owner of property, residing thereon, while his family, consisting of a wife and children, had never been in the state, but resided elsewhere, without any intention of coming to the state and residing upon the property, did not constitute a family, within the meaning of the homestead laws. *Farlin v. Sook*, 26 Kan. 397, 403.

For some purposes the husband and wife may be regarded as a family. *Regan v. Zeeb*, 28 Ohio St. 483; *Cox v. Stafford* (N. Y.) 14 How. Prac. 519. But a bond given by a husband to provide for the support of a family which he abandoned is invalid where the wife, only, has been abandoned. *People v. Sagazel*, 59 N. Y. Supp. 701, 705, 27 Misc. Rep. 727.

#### Same—Surviving child.

The term "family," in the charter of a benefit association, stating its object to be the relief of the distressed, injured, sick, or disabled members of the association, and their immediate families, was construed to include the only child of a member, though his wife was divorced for her fault; and it was held that the fund should be payable to such child, in preference to a brother of deceased, even though the latter lived with deceased. *Norwegian Old People's Home Soc. v. Wilson*, 52 N. E. 41, 43, 176 Ill. 94.

"Family," as used in Gen. St. 1899, §§ 2242, 2244, 2245, providing that a homestead of a decedent shall be exempt from his debts while occupied as a residence by the family,

will not be held to apply to a sole surviving child of decedent, who left no widow. *Batley v. Barker*, 64 Pac. 79, 62 Kan. 517, 56 L. R. A. 33.

#### Same—Surviving husband.

"Family," in its ordinary signification, refers to two or more persons. As used in Code Civ. Proc. § 1474, which allows the court, under certain circumstances, where the homestead has vested in the heirs, to assign it for a limited period to the family of the deceased, it will include those living under the same roof as kindred or dependents, and under one head—those constituting a "family," as that term is generally understood. But this word, as used in the statute, is not to be so restricted in its meaning as to exclude the only survivor of the family of which the deceased was a member. Therefore, where a wife dies, leaving no children, and it does not appear that the wife's father had made his home with her, or that his circumstances were such that she was under any obligation to support him, the husband may be regarded as the family. In *re Lamb's Estate*, 30 Pac. 568, 571, 95 Cal. 397.

A family is a collective body of persons who live in one house and under one head or manager, as the group comprising a husband and wife and their dependent children, so that a husband, after the death of his wife without children, would not constitute a family. *Betts v. Mills*, 58 Pac. 957, 958, 8 Okl. 351 (citing *Deere v. Chapman*, 25 Ill. [15 Peck] 610, 612, 79 Am. Dec. 350).

The word "family" denotes a collective and communal body, and not a single individual. No one may be his own family. So it is held, under the Constitution, exempting homesteads only when occupied by the family of the owner, that a homestead claimant, whose wife is dead, and whose children had grown to maturity and moved away, and who has no one else associated with him in the family relation, cannot continue to retain the homestead exemption; the court remarking that there is no more reason for continuing the homestead exemption to a sole adult survivor of the family than there would be to confer it on him in the first instance. *Ellinger v. Thomas*, 67 Pac. 529, 530, 64 Kan. 180; *Zimmerman v. Franke*, 9 Pac. 747, 750, 34 Kan. 660.

#### Same—Surviving wife.

In an application for membership in a mutual life insurance company, designating the applicant's family as a beneficiary, the word "family" means the person who constituted his household or family. Where the widow is the only surviving member, she alone fills the meaning of the term "family," though at the time of the application the

applicant had a daughter who was a member of his family. *Brooklyn Masonic Relief Ass'n v. Hanson*, 6 N. Y. Supp. 161, 58 Hun, 149.

"Family," as used in a will directing a trustee to pay the testator's widow such part of the income of the estate as should be necessary for the maintenance of testator's family, should be construed to include the wife and children while they lived together, thus constituting a family. After the death of the children without issue, the sale of the dwelling house, and the ceasing to keep house by the widow, she cannot be regarded as constituting a family, for whose support the provision in the will was designed. *Bowditch v. Andrew*, 90 Mass. (8 Allen) 339, 341.

In Probate Act, § 123, providing that the court may set aside for the use of the family of the deceased certain property, etc., "family" should be construed to include a childless widow. In *re Walley's Estate*, 11 Nev. 260, 263.

The word "family," as used in the constitution of a benefit society, providing that a certain sum should be paid at the death of each member to his family, should be construed to include the widow of a deceased member, to the exclusion of the father of deceased, who was not a member of his family, or dependent upon him for support. *O'Neal v. O'Neal*, 58 S. W. 529, 530, 109 Ky. 113.

"Families," as used in a will giving property to the surviving members of the testatrix's brother's and sister's families, should not be construed to denote the households gathered around parents, but the stocks of descent. A widow can sometimes be regarded as included in a provision for the family, but seldom, if ever, unless the husband was first to share. *Hoadly v. Wood*, 42 Atl. 263, 264, 71 Conn. 452.

#### Same—With servants.

The word "family," in a statute exempting certain property of the head of a family from execution, includes a widow keeping a boarding house, and having a lady friend residing with her as one of the family, and female servants. *Race v. Oldridge*, 90 Ill. 250, 252, 32 Am. Rep. 27.

Under Const. art. 2, § 32, exempting certain property belonging to a head of a family from forced sale, a single man, having no person under the same roof with him, and no person on his premises, save servants and employes, whose continuance with him is but temporary, and whom he may change from time to time, and they at their own will may depart his services, does not constitute a family. *Garaty v. Du Bose*, 5 S. C. (5 Rich.) 493, 499; In *re Lambson* (U. S.) 14

Fed. Cas. 1047, 1048. The case of a single woman dwelling in such an establishment must necessarily fall within the same principle. *Murdock v. Dalby*, 13 Mo. App. 41, 47.

#### Parents.

In Acts 1848, § 8, providing that a married woman may bind her estate by contract for necessities for the support and maintenance of the family, the word "family" should be construed to include the mother of such married woman, so that a contract for her funeral expenses will bind the married woman. *Bair v. Robinson*, 108 Pa. 247, 249, 56 Am. Rep. 198.

As used in Code, § 1245, exempting the homestead of every head of the family, the term "family" includes a man and his mother, living in his house and under his control. *Parsons v. Livingston*, 11 Iowa, 104, 106, 77 Am. Dec. 135.

The term "family," as used in an act regulating the service of process, and authorizing service by leaving a copy with a member of the family of the defendant, if he cannot be found at his place of residence, is not confined to persons under the control or in the employ of the defendant, but includes, as well, all persons residing with the defendant at his place of abode. Thus, where a son takes his mother to live with him, she is a member of his family. *Ellington v. Moore*, 17 Mo. 424, 428.

The word "family" may be of narrow or broad meaning, as the intention of the party using the word, or the intention of the law when using it, may be made to appear. It is not easy to disassociate ourselves from the notion that the mother is always and under all circumstances of the family of the child, yet in point of fact it is a part of the course of nature for the child, when grown into manhood, to separate from the mother and establish an independent family, which is dependent on him, and which primarily he seeks to provide for. The mother may be a portion of such family by remaining with it and being dependent on the relationship. *Lister v. Lister*, 73 Mo. App. 99.

#### Servant or employé.

The relation of the master and servant, or, more properly speaking, of employer and employee, as it ordinarily exists in this country, does not constitute a family. There being no duty to support. *Calhoun v. Williams* (Va.) 82 Grat. 18, 22, 34 Am. Rep. 759.

Under a statute allowing service of summons by leaving a copy with one of defendant's family, defendant's employé is not one of his family. *Mayer v. Griffin*, 7 Wis. 82, 84.

"Family," as used in 2 Rev. St. p. 204. § 169, exempting all necessary wearing apparel for a householder and his family from execution, cannot be construed to include a person nearly 40 years old living in a family, in which he received his board and some other compensation for the services he rendered, he purchasing his own clothing. *Bowne v. Witt*, 19 Wend. (N. Y.) 475.

"Family," as used in Wagner's St. p. 88, § 33, providing that a widow shall keep all the wearing apparel of a family, etc., necessary for the subsistence of the widow and her family for 12 months, means "children, or those persons who have a legal or moral right to expect to be fed and clothed by another; but those who have neither a legal nor moral claim to the bounty of another cannot be placed in that category, and hence it does not include assistants" necessary to keep the house or manage the farm. *Whaley v. Whaley*, 50 Mo. 577, 581.

"The most comprehensive definition of a 'family' is a number of persons who live in one family, and under one management or head. It is not necessary that they should eat in the house where they live. It is not necessary that they shall be employed in the house or about it, nor is it material that they are hired. The precise question is, are they living together under one head or management? which is a question of fact, and not of law." The term, in a policy of fire insurance requiring a building to be occupied by a family throughout the year, was construed to include two men servants, employes of the insured, who were staying in the building, taking their meals at an adjoining hotel, and working around the premises. *Poor v. Hudson Ins. Co.* (U. S.) 2 Fed. 432, 438. *Contra*, *Poor v. Humboldt Ins. Co.*, 125 Mass. 274, 277, 28 Am. Rep. 228.

#### Surviving husband or wife and children.

It is claimed that, in the term "head of a family," the word "family" means husband, wife, and child. We are not disposed to take that view of it. We think that is too narrow and limited a construction to be placed upon the statute. We think that where a man is living with his minor child, or a woman is living with her minor child, on the homestead, she should be entitled to a homestead, the same as if husband and wife were living together and occupying the homestead. *Weber v. Beler*, 7 O. C. D. 381, 386, 14 Ohio Cir. Ct. R. 277.

"Family," as used in the exemption laws, includes a man and his daughter (the wife and mother being dead) who live together, the daughter being dependent upon the father for support. *Cox v. Stafford* (N. Y.) 14 How. Prac. 519, 521.

In construing a statute exempting the property of the head of a family from execution, in its application to a case where the defendant had only one child dependent on him for support, and had no wife, and did not keep house, but he and his child boarded at different houses in the same town, the court held that he was the head of a family. *Sallee v. Waters*, 17 Ala. 482, 486.

By the word "family," in a bequest by testator "for the benefit of the family," testator doubtless intended his widow and children. *Osgood v. Lovering*, 33 Me. 464, 468.

"Family," as used in the constitution of a mutual benefit association, declaring that the benefit fund could only be paid to the family of the deceased member, or those dependent on him, means the widow and children. *Britton v. Supreme Council of Royal Arcanum*, 18 Atl. 675, 677, 46 N. J. Eq. (1 Dick.) 102, 19 Am. St. Rep. 376.

"Family," as used in Code Civ. Proc. § 1468, relating to the setting aside of homesteads for a family, is synonymous with and represents the surviving wife or husband and children, if any. *Hoppe v. Hoppe*, 37 Pac. 894, 895, 104 Cal. 94 (citing *Phelan v. Smith*, 100 Cal. 158, 170, 34 Pac. 667).

In a will making a gift in remainder to testator's family, the word "family" must be taken to mean his widow and children. *Bates v. Dewson*, 128 Mass. 334, 335.

Rev. Code 1845, p. 396, declares that "if any person or persons in the nighttime shall willfully disturb the peace of any neighborhood, or of any family, by loud and unusual noise," etc., "he shall be adjudged guilty of a misdemeanor, punished," etc. Held, that the word "family," as used in such section, meant the persons living together, forming a single household, and that a married woman who had been abandoned by her husband for five years could be properly held to be the head of a family; she living with her children in one household, and supervising their affairs. *State v. Slater*, 22 Mo. 464, 466.

"Family," as used in Laws 1842, c. 157, which exempts certain household furniture of a person having a family, for which he provides, from sale on execution, includes a woman and her infant son; the son being dependent on his mother for support. *Cantrell v. Connor* (N. Y.) 6 Daly, 224, 225.

Under the Constitution, giving the head of a family the homestead, where there is but one child the family would be the head and such child. And where a widow has one child, she and the child are the family—she the head, and the child the other part of it—or it may be that the child alone would constitute the family of which she was the

head. *Rountree v. Dennard*, 59 Ga. 629, 630, 27 Am. Rep. 401.

The term "family," within the meaning of the exemption laws, includes a man and his daughter who live together after the death of the wife and mother. *Cox v. Starford* (N. Y.) 14 How. Prac. 519, 521.

The use of the words "family for whom he provides," in a statute exempting the necessary household furniture of a householder, or a person having a family for whom he provides, operates to extend the exemption statute not only to householders, but to any one providing for a family. Thus a woman and her infant son, who lives with and is dependent on her for support, may be deemed to constitute a family for which she provides. *Cantrell v. Conner* (N. Y.) 51 How. Prac. 45, 46.

#### Two or more families residing together.

"The word 'family,' in its more general and comprehensive sense, consists of all those who live in the same house and have one head or manager. When one man controls, supervises, and manages the affairs about a house, he is in the largest sense the head of the family, and all who reside in the house are members of the family. But it may be a large boarding establishment, in which half a dozen distinct families reside. We do not suppose that these families lose their character as such because they reside under another man's roof, and feed at a common table. So two families with equal rights and claims may reside together, and, though thus associated, they all constitute, in a large sense, one family—still, the father or mother, as the case may be, exercising a distinct control over the children and servants belonging to them, constitutes each a distinct family." *Bachman v. Crawford*, 22 Tenn. (3 Humph.) 213, 215, 39 Am. Dec. 163.

#### Two single persons.

Under the colonization laws, authorizing grants of certain quantities of land to families, it is held that two single men uniting in a petition for a grant of land constitute a family, within the meaning of the statutes. The court, however, observe that if it were an open question, for the first time to be determined, they might feel no hesitation in deciding that two single men did not constitute a family, in the proper acceptation of that term, but that what should be held to constitute a family, within the contemplation of the colonization laws, was a question of judicial construction and interpretation, which had been submitted to the authorities appointed and empowered to execute those laws, and that as it had been settled by contemporaneous construction and usage that two single men may be regarded as a family, within the meaning of those

laws, that determination will not be overthrown by the courts. The original construction of the term was doubtless given because it was the policy of the law to encourage the immigration of single men, as well as men with families, and that it should be construed and administered so as to accomplish that purpose. *Hardiman v. Herbert*, 11 Tex. 656, 659.

**Unmarried man with mistress and children.**

The word "family," as used in the homestead exemption, includes an unmarried man, his mistress, and their two illegitimate children, who have lived on certain land as a home for more than five years. To constitute a family, within the meaning of the law giving the homestead exemption, the persons who dwell together must not, in the fact of so doing, be violators of the law of the land. If, however, the relation between the appellant and the children who lived with him be such as to constitute those persons a family, then his homestead right must be recognized and enforced, notwithstanding the fact that his cohabitation with the woman was illegal, for the homestead right, existing by reason of and for the protection of the family, of whomsoever composed, cannot be defeated by the fact that the head of the family permitted another person, with whom he unlawfully cohabited, to dwell on the land. *Whitehead v. Tapp*, 69 Mo. 415. This case, in its facts, is much like the case of *Bell v. Keach*, 80 Ky. 42, 44. In that case property claimed to be exempt was seized and sold under execution; and it appeared that the person claiming the exemption, without marriage, had lived with a woman for about 20 years, she passing for his wife, and having by him one son, then about 19 years of age. The father, mother, and son constituted the family; and, in disposing of the case, the court said: "It may be true that the appellee and the woman residing with him were living in adultery, and that he may not have been strictly under any natural or legal obligation to support her; and counsel for appellant contends that it would be against public policy, as well as the spirit of the exemption laws, to treat persons thus dwelling together as entitled to its salutary provisions. But it is not necessary to decide how the exemption laws should be construed or administered, if they alone were to be affected. For, whatever may be their offenses, or the relation they sustain to each other, appellee was under a moral and natural obligation to support his infant son, though he may have been born out of wedlock; and, so far from beginning against, it is in accordance with, the spirit of the law, as well as public policy, that he should be treated as a member of the family of appellee." *Lane v. Phillips*, 6 S. W. 610, 69 Tex. 240, 5 Am. St. Rep. 41.

**As relating to time of death.**

A testator, in making a bequest to "H. and family jointly," meant those persons constituting H.'s heirs or household at the time of the death of the testator and the taking effect of the will, and did not include a child born after testator's death. *Langmaid v. Hurd*, 15 Atl. 186, 137, 64 N. H. 526.

The term "families of deceased persons," in the by-laws of a beneficial association organized for the purpose of rendering pecuniary aid to the families of deceased persons or their heirs, etc., has reference to the family of a member at the time of his death. *Tyler v. Odd Fellows' Mut. Relief Ass'n*, 13 N. E. 360, 363, 145 Mass. 134.

The word "family," in a will devising property in trust for the benefit of a certain person and his family until he shall discharge his present liability, when he is to receive the property absolutely, will be construed as meaning the persons in being at testator's decease, or the children of such person, so as not to violate Gen. St. § 2952, against perpetuities. The term "family" is not one which has a definite and invariable meaning. In its widest sense, it may be used to include the domestic servants employed in the household. If the word had been followed in the will by a proviso that it should not be deemed to include any person except such as were in being at his decease or children of such persons, it is clear that no perpetuity would have been created. We are of opinion that the law, in effect, supplies such a limitation. *St. John v. Dann*, 34 Atl. 110, 111, 66 Conn. 401.

**As designation of paupers.**

The word "family," in a notice by a town furnishing support to a pauper of another town, where the pauper is claimed to be settled, that support has been furnished to the pauper and his family, is not a sufficient designation of the members of the family to whom the support has been furnished. *Inhabitants of Shutesbury v. Inhabitants of Oxford*, 16 Mass. 102, 104; *Inhabitants of Ware v. Inhabitants of Williamstown*, 25 Mass. (8 Pick.) 388, 389; *Inhabitants of Embden v. Inhabitants of Augusta*, 12 Mass. 307, 308; *Inhabitants of Dover v. Inhabitants of Paris*, 5 Me. (5 Greenl.) 430.

The word "family," in a notice by a town furnishing support to paupers, to the town chargeable therewith, that the support has been furnished to the family of A., is a sufficient designation of the paupers. *Inhabitants of Sheburne v. Inhabitants of Buckland*, 124 Mass. 117, 118.

**As too indefinite to support a devise.**

Where the word "stock" or "family" is used in a will, the court confines it to the head of the family, to preserve the devise

from being void from uncertainty. *Crossly v. Clare*, Amb. 397.

The word "family," in a devise to T. and his family, was held not sufficiently definite to designate any individual persons with sufficient accuracy, and therefore the devise was held to have failed. *Tolson v. Tolson* (Md.) 10 Gill & J. 159, 174.

The word "family," as used in a devise of certain money in trust for the purpose of aiding any of the members of testator's family, though it originally may have been uncertain, and thought to have embraced all relations, to the most distant cousin, yet the term has received such a construction by the courts as to restrain it within certain limits, so that the devise was not void for uncertainty. *Hill's Ex'rs v. Bowman* (Va.) 7 Leigh, 650, 655.

The word "family" is exceedingly vague and indefinite—so much so that, upon the sole ground of the uncertainty of its application, Lord Thurlow, in *Harland v. Trigg*, 2 Brown, Ch. 42, refused to decree the execution of a power as a trust; but his decision is not very consistent with subsequent cases, and it may now be considered as settled that it is the duty of the court to give, if possible, a definite meaning to the ambiguous term "family," when used in a will as designating a beneficiary, by a reference to the context of the will and to the relative situation of the testator. Thus it has been held that the word "family," in a power to give to the male descendants of the family of the testator, bearing his surname, means children of the testator. *Dominick v. Sayre* (N. Y.) 3 Sandf. 555, 569.

#### FAMILY CONCERNS.

Business of, see "Business."

#### FAMILY EXPENSE.

Any expense incurred by order of the head or manager of a family body, or by his authority, express or implied, to maintain it in being as then constituted, although in one sense personal to the party whose relations were threatened, would seem to be in another a proper family expense. *Cole v. Bentley*, 26 Ill. App. 260, 262.

Under a statute declaring either or both the husband and wife liable for expenses of the family, the term includes all expenditures incurred for, on account of, and to be used in, the family. *Smedley v. Felt*, 41 Iowa, 588, 590.

In an action brought against a husband and wife to recover against both for goods sold and delivered, on the ground that the same were chargeable against both as family expenses, under Code 1873, § 2214, providing that "the expenses of the family are

chargeable on the property of both husband and wife, or either of them," the court charged the jury that "the only criterion in ascertaining what is a family expense is the determination of the question whether the expenditure was for the family use, or incurred for, on account of, and to be used in, the family." In construing this charge, the appellate court said: "We think the instructions should have gone one step further, and the jury instructed it was essential, to constitute a family expense, the thing for which the expenditure was incurred should have been used or kept for use in the family. It is the expenses of the family which under the statute are chargeable on the property of both husband and wife. This implies, we think, that the expense must have been incurred for something used in the family, kept for use, or been beneficial thereto." *Fitzgerald v. McCarty*, 8 N. W. 646, 648, 55 Iowa, 702.

"Family expenses," as used in Acts 1878, § 10, providing that the expenses of the family and the education of the children are chargeable on the property of both husband and wife, or either of them, and, in relation thereto, they may sue jointly or separately, means the expenses incurred for or on account of a family, without limitation or qualification as to kind or amount. *Phipps v. Kelly*, 6 Pac. 707, 711, 12 Or. 213.

Where a husband and wife are by statute rendered liable for family expenses, the fact that goods sold were for the use of the family, and were so used, but were charged to the husband individually, or that he had given his note for the same, will not exonerate the wife from liability on the original indebtedness, so long as the note remains unpaid. *Holmes v. Page*, 19 Or. 232, 233, 23 Pac. 961.

The defendant, in writing, forbade plaintiff to sell goods to his wife on his account, he having no account with the plaintiff; but, notwithstanding such order, plaintiff sold goods to the wife, which were used in the family, and sued the husband therefor. Under the statute providing that "the expenses of the family are chargeable upon the property of both husband and wife, or either of them, and, in relation thereto, they may be sued jointly or separately," the court held that the husband had a right to determine where the goods for which he was to pay should be bought, and that he was not liable for those purchased of plaintiff, in the absence of evidence that he neglected to supply all the goods necessary for the family. *Devendorf v. Emerson*, 24 N. W. 515, 516, 66 Iowa, 698.

#### Borrowed money.

The family expenses for which the estate of the wife may be held jointly liable

do not include money borrowed to purchase or pay for articles which in themselves were in fact proper items of family expense. *Davis v. Ritchey*, 8 N. W. 669, 670, 55 Iowa, 719.

#### Carriage.

"Expenses of the family," as used in Hill's Code, § 2874, should be construed to include the cost of a buggy purchased and brought into the family and used by the family. "The term 'expenses of the family' is broad enough to subject the wife to liability for articles that are purchased and used in the family, whether they were necessary or not. In fact, the articles may have been entirely unnecessary, or such as the family ought to have dispensed with, for they may have been of no utility; but, if they were purchased and used in the family, they are family expenses." *Dodd v. St. John*, 29 Pac. 618, 22 Or. 250, 15 L. R. A. 717.

#### Farm machinery.

The term "family expenses," in Code, § 2214, providing that the expenses of the family are chargeable upon the property of both husband and wife, or either of them, means something quite different from whatever may contribute either remotely or directly to the support of a family. A reaping machine is not a family expense. *McCormick v. Muth*, 49 Iowa, 536, 537. Nor is a breaking plow. *Russell v. Long*, 52 Iowa, 250, 252, 3 N. W. 75.

#### Furniture.

Expenses of the family, within the meaning of Code 1873, § 2214, are not limited to necessary expenses, but apply to the expenses of the family, without limitation or qualification as to kind or amount. What is a necessary depends very much upon the wealth, habits, and social position of the party. What is a family expense depends upon none of these conditions. Thus a piano was held to be a family expense. If a cook stove comes within the meaning of the statute, so must also wardrobes, bureaus, bedsteads, and the like; and it will be found impossible to exclude, upon any well-defined legal principle, a knitting and a sewing machine. The latter are useful and convenient, and they minister largely to physical comfort, in facilitating the discharge of household duties, yet they cannot properly be deemed as necessities; and, if these which enhance domestic comfort by facilitating enjoyment are admitted, upon what principle shall a musical instrument which increases the social enjoyment in a different manner, but in a larger degree, be excluded? *Smedley v. Felt*, 41 Iowa, 588, 590.

The term "family expenses," in Code, § 1455, providing that the expenses of the family shall be chargeable upon the property of

both husband and wife, or either of them, includes a cook stove and fixtures, when purchased for that use and used in the house, as they come as property within the meaning of the statute, as clothing, food, or medicine. *Finn v. Rose*, 12 Iowa, 565, 567.

An organ purchased for use in a family is a family expense, which may be charged against the separate property of the wife. *Frost v. Parker*, 21 N. W. 507, 508, 65 Iowa, 178.

#### Jewelry.

The term "family expense," in Code, 1873, § 2214, is limited to expenses included for something used in the family, or kept for use, or beneficial thereto, and may include articles which enhance domestic comfort and increase social enjoyment. A diamond shirt stud worn by a husband for personal use and adornment is a family expense for which the wife is liable. *Neasham v. McNair*, 72 N. W. 773, 103 Iowa, 695, 38 L. R. A. 847, 64 Am. St. Rep. 202.

"Expenses of the family," as used in Rev. St. c. 68, § 15, making expenses of the family chargeable against the property of both husband and wife, include articles purchased for use by one member of the family, if it conduces in any substantial manner to the welfare of the family generally, but do not include disbursements for articles for personal adornment and for display, where it in any way conduces to the welfare of the family generally; and hence a ring purchased by the husband or wife for his or her own use is not a family expense, within the statute. *Hyman v. Harding*, 44 N. E. 754, 755, 162 Ill. 357.

The term "family expense" includes a gold watch chain, ring, and other articles of jewelry purchased by the husband, and worn by his wife and daughter. *Marquardt v. Flaughner*, 14 N. W. 214, 60 Iowa, 148.

#### Medical attendance or service.

Within the meaning of a statute providing that the expenses of the family shall be chargeable upon the property of both husband and wife, or either of them, medical services rendered to the husband is a family expense, for which the property of the wife may be held liable. *Younkin v. Essick*, 29 Ill. App. 575; *Walcott v. Hoffman*, 30 Ill. App. 77; *West Chicago St. R. Co. v. Carr*, 67 Ill. App. 530, 532; *Cole v. Bentley*, 26 Ill. App. 260, 261, 262; *Mueller v. Kuhn*, 59 Ill. App. 353, 356; *Glaubensklee v. Low*, 29 Ill. App. 408, 414, 415; *Illingworth v. Burley*, 33 Ill. App. 394, 395.

Under a statute providing that "the expense of the family and the education of the children are chargeable upon the property of both husband and wife, or either of them,

and in relation thereto they may be sued jointly or separately," a wife may be sued for the bill of a physician for services rendered to her at the husband's request; such services being a family expense. *Schrader v. Hoover*, 45 N. W. 734, 80 Iowa, 243.

The term family expenses, in Code, § 2214, do not include the expenses for the treatment of an insane wife in a hospital for the insane provided by the state. "The treatment is intended partly as a great charity towards the unfortunate subjects, and partly as a protection and relief to society. The treatment furnished the defendant's wife was not given her by any contract with him, either express or implied. It cannot then, we think, be regarded as a part of the family expenses." *Delaware County v. McDonald*, 46 Iowa, 170, 171.

#### **Provisions and clothing.**

Provisions and clothing for the family are family expenses, so as to be chargeable against both husband and wife, or either, under the statute. *Hawke v. Urban*, 18 Iowa, 83, 85.

#### **Rent of house.**

The rent of the house occupied as a residence is a family expense, within Rev. St. c. 68, § 15. Food, clothing, medicine, household and kitchen furniture, and a ladies' watch and chain, all have been held to be within the statute, when provided for and actually used by the family. A physician's bill for services rendered to a husband in his illness at his request was a family expense, for which the wife was liable. It would seem that a house to live in is as essential to the expense of the family as household furniture or cooking utensils, so that rent for its use cannot fall to be regarded as such an expense. *Illingworth v. Burley*, 33 Ill. App. 394, 395; *Houghteling v. Walker* (U. S.) 100 Fed. 253, 254.

#### **Support distinguished.**

The expenses of a family are something quite different from whatever may contribute, either remotely or directly, to the support of the family. The merchant purchases goods on credit, and, by selling them at a profit, supports his family, or a farmer purchases cattle on credit, and, by selling them at a profit, contributes to the comfort and support of his family, but the indebtedness so contracted does not become a family expense. So, where an employé of the husband worked part of the time about his coal and liquor business, and the rest of the time as a servant about the dwelling of the family, only the latter services were family expenses for which the wife was liable. *Von Platen v. Krueger*, 11 Ill. App. (11 Bradw.) 627, 629, 631.

### **FAMILY FREEDOM.**

The term "family freedom," as used in an advertisement by which an attorney guarantees "family freedom in a month," can mean nothing else than freedom from family ties, and is undoubtedly an advertisement to aid in procuring divorces. *People v. Smith*, 66 N. E. 27, 28, 200 Ill. 442, 93 Am. St. Rep. 206.

### **FAMILY GRAVEYARD.**

In a conveyance of a tract of 20½ acres, containing a clause excepting and reserving one-half acre of the land of said tract, being the old family graveyard of the grantor, together with the right of way to said graveyard, the words "old family graveyard" were used not simply to identify the land excepted, but to indicate the purpose of the exception, and the persons benefited by it, and to mean that the exception was for the sole purpose of a graveyard, and for the interment only of persons answering the description of members of the grantor's family, which included his lineal descendants generally. *Brown v. Anderson*, 11 S. W. 607, 608, 88 Ky. 577.

### **FAMILY HOMESTEAD.**

The homestead act of 1851, in exempting the family homestead from execution, means the residence or dwelling place of a family. *Barney v. Leeds*, 51 N. H. 253, 265.

Under the Constitution, the family homestead consists of dwelling house, outbuildings, and lands appurtenant, not to exceed the value of \$1,000, and the yearly product thereof. *Trimmer v. Winsmith*, 41 S. C. 109, 115, 19 S. E. 283, 285.

### **FAMILY HOTEL.**

A family hotel is a hotel which is not designed for the accommodation of transient guests of casual boarders, but in which rooms and suites are taken by families or individuals for some period. The cooking in such hotels is done by the proprietors, and is not allowed in the rooms of the guests. *Musgrave v. Sherwood* (N. Y.), 54 How. Prac. 338, 357.

### **FAMILY LIBRARY.**

A statute exempting the family library of a debtor from execution includes the professional library of a physician. "It is true that the statute does not designate of what the family library shall consist, and it may be of books of a miscellaneous, but instructive, character are contemplated, without reference or regard to the scientific books which may constitute the chief means of the debtor's support. The head of a family, whose



vocation is one of the learned professions, will be protected to a reasonable extent in the possession of books which are to him necessary for the revelations they contain, and a reasonable amount of miscellaneous matter, as well for his use as for the use of his family." *In re Robinson* (N. Y.) 3 Abb. Prac. 466, 467.

#### FAMILY MEETING.

The family meeting is an advisory jury—one, however, differing radically from an ordinary jury, in this: that it is constituted with direct reference to its members having a bias, a partiality, and an affection for those on whose affairs it is called to deliberate. *In re Bothick*, 11 South. 712, 714, 44 La. Ann. 1037.

#### FAMILY NAME.

A family name is that portion of the name of an individual which is employed by him in common with other members of his family, and therefore fails to designate any particular individual. *State ex rel. Malinckrodt v. McGrath*, 75 Mo. 424, 426.

#### FAMILY NECESSARIES.

See "Necessaries."

#### FAMILY PHYSICIAN.

The phrase "family physician" is in common use, and has no technical significance. It may be sufficiently defined as signifying the physician who usually attends and is consulted by the members of a family in the capacity of a physician. In this definition, the word usually is employed because it is not necessary to constitute a person a family physician, as the phrase is used in an application for life insurance, that he should invariably attend and be consulted by the members of a family in the capacity of a physician, and because it is not necessary that he should attend and be consulted as such physician by each and all of the members of a family. Where the family of insured consists of himself, his wife and two or three children, a person who usually attended and was consulted by the wife and children as a physician would be the family physician of the insured, although he did not usually attend on, and was not usually consulted by, the insured himself. *Price v. Phoenix Mut. Life Ins. Co.*, 17 Minn. 497, 519 (Gil. 473, 495), 10 Am. Rep. 166; *Reid v. Piedmont & A. Life Ins. Co.*, 58 Mo. 421, 424.

#### FAMILY PICTURES.

The term "family pictures," as used in a statute exempting family pictures from

levy and sale on execution, etc., does not include the private gallery of a connoisseur, nor costly pictures, the subject of which are not connected with the family in whose possession they are found. *McMicken v. Board of Directors of McMicken University*, 2 Am. Law Reg. (N. S.) 489, 490.

#### FAMILY RELATION.

"When a son works for his father, or a father works for his son, without any express or actual contract made that wages shall be paid for the services, the person so serving cannot recover anything for the services so performed, for the law will not imply any promises to pay for such services, but assumes that the work was done without any expectation of pay or wages, and was done under what is known in our law as the 'family relation,' where each individual works for the benefit and comfort of the whole family, and without any expectation of receiving compensation or pay outside of the general comforts of all." *Curry v. Curry* (Pa.) 11 Atl. 198, 199.

#### FAMILY RESIDENCE.

A covenant of a deed not to erect any building less than three stories in height, the same to be adapted for use as a family residence, is not infringed by the erection of an apartment house—the word "family" in no sense qualifying the purpose to which the building should be put—and the structure does not cease to be a family residence, though more than one family resides therein. *Sonn v. Heilberg*, 56 N. Y. Supp. 341, 342, 38 App. Div. 515.

#### FAMILY SETTLEMENT.

A family settlement is an agreement made between a father and his son or children, or between brothers, to dispose of property in a different manner from what would otherwise take place. A voluntary deed made by a father to an adult son without any prior consultation or agreement with the son, and intended to convey to him certain land in consideration of natural love and affection, does not constitute a family settlement. *Wiley v. Hodge*, 80 N. W. 75, 76, 104 Wis. 81, 76 Am. St. Rep. 852.

#### FAMILY USE.

1 Wagner's St. p. 604, § 9, providing that all such provisions as may be found on hand for family use, not exceeding a certain sum in value, when owned by the head of a family, are exempt from execution, cannot be construed to include groceries forming the stock in trade of a head of a family; they not being segregated from the rest of the

stock of provisions in his store. State ex rel. Nussberger v. Conner, 73 Mo. 572, 575.

"Family uses," as used in Act April 22, 1859, § 4, providing that all water companies formed under the provisions of the act should furnish pure, fresh water to the inhabitants of the city and county, or city or town, for family uses, means such as are appropriate to the individual needs of the members of a household, and to the needs of the household in its collective capacity. It is the inhabitants, the men, women, and children, who are to be supplied with water for family uses—domestic uses, drinking, lavation, etc. The occupants of the jail—keepers and prisoners—have such family uses, as well as the best-ordered family of parents, children, and servants. The fact that the city and county, as an incident to its power and duty to establish a jail, has the right and obligation to furnish necessary water for keepers and prisoners, does not change the nature of the uses for which such water is supplied, which are still family uses. These remarks will apply to the hospitals, poorhouses, schools, and other institutions to which water is supplied to the occupants or inhabitants for family uses. Spring Valley Waterworks v. City and County of San Francisco, 52 Cal. 111, 120.

## FANATICA MANIA.

A form of insanity, characterized by a morbid state of religious feeling. Ekin v. McCracken (Pa.) 11 Phila. 534, 540.

## FANCY.

"Fancy," as used in an order for fancy cranberries, refers to quality, and does not mean berries of a particular variety or possessing any one unusual quality, but generally berries of excellent quality. Cape Cod Cranberry Sales Co. v. Whitney, 59 N. E. 70, 71, 177 Mass. 385.

## FANCY BREAD.

Fancy bread is bread containing milk, butter, and sugar. Commonwealth v. McArthur, 25 N. E. 836, 152 Mass. 522.

## FANCY GOODS.

Firecrackers and fireworks constitute an ordinary and usually a well-recognized portion of the stock of fancy goods in Yankee notion stores. Barnum v. Merchants' Fire Ins. Co., 97 N. Y. 188, 192.

## FAR.

See "As Far as."

## FARCE.

A farce is a short dramatic entertainment, in which ludicrous qualities are greatly exaggerated for the purpose of exciting laughter, and it is not necessary to its creation that it should be written. It may be impromptu, and be an interlude, the details having been agreed upon, and each actor left to his own capacity to make it harmonious or ludicrous, so that an impromptu performance of such a farce in a public garden on a raised stage is within an act of the Legislature requiring a license for theatrical or dramatical performances. Society for Reformation of Juvenile Delinquents v. Diers (N. Y.) 60 Barb. 152, 156; Id., 10 Abb. Prac. (N. S.) 216, 220.

## FARCY.

Farcy is a disease of horses in the nature of scabies (itch) or mangy (eruptions of the skin), and is contagious. Wirth v. State, 22 N. W. 860, 862, 63 Wis. 51.

## FARE.

"Fare is a rate of charge for the carriage of passengers." McNeal Pipe & Foundry Co. v. Howland, 16 S. E. 857, 860, 111 N. C. 615, 20 L. R. A. 748; Chase v. New York Cent. R. Co., 26 N. Y. 523, 528.

In common acceptance, when used in relation to common carriers, "fare" relates to the passengers, and not to freight, while compensation embraces both, so that a statute authorizing street surface railroads to convey persons and property in cars for compensation signifies an intention to authorize the carriage of freight. De Grauw v. Long Island Electric Ry. Co., 60 N. Y. Supp. 163, 167, 43 App. Div. 502.

## FARINA.

Within the tariff act, farina does not include starch made from potatoes, and pulverized or ground so as to take the form of a fine flour or powder; the term "farina" being applied in the act to the food preparation made from that portion of the wheat kernel which contains the largest percentage of gluten. Union Nat. Bank v. Seeberger (U. S.) 30 Fed. 429.

## FARM.

See "Fee Farm"; "Homestead Farm."  
All my farm, see "All."

A farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated or made up of many parcels. In re Drake (U. S.) 114 Fed. 229, 231.

A testator, in devising his "farm at Bovington," meant all of the farm situated at that place, and not a part thereof. *Goodtitle v. Paul*, 2 Burrows, 1089, 1094.

Certain words usually employed in a lease, as "house," "farm," "land," and the like, have, if necessary, a very wide meaning, and, where such general and comprehensive terms are employed, all things usually comprehended within the meaning thereof will pass, unless the circumstances of the case show very clearly that the intention of the parties was otherwise. *Riddle v. Littlefield*, 53 N. H. 508, 508, 16 Am. Rep. 388.

Where a lease describes the property as a "farm" or "homestead farm," the description is sufficiently ambiguous to render parol evidence admissible to show just what land was meant thereby. *Locke v. Rowell*, 47 N. H. 48, 51.

The term, as to extent, is indefinite and ambiguous. A. grants or devises a farm situated in a particular parish in a particular town. He may own divers farms or divers tracts of land in the same parish. Such a grant or devise would not be void for uncertainty. It would not be void merely because from the face of it it could not be ascertained which farm was intended, or how many tracts were intended to be included in the term "farm." A. devises a farm by the description of his home farm. What must be meant by "home farm" must in many instances be collected from the knowledge of persons acquainted with the devisor's own understanding of his home farm at the time of making the devise, and whether a particular piece of land was or was not, in the mind of the devisor, a part of his home, is frequently to be ascertained by proof other than that arising from the will itself. *Doolittle v. Blakesley* (Conn.) 4 Day, 265, 271, 4 Am. Dec. 218.

The word "farm," as used in a devise of "the farms which I now occupy," was used in the common popular sense. According to Plowden, the technical definition of farm would only extend to land in the possession of a tenant, for, says he, "it must not only be a capital messuage and land attached to it, but it must have been let or devised to another, for, if it has always been reserved in the hands of the inheritor thereof, it has not the name of a farm." *Jackson v. Sill* (N. Y.) 11 Johns. 201, 215, 6 Am. Dec. 363.

#### As all connected lands.

B., after adding a small piece of woodland to a farm which he had owned for a long time and lived upon, made a mortgage of his farm to S. in these terms, "My home farm, containing seventy acres, more or less," but so described by metes and bounds as to exclude the said woodland. He afterwards

made a conveyance of his lands and of his personal property to an assignee, in trust to pay his creditors. In this conveyance to the assignee the only description of his lands which would include the woodlands was this: "The farm whereon I live, containing about seventy acres, which estate is now under mortgage to S." Held, that the "farm whereon I live" would, if unrestricted by any subsequent limitation in the deed, pass all the lands lying adjacent to and occupied with the homestead. Held, further, that notwithstanding the clause, "which estate is now under mortgage to S.," the woodland would pass by the conveyance to the assignee. *Wheeler v. Randall*, 47 Mass. (6 Metc.) 529, 533.

A mortgage describing the premises as the "farm" known as the "T. Place," including all the buildings thereon, the mills, water power, machinery, and fixtures belonging thereto, and being the same estate which was conveyed to him by B. by her deed, to which deed and the record thereof reference is duly made for a description of the premises, should be construed to include a small parcel of land on which stood the only mill of the mortgagor, with the connected buildings, which were not included in the deed from B. *Auburn Congregational Church v. Walker*, 124 Mass. 69, 71.

In a deed of land conveying a certain lot, giving the number, and adding, "being the said farm on which the said K. now lives," such phrase is not restrictive, and would not exclude from the operation of the deed an island in a stream opposite to the land, which was not occupied by K., where the said island came within the boundaries of the lot conveyed. *Kimball v. Schoff*, 40 N. H. 190.

Testator devised "all that my farm and plantation near C., conveyed to me by the heirs of my deceased wife, and where my son T. now resides, containing about eighty-five acres, more or less." The testator owned two parcels of land near C.—one a farm, containing about 72.62 acres, which had been conveyed to him by the heirs of his deceased wife, and the other containing 14.73 acres, which had been conveyed to him by L. These two parcels adjoined each other, and T. resided on the first-named parcel, but cultivated and used both. Held, that the word "farm," as so used, was a word of such indefinite meaning that from it alone it was impossible to determine that the testator intended to devise both pieces, since the argument that the word "farm" denotes a single thing, and has a definite signification, was exploded by Lord Ellenborough in the case of *Doe v. Lyford*, 4 Maule & S. 550, and that the word "farm" as so used in connection with the other words of description used in the devise should be construed to mean only the tract

of land which the testator had received from the heirs of his deceased wife, and that only such premises passed under such devise. *Evens v. Griscom*, 42 N. J. Law (13 Vroom) 579, 593, 36 Am. Rep. 542.

#### Artificial subdivisions as affecting.

A farm, as defined by Webster, means a parcel or tract of land consisting usually of grass land, meadow, pasture, tillage, and woodland, cultivated by one man, and usually owned by him in fee. Because such a body of land might be made up of land lying in different sections, or even townships, particular parcels would not constitute distinct farms within Rev. St. p. 444, § 6, providing that mortgaged premises consisting of distinct farms shall be sold separately; nor was the fact that such obtaining of land had been acquired through different ones make distinct farms of the parcels in the hands of the purchaser. The object with which a body of land is held by the owner or occupant, the manner of its use, and the conveniences attached to it for farming purposes, would be circumstances entitled to far more weight in determining whether it is to be considered as one farm than imaginary lines drawn by the government for its convenience in disposing of the land. *Worley v. Naylor*, 6 Minn. 192, 202 (Gil. 123, 128).

A farm is a body of land usually under one ownership, and devoted to agriculture—either to the raising of crops, pasturage, or both. It is not understood to have any necessary relation to, or be circumscribed by, political subdivisions. A "farm" may consist of any number of acres, of a quarter section or less or many quarter sections, of one field or many fields, and may lie in one township or county or in more than one. *Rodgers v. Caldwell*, 82 N. E. 691, 693, 142 Ill. 434.

#### As cultivated land.

Farm, according to Blackstone, is an old Saxon word signifying provisions, and it came to be used instead of "rent" because anciently the greater part of rents was received in provisions—in corn, in poultry, and the like—until the use of money became more frequent; so that a farmer—*firmarius*—was one who held his lands on payment of rent, or *feorme*; though at present, by a gradual departure from the original sense of the word, farm is brought to signify the very estate or lands so held upon farm or rent. In more modern times the word "farm" has received a more extended signification, and now denotes in this country, both in a popular and legal sense, a considerable tract of land, devoted in part at least to cultivation, with suitable buildings, and under the supervision of a single occupant, regardless of the nature and extent of his tenure. Any considerable tract or number of smaller tracts of land set apart for cultivation by a single

occupant, whether as tenant or owner, and upon which he resides, even though disconnected and separated by the lands of adjoining owners, if used together, would be regarded as constituting a single farm, and, if sufficiently identified, the whole would undoubtedly pass under the word "farm" in a testamentary devise. *Kendall v. Miller* (N. Y.) 47 How. Prac. 446, 448. See, also, *In re Drake* (U. S.) 114 Fed. 229, 231.

Rev. St. c. 138, § 7, subd. 4, declares that where a known farm has been partly improved, the portion of such farm that may have been left not cleared or not included, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated. Held, that the word "farm" in the statute is land held for cultivation, and cultivated in whole or in part, of whatever size, shape, or boundaries, and whether comprising several lots or parts of lots or less than one lot. *Pepper v. O'Dowd*, 39 Wis. 538, 547.

Farm, in the ordinary sense, implies land cultivated, used in some way for the purposes of production by the owner thereof or some other person having a temporary estate or interest therein, and land, whether covered by forest or not, adjoining or near, and used in aid thereof for the purposes of producing grain, fruit, hay, vegetables, and the like, and perhaps live stock, such as cattle, sheep, horses, swine, and the like. *State v. Kennerly*, 4 S. E. 47, 48, 98 N. C. 657.

#### Detached parcels.

By a farm is meant an indefinite quantity of land, some of which is cultivated. In many cases farms consist of detached parcels of land. Farms of such a kind are within the meaning of an act prohibiting turnpike companies from taking tolls from any persons passing from one part of his farm to another along the turnpike road. *Commonwealth v. Carmalt* (Pa.) 2 Bin. 235, 238.

Where testator devised a farm, describing it as the "T. farm," the word "farm" included a tract of meadow land, which had been generally known as a part of the farm when the will was executed, though it was an outlying tract not included in the farm proper. *Gafney v. Kenison*, 10 Atl. 706, 707, 64 N. H. 354.

Where a man owns a farm in one town and a parcel of woodland half a mile from his tract, a devise of his farm does not carry the woodland. *Allen v. Richards*, 22 Mass. (5 Pick.) 512, 514.

A will devising the farm whereon the testator lived, consisting of about a certain number of acres, should be construed to in-

clude a tract of land not immediately adjacent to that on which the testator lived, it having once been a part of the testator's farm, and never severed from it. "The word 'farm' is one of large import, both in England and in America, though perhaps somewhat different in the two countries. In the former it commonly implies estate leased; but, as to the term, it is said to be a collective word, consisting of diverse things gathered into one as a message, land, meadow, pasture, wood, common, etc. In this country a man is generally the owner of his farm, and it is a parcel of land used, occupied, managed, and controlled by one proprietor." *Aldrich v. Gaskill*, 64 Mass. (10 Cush.) 155, 157.

#### As estate.

A testator, after making certain devises, made a devise to his sons as follows: "All the remaining part of my homestead farm." It was held that the word "farm" was not as comprehensive as the word "estate," and the devise did not give the sons a fee in the farm, as it might have done if testator had used the word "estate," instead of farm. *Terrel v. Sayre*, 3 N. J. Law (2 Penning.) 598, 602.

#### As freehold estate.

The word "farm," as used by testator in devising "all my messuages or tenements, farms, lands, hereditaments, and premises, and all my other freehold lands and tenements whatsoever and wheresoever," applies only to freehold estates. *Arkell v. Fletcher*, 10 Sim. 299, 309.

#### Inclosure as limiting.

The word "farm," as used in the fifth section of the act concerning woods, marshes, and prairies (Rev. St. 1835), and prohibiting the firing thereof, ought not to be confined to that portion of a farmer's possession that is actually inclosed with a fence, since this is not the ordinary meaning of the word in the United States; and as used in this statute it ought to receive a liberal interpretation, so as to meet the necessities of the country, and, where the extent of its meaning is the question in a penal prosecution on the statute, it ought to receive the largest meaning, so as to exempt the party from the infliction of the penalty. The term should extend, therefore, to all the land of a person engaged in agricultural pursuits, and used for that purpose. *Finely v. Langston*, 12 Mo. 120, 123.

#### Lot synonymous.

As used in Laws 1823, p. 391, providing that, where the line between two towns divides any occupying lot or farm, the same shall be taxed in the town where the occupant lives, the word "farm" is synonymous

with "lot." *Saunders v. Springsteen* (N. Y.) 4 Wend. 429, 431.

#### Stock and tools included.

In a contract for the sale of a "farm," in which the vendor agreed to deliver a deed of such farm, including the stock and tools belonging thereto, for which the purchaser was to pay a part in cash and give his note, secured by a mortgage on the farm, for the balance, the term "farm" cannot be construed to include the stock and tools on the farm, so as to require a mortgage thereon. *Hallett v. Taylor*, 58 N. E. 154, 177 Mass. 6.

#### FARM BUILDING.

Laws, c. 421, § 2, provides that no mutual fire insurance company shall insure any property other than detached dwellings and their contents, farm buildings and their contents, and farming implements. It was held that a mutual fire insurance company had no power to insure an incubator building, the court saying that it was not a farm building, within the meaning of the statute. The words "farm" and "farmer" have well-recognized and definite meanings. A farmer is a man who cultivates a considerable tract of land. A man is not called a farmer, and his place is not called a farm, unless he has some considerable tract of land, and cultivates or uses it in some one of the usually recognized ways of farming. The only acre of land upon which the incubator was situated, and in which building the business of hatching chickens by artificial means and rearing them for the market was carried on, was not what is ordinarily known as a farm, nor the incubator building a farm building. *O'Neil v. Pleasant Prairie Mut. Fire Ins. Co.*, 38 N. W. 345, 346, 71 Wis. 621.

#### FARM CROSSINGS.

As road crossing, see "Road Crossing."

The term "farm crossing," as used in the railroad act requiring railroads to erect such crossings, should be construed to mean any passage across the railroad, whether built under as well as over it; but it is to be built under the road only in such cases when the road is so constructed as to admit of no proper passage over it. *Wheeler v. Rochester & S. R. Co.* (N. Y.) 12 Barb. 227, 228.

"Farm crossings," as used in the charter of the St. Paul & Sioux City Railway Co. (Sp. Laws 1864, c. 1, subc. 2, § 2), providing that the company shall construct and maintain all proper and necessary farm crossings over the line of the road, means crossings from one side to the other of the railroad track, whether by passing over it or under it. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500, 522 (Gil. 433, 452).

**FARM ENGINE.**

See "Steam Farm Engine."

**FARM HORSE.**

Under a statute exempting a farm horse from execution, a stud horse owned by a farmer is exempt, because, though used for breeding, he could be used for farming purposes as well as any other description of horse beast. *Tipton v. Pickens*, 31 Tenn. (1 Swan) 25, 26.

**FARM PRODUCT.****Growing crops and grain.**

"Farm products," as used in a policy of insurance insuring farm products while contained in a certain granary or barn, includes wheat. *Union Nat. Bank v. German Ins. Co.* (U. S.) 71 Fed. 473, 475, 18 C. C. A. 203.

"Farm product," as used in St. 11 Geo. II, c. 19, § 8, empowering the landlord to seize as a distress, after enumerating certain crops, any "other product whatsoever which shall be growing on any part of the estate demised," applies only to such products of the land as are subject to the process of becoming ripe and of being cut, gathered, made, and laid up when ripe. *Clark v. Gas-karth*, 8 Taunt. 431, 433.

"Farm products," as used in Rev. St. § 2517, as amended by Acts 1897, c. 4531, denouncing punishment against whoever takes and carries away from any farm, garden, orchard, etc., any farm products, fruits, etc., while possibly sufficient to include the un-severed fruit of the pineapple plant, is not sufficient to include the growing plant; that being part of the realty. *Long v. State*, 28 South. 775, 777, 42 Fla. 509.

**Live stock, meat, etc.**

Pub. Laws 1899, c. 11, § 51, imposes on individuals, firms, or their agents buying and selling fresh meats from stores, etc., in cities or towns of less than 8,000 inhabitants, an annual license tax, but exempts farmers vending their own "products," and without a regular place of business. Held, that the word "products," as used in the proviso exempting farmers, included live stock and fresh meats. *State v. Spaugh*, 40 S. E. 60, 61, 129 N. C. 564.

Swine, horses, neat cattle, sheep, cord wood, hay, as well as vegetables, fruit, eggs, milk, butter, lard, and other provisions for the mouth, are strictly "products of the farm," much more so, indeed, than beef, which, though it comes, like everything else, primitively from the soil, is as much a manufactured article as leather, cloth, or charcoal. The ox is a product of the farm; beef is a product of the slaughter house and the

shambles. *City of Philadelphia v. Davis* (Pa.) 6 Watts & S. 269, 279.

The common parlance of the country and the common practice of the country have been to consider all those things as farming products or agricultural products which have the situs of their production upon the farm, or which are brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, in contradistinction from manufacturing or other pursuits. The product of the dairy and the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil, and those who are engaged in the culture of the soil. *District of Columbia v. Oyster* (U. S.) 15 D. C. 285, 286, 54 Am. Rep. 275.

**FARMER.**

See "Supervising Farmer."

The term "farmer" means a man who cultivates a considerable tract of land in some one of the usual recognized ways of farming. *O'Neil v. Pleasant Prairie Mut. Fire Ins. Co.*, 38 N. W. 345, 346, 71 Wis. 621.

The term "farmer," within the meaning of the exemption law, applies to one who has been engaged in farming, though he does not own a farm, and his lease on a farm operated by him has expired several months before the levy of execution, and he has not rented another farm. A man may be a farmer although he is not, on the particular day an execution may be levied on his property, doing any specific thing as a farmer, if such is his avocation or business. *Hickman v. Cruise*, 34 N. W. 316, 317, 72 Iowa, 528, 2 Am. St. Rep. 256.

The fact that a man carrying an insurance policy lived upon his farm, and carried it on through others, does not make him a "farmer" within the meaning of the term as used in the policy, where the insured was at home only from Saturday night to Monday morning and on Wednesday night of each week. *Johnson v. London Guaranty & Accident Co.*, 72 N. W. 1115, 1116, 115 Mich. 91, 40 L. R. A. 440, 69 Am. St. Rep. 549.

The fact that one lives on his farm, and carries it on through others, does not make him a farmer within the meaning of that term as used in an accident policy. *Johnson v. London Guarantee & Accident Co.*, 72 N. W. 1115, 1116, 115 Mich. 88, 40 L. R. A. 440, 69 Am. St. Rep. 549.

**As chief occupation.**

A farmer is one who resides on a farm with his family, cultivating such farm, and mainly deriving his support from it, though he is also the publisher of a weekly news-

paper and the proprietor of patent medicines. *McCue v. Tunstead*, 4 Pac. 510, 65 Cal. 506.

In a city ordinance forbidding the sale of fresh meat within certain limits except by persons licensed to sell and "farmers selling meat, the produce of their farms," such exception cannot be construed to include a butcher, who followed butchering as a regular business for a livelihood, but owned a farm in the neighborhood, which he used chiefly for the benefit and accommodation of his occupation as a butcher. *Trustees of Rochester v. Pettinger*, 17 Wend. 265, 266.

The term "farmer, or one engaged in the tillage of the soil," as used in Bankr. Act, § 4b, providing for involuntary bankruptcy in the case of any natural person, except a person engaged chiefly in farming or tillage of the soil, means the business of cultivating land or employing it for the purposes of husbandry; and it matters not, therefore, if the person may have other business or other interests, if his principal occupation is that of an agriculturist; if that is the business to which he devotes most largely his time and attention, which he relies upon as a source of income, though, as before stated, he may have other interests or other investments, yet the conclusion must be that his chief business is that of farming or tillage of the soil. *Wulbern v. Drake* (U. S.) 120 Fed. 493, 495, 56 C. C. A. 643.

#### **Herder.**

A person who leaves his farm and goes to work for wages in herding or feeding or keeping cattle is not a farmer within the meaning of Gen. St. § 1705, providing that any farmer to whom cattle shall be intrusted for the purpose of feeding, herding, etc., shall have a lien thereon for his services, the word as used in the statute being construed to mean a farmer who takes the stock to his farm, and keeps it there; the court saying, in reaching this conclusion, that, if any other meaning were given to the statute, the use of the specific word "farmer" would be rendered superfluous, since all that would have been necessary, if it had been intended to give a lien to any one except a technical farmer, would have been to say that any "person" intrusted with the feeding, herding, etc., of cattle should have a lien. *Hooker v. McAllister*, 40 Pac. 617, 618, 12 Wash. 46.

#### **Horticulturist, etc.**

A farmer is one who is devoted to the tillage of the soil, and persons who follow this occupation may call themselves horticulturists, viculturists, or gardeners, but they are farmers; and the tools which they use would come within the provisions of Code Civ. Proc. § 690, exempting from execution the farming utensils and implements

of husbandry. In *re Slade's Estate*, 55 Pac. 158, 159, 122 Cal. 434.

#### **As merchant or trader.**

See "Merchant"; "Trader—Tradesman."

#### **FARMING.**

Engage in farming, see "Engage."

Farming is the business of cultivating land, or employing it for the purposes of husbandry. In *re Drake* (U. S.) 114 Fed. 229, 231.

It is exceedingly doubtful whether farming can be called a trade within the true meaning of the statute providing that where a minor shall serve an apprenticeship in any lawful trade for seven years in a town he shall thereby gain a settlement therein. *Inhabitants of Leeds v. Inhabitants of Freeport*, 10 Me. (1 Fair.) 356, 359.

#### **FARMING LAND.**

Where the ultimate use of every foot of land included within the corporate limits of a city as incorporated by the county court will be for city purposes, and its present value is estimated upon its then or prospective use for such purposes, and is in close proximity to a city like St. Louis, with surrounding suburban neighborhoods in every direction, with railway and street car connections to and with the city of St. Louis, and subdivided into lots and small tracts and parcels of lands, it is impressed with the character of urban, as distinct from rural or farming land, notwithstanding the fact that there is an occasional calf lot and scattered cornhills of truck patches here and there found within the corporate limits. *State ex inf. Crow v. Fleming*, 59 S. W. 118, 121, 158 Mo. 538.

#### **FARMING NEIGHBORHOOD.**

The term "farming neighborhood" implies more than one farm, but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other, relatively to the surrounding settlers, as to be in the same vicinity. *Lux v. Haggin*, 10 Pac. 674, 700, 69 Cal. 255.

"Farming neighborhood," within the meaning of Code Civ. Proc. § 1238, providing that the right of eminent domain may be exercised in behalf of the following public uses: canals, ditches, flumes, aqueduct and pipes for public transportation, supplying mines and farming neighborhoods with wa-

ter, a farming neighborhood may be defined as a region in which there are several tracts of farming land with a proximity of location, and which can be regarded as a whole with reference to some common interest, though they are distinct in boundaries, and held in individual proprietorship. Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors; and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if held in single ownership. The distinctive characteristic of the neighborhood is that it be a farming one, and this implies the proximity of the several tracts of land, rather than of their proprietors. The term "farming neighborhood" is an indefinite expression, and whether it can be applied to any particular tract of land must be determined by evidence. The word "neighborhood" is not synonymous with "territory" or "district," but is a collective noun, with a suggestion of proximity, and refers to the units which make up its whole as well as to the region which comprehends those units. *Lindsay Irrigation Co. v. Mehrtens*, 32 Pac. 802, 803, 97 Cal. 676.

#### FARMING PURPOSES.

Land exclusively used for farming purposes, see "Exclusively Used."

#### FARMING STOCK.

"Farming stock," as used in a will giving to testator's wife all his farming stock of every kind and description whatsoever, in common and popular language does not include crops on the ground. *Valsey v. Reynolds*, 5 Russ. 12.

#### FARMING TOOLS AND UTENSILS.

The term has no well-defined legal significance, but is susceptible of divers meanings, and is applicable to the various implements used in different branches of farming. Its meaning is dependent on circumstances, and may be explained by extrinsic evidence. *Rugg v. Hale*, 40 Vt. 138, 144.

The question whether the term "farming tool," in the statute exempting farming tools from attachment, includes the wagon of a certain debtor, is a question for the jury. *Hall v. Nelson*, 59 N. H. 573.

Where testator bequeathed "all his farming utensils," the phrase included a wagon, the same being an instrument almost as necessary as a plow; and in *Roper*, Leg. 211, it is stated that the word "utensil" will embrace everything necessary for household purposes or applicable to the trade to which

the term has reference. *Elliott v. Posten*, 57 N. C. 433, 434.

#### Blacksmith tools.

A bill of sale by a grantor intending to convey all of his personal effects on his farm to his nephew, purporting to convey all the grantor's stock, farming implements, farming utensils, wagons, etc., should be construed to include blacksmith's tools used in operating the farm. *Royston v. McCulley* (Tenn.) 59 S. W. 725, 730, 52 L. R. A. 899.

#### Mower or reaper.

Rev. St. 1858, c. 134, § 131, exempting from sale on execution one wagon, cart, or dray, one sleigh, one plow, one dray, and other farming utensils, not exceeding \$50 in value, should be construed to exempt a mower of less than \$50 value. *Humphrey v. Taylor*, 45 Wis. 251, 253, 30 Am. Rep. 738.

Gen. St. 474, § 3, subd. 6, exempting from forced sale farming utensils of a certain value, should be construed to exempt a McCormick Advance reaper and mower. *Voorhees v. Patterson*, 20 Kan. 555, 556.

#### Threshing machine.

Code Civ. Proc. § 690, subd. 3, exempting from execution "farming utensils or implements of husbandry," means such utensils or implements as are needed or used by the farmer in conducting his own farming operations; and it was not intended that all farming machinery which a farmer may own may be exempt, because, while he uses it chiefly for renting it out or in doing work on other farms for hire, he still used it to a small extent on his own land. The phrase does not include a threshing machine with which the owner threshes his own grain, but which he employed during the larger portion of the threshing season in threshing for others for hire. *In re Baldwin*, 12 Pac. 44, 45, 71 Cal. 74.

"Farming utensils," as used in Exemption Law 1850 (2 Swan & O. Rev. St. 1147), which exempts from execution farming utensils belonging to the head of a family who is not the owner of a homestead, include a threshing machine, clover huller, and wagon which is used for the purpose of carrying the machines from place to place, although the machines are used in threshing for persons other than the one who owns them. *Muse v. Darrah*, 2 Ohio Dec. 604, 606.

#### FARO.

Though cards are used in dealing it, faro is a banking game, within statute prohibiting such games. *Patterson v. State*, 12 Tex. App. 222, 224.



**FARO BANK.**

A faro bank is a contrivance for gambling. *Commonwealth v. Kammerer* (Ky.) 13 S. W. 108, 109.

Act Cong. March 2, 1831, commonly called the "Penitentiary Act," making punishable the keeping of a "faro bank or gaming table," means only a gaming table called a "faro bank," and no other kind of gaming table. There is no certain legal or established meaning attached to the words "faro bank." A "faro bank" or "gaming table" is only an alternative expression of the same thing. *United States v. Smith* (U. S.) 27 Fed. Cas. 1149, 1153.

An indictment under a statute making it penal to exercise certain gaming tables or any faro bank, charging defendant with keeping gaming tables commonly called "faro" without the use of the word "bank," was sufficient; such word being unnecessary to convey a perfect and adequate idea of the game, and consequently not required for the purpose of appraising defendant of the nature of the charge. The game of roulette is as much a bank game as that of faro, but yet the term "bank" is not necessary in its description. *Brown v. State*, 10 Ark. (5 Eng.) 607, 614.

The term "faro bank" being used in the statute prohibiting gaming, the court is bound to know its meaning, and the exhibition of and betting at gaming tables of this kind have become of late so much the object of legislative animadversion and legal penalty that there is no difficulty upon that score. Its meaning is defined by our law writers, and according to the same authority the terms "betting at faro" are equivalent to "betting at a game or table known as the faro bank." The term "betting at faro" may not perhaps be understood by every one, but, when understood, it has a clear and definite meaning, and conveys precisely the same idea as if the word "bank" was added, so that the word "faro" in an indictment is of equivalent import to the term "faro bank" as employed by the statute. *Ward v. State*, 22 Ala. 16, 19.

Faro is one of the banking games specifically named in Pen. Code, art. 360, and to allege that defendant played at a "faro bank" is to sufficiently allege the offense of which defendant has been convicted. *Short v. State*, 23 Tex. App. 312, 313, 4 S. W. 903.

**FAST.**

See "As Fast As."

The terms "fast" and "loose" are relative terms, and might mean one thing in one place and quite another thing in another place. *Sandwich Enterprise Co. v. Joliet Mfg. Co.* (U. S.) 91 Fed. 254, 255, 33 C. C. A. 491.

The word "fast" is defined by Webster as "moving rapidly, quick in motion, rapid, swift," and is the meaning usually given to the word; and the word was so used in an instruction in an action against a street railway company predicating a recovery if at the time the defendant was "running fast, or without sounding a gong or bell," and the use of such word was not prejudicial error. *South Covington & C. St. Ry. Co. v. Beatty*, 20 Ky. Law Rep. 1845, 1846, 50 S. W. 239.

**FAST ESTATE.**

A will authorizing the testator's executors to make sale of the fast estate, and lodge the proceeds with the executrix, does not embrace lands which have been sold by contract by the testator, the purchase money being unpaid, and the title still remaining in him. *Lewis v. Smith*, 9 N. Y. (5 Seld.) 502, 510, 61 Am. Dec. 706.

**FAST FISH.**

"By the usage of the whale fishery a fish is to be considered as a fast fish which is attached by any means (such as the entanglement of the line around it, etc.) to the boat of the first striker, though the harpoon does not continue in the body of the fish—and this is a more reasonable usage than that mentioned in a note to the case of *Fennings v. Lord Grenville*, 1 Taunt. 243." *Hogarth v. Jackson*, 2 Car. & P. 595.

**FASTEST PASSENGER TRAIN SERVICE.**

A stipulation for the "fastest passenger train service" in the written part of a bill of lading, which contained a blank space for the place of destination, with directions not to insert points not on the carrier's line, which blank space was not filled, was held simply to be a designation as to how the freight should be carried, and not to operate to render the carrier liable for losses on connecting lines. *Taffe v. Oregon R. Co.*, 67 Pac. 1015, 1019, 41 Or. 64, 58 L. R. A. 187.

**FATHER.**

See "Putative Father"; "Come By the Father."

The word "father" may mean a male parent, a male who has begotten a child, and it may also mean an adopted father or a male ancestor more remote than parent (Webster and Century Dictionaries), and hence, as used in a letter by a person calling himself father, is not sufficient recognition of a child as his child to comply with Comp. St. 1897, c. 23, § 31, providing that every illegitimate child shall be considered

as an heir of the person who shall, in writing, sign in the presence of a competent witness, having acknowledged himself to be the father of such child. *Lind v. Burke*, 77 N. W. 444, 445, 56 Neb. 785.

The term "father," as used in a complaint under a statute giving a right of action to a father, is not to be construed against the pleader to the extent of being held to have reference to a putative, rather than a legal, father, but should be presumed to refer to a parent within the rules of legitimacy. *Orook v. Webb*, 28 South. 384, 386, 125 Ala. 457.

#### **Mother.**

Rev. St. c. 6, art. 3, tit. 1, § 49, providing that a testator's child born after the making of his will shall receive the same portion of his "father's real and personal estate" as would have descended or been distributed to such child if the father had died intestate, cannot be construed so that it will apply to the mother; that is, if a married woman executes her will, as she is allowed to under the statute, and makes no provision for an after-born child, the child will not inherit anything from his mother's estate by virtue of this section of the statute. *Cotheal v. Cotheal*, 40 N. Y. 405, 410.

#### **Parent distinguished.**

The word "father" is not equivalent to the word "parent" as used in Pen. Code, art. 376, providing for the punishment of any person selling intoxicating liquor to a minor without the written consent of the parent of such minor, for the word "parent" includes both parents, father and mother. *Lantzner v. State*, 19 Tex. App. 320, 321.

#### **Stepfather.**

The word "father," as used in a statute, providing that a father may sue for the injury or death of a child, should be construed to mean only one's own natural father, and not to include a stepfather. *Thornburg v. American Strawboard Co.*, 40 N. E. 1062, 1063, 141 Ind. 443, 50 Am. St. Rep. 334; *Citizens' St. Ry. Co. v. Cooper*, 53 N. E. 1092, 1094, 22 Ind. App. 459, 72 Am. St. Rep. 319.

### **FATHOM.**

When used in the measurement of land, the word "fathom" is to be understood as meaning a square fathom, for in its common usage it is an integral part of a unit of land measure. *Nahaolelua v. Kaaahu*, 9 Hawaiian, 600, 601.

### **FAULT.**

See "With All Faults"; "Without Fault"; "Gross Fault"; "Slight Fault"; "Very Slight Fault."

In holding that the employment of the word "fault" in an instruction that an employee suing a railroad company for personal injuries must be free from fault was not erroneous, the court said that "fault" is a big word, and it is one easily comprehended by the jury. It means that nothing should have been done that ought not to have been done by the party complaining, and that he should not have omitted anything that ought to have been done. *Central R. & Banking Co. v. Lanier*, 10 S. E. 279, 280, 83 Ga. 587.

A mortgage on the revenues of a canal company provided that if the company should pay the interest on the bonds, and provide a sinking fund to meet the principal when due, it should retain the management of the property, and receive the revenues, but if it should fail to comply with these conditions "from any cause except a deficiency of revenues arising from the failure of business without fault on the part of the company, then the mortgagees should take possession and receive the revenues." It was held that the word "fault" should be construed in its broader sense as meaning not only mismanagement, but also any legal default on the part of the company in view of its obligations to the public to operate it as a public work. *State v. Brown*, 21 Atl. 374, 376, 73 Md. 484.

The word "fault," as used in a statute giving a wife the right to a bill for support and maintenance where the living separate and apart from her husband was without her fault, means a voluntary consenting to the separation, or such failure of duty or misconduct on her part as materially contributes to a disruption of the marital relation. *Johnson v. Johnson*, 16 N. E. 891, 892, 125 Ill. 510.

#### **As defect in quantity.**

In the condition of an auction sale by which the purchaser was to take the goods notwithstanding any faults, imperfections, or errors of description, the word "faults" might refer to the quantity as well as to the quality of the article purchased. *Pettitt v. Mitchell*, 4 Man. & G. 819, 838.

#### **As error or mistake.**

"The word imports error or mistake." *Malone v. United States (U. S.)* 5 Ct. Cl. 486, 489.

The words "fault" and "error" are not synonymous. Fault imports blame; error may arise from ignorance or mistake alone. *The Manitoba (U. S.)* 104 Fed. 145, 154.

#### **As negligence.**

"Fault," in legal literature is the equivalent of "negligence." It means an error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any shortcoming or neglect of care or perform-

ance resulting from inattention, incapacity, or perversity; a wrong tendency, course, or act. *Louisville, E. & St. L. C. R. R. Co. v. Berry*, 28 N. E. 714, 716, 2 Ind. App. 427.

In an action against a railroad for injuries, an allegation that plaintiff was injured without fault on his part means that he was free from contributory negligence. *Evansville & T. H. R. Co. v. Weikle*, 33 N. E. 639, 6 Ind. App. 340; *Louisville, E. & S. L. Consolidated R. R. Co. v. Summers*, 30 N. E. 873, 11 Ind. App. 185.

The expression "without fault," as used in the Code, referring to actions for injuries by an employé, means the same as "without negligence," and the words "fault" and "negligence" in this connection are synonymous. *Savannah, F. & W. Ry. Co. v. Austin*, 30 S. E. 770, 771, 104 Ga. 614.

The word "fault," as used in a declaration against a common carrier alleging that goods were destroyed through the fault of the carrier, means negligence of the carrier. *School Dist. in Medfield v. Boston, H. & E. R. Co.*, 102 Mass. 552, 553, 3 Am. Rep. 502.

The term "fault," as used in act approved March 5, 1874 (Revision, p. 576, § 28), which declares that whenever any building or buildings erected on leased premises shall be injured by fire without the fault of the lessee the landlord shall repair, etc., includes the negligence of a tenant occasioning injury to the demised premises by fire. *Dorr v. Harkness*, 10 Atl. 400, 402, 49 N. J. Law, 571, 60 Am. Rep. 656.

## FAVOR.

See "Challenge to the Favor"; "In Favor of."

An instruction that "You are not required to find any fact to be proven because you find the same suggested in a verdict, or in the verdict of the party you desire to favor," means "find to have the merits," and the jury could not have understood that their verdict could be bestowed by favor. *Pittsburg, C., O. & St. L. R. Co. v. Burton*, 37 N. E. 150, 154, 139 Ind. 357.

## FAVORABLE.

An ordinance giving exclusive privileges to a gas company, but requiring it to furnish gas at "rates as favorable as" furnished by a certain gas company in another city, should be construed to mean prices as low, irrespective of any circumstances or conditions. *Decatur Gas Light & Coke Co. v. City of Decatur*, 11 N. E. 406, 408, 120 Ill. 67.

## FAVORITE.

"Favorite" is a word in common use, and, except under special circumstances, is

not the subject of exclusive appropriation as a trade-mark by any one. *Cooke & Cobb Co. v. Miller*, 62 N. E. 582, 583, 169 N. Y. 475.

## FEALTY.

The term "fealty" was used in the common law to designate the obligation of fidelity which the feudal tenant owed to his lord. *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 497, 57 Am. Dec. 470.

## FEAR.

See "Putting in Fear"; "Without Fear or Compulsion."

The fear which the law recognizes as an excuse for the perpetration of an offense must proceed from an immediate and actual danger threatening the very life of the party. The apprehension of any loss of property by waste or fire, and even an apprehension of a slight or remote injury to the person, furnishes no excuse. *United States v. Vigol* (U. S.) 2 Dall. 346, 1 L. Ed. 409, 28 Fed. Cas. 376.

It is possible that fear may exist without threats, but it is not very easy to suppose there can be fear if there be no compulsion. *Hadley v. Geiger*, 9 N. J. Law (4 Halst.) 225, 233.

The word "fear," as required in the acknowledgment of a deed by a married woman, stating that the deed was executed on her part without fear, means a particular specific kind of fear, and signifies that she makes her acknowledgment without being induced thereto by fear of ill usage by her husband. *Hollingsworth v. McDonald* (Md.) 2 Har. & J. 230, 237, 3 Am. Dec. 545.

The word "fear," in an affidavit in support of a motion for change of venue, that the applicant has reason to fear and does fear that he cannot have a fair and impartial trial, is not equivalent to the word "believe" in Rev. St. § 2625, requiring such affidavit to state that the applicant has good reason to believe and does believe that he cannot have a fair trial. "We are not aware of any decision of this court holding the two expressions to be equivalent. To our minds, they are substantially unlike. To hold them to be equivalent by refining upon the words of each would be to establish a rule which would call for another departure whenever some new form of expression should be presented. The statutory requirement is jurisdictional. In such a case the substitution of equivalents to be ascertained by such finical reasoning would be dangerous." *Smith v. Clarke*, 35 N. W. 318, 319, 70 Wis. 137.

Extortion is the obtaining property from another with his consent, induced by wrong-

ful use of force or fear, or under color of official right; and fear such as will constitute extortion may be induced by a threat either to do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family. Cal. Pen. Code, §§ 910, 911. In re McCabe, 73 Pac. 1106, 29 Mont. 28.

## FEASIBLE.

The laying out of the most "feasible route" between two fixed points is not necessarily equivalent to the laying out of the best route for the accommodation of public travel between the same bounds. In the one case the test is arbitrary and unyielding, and in the other it is governed by reasonable public necessity. *Spaulding v. Town of Groton*, 44 Atl. 88, 89, 68 N. H. 77.

## FEATHER.

A protrusion from the inside of the shell of the cylinder of a cloth-printing machine, which fits a groove in the mandrel and keeps it from slipping as the mandrel revolves. *Griggs v. Stone*, 18 Atl. 1094, 1095, 51 N. J. Law, 549, 7 L. R. A. 48.

## FEATHER BED.

A "feather-bed" means a single article composed of a quantity of feathers inclosed in a bedtick, and such term in an indictment is a sufficient description of the article stolen. *State v. Parker*, 47 Vt. 19.

## FED.

The term "fed" has a well understood meaning when applied to cattle or hogs, and it is to be made fit for market by feeding. *Brockway v. Rowley*, 66 Ill. 99, 102.

## FEDERAL.

A federal government is distinguished from a national government by being the government of a community of independent and sovereign states, united by compact. Per Bartley, C. J., dissenting. *Piqua Bank v. Knoup*, 6 Ohio St. 342, 393.

## FEDERAL QUESTION.

Cases arising under the Constitution or laws of the United States, jurisdiction of which is conferred upon the Circuit Courts of the United States, are commonly expressed by the profession as cases involving a federal question. In re *Sievers* (U. S.) 91 Fed. 366, 372.

By the words "federal question" are meant a question requiring a construction

to be put upon the Constitution or such laws of the United States or treaties made under its authority. The construction of orders and decrees of a federal court according to their meaning does not involve federal question. *United States v. Douglas*, 18 S. E. 202, 113 N. C. 190.

Where a judgment of the highest court of a state, so long as it remains unreversed, will be authority in the lower courts of the state, that the confiscation of debts due to loyal citizens under an act of the Confederate government, enforced as a law of the state, was a valid proceeding, it involves a federal question of which the Supreme Court of the United States has jurisdiction. *Williams v. Bruffy*, 102 U. S. 248, 255, 26 L. Ed. 135.

## FEE.

See. "Base Fee"; "Conditional Fee"; "Defeasible Fee"; "Limited Fee"; "Determinable Fee"; "Qualified Fee"; "Deed in Fee."

The word was originally used in contradistinction to "allodium," and signified that which was held of another on the condition of rendering him service. It related to the quality, and not the quantity, of the estate; and, although the word is now generally employed to express the quantum of the estate, that is not its only meaning. As used in New York statutes abolishing entails, one provision of which is as follows: "Where any person now is seised of an estate in fee tail in any lands, etc., such person shall be deemed to be seised of the same in fee simple," it relates rather to the kind or quality than to the quantity of the estate. *Wendell v. Crandall*, 1 N. Y. (1 Comst.) 491, 495.

The word "fee" is derived from the nature of the feudal system. It imports that the land is held of some superior, to whom certain services are due, and in whom the ultimate property resides. *Gibbons v. Gibbons* (Ga.) T. U. P. Charit, 113, 116.

An "estate in fee simple" is one to a man and his heirs forever. *Brown v. Freed*, 43 Ind. 253, 256.

In modern English tenures a fee signifies an estate of inheritance. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277.

It is said by 2 Blackstone, p. 106, that, taking the word "fee" as meaning an estate of inheritance, "it is applicable to, and may be had in, any kind of hereditament, either corporeal or incorporeal." *Oswald v. Wolf*, 126 Ill. 542, 548, 19 N. E. 28, 30.

"An estate in fee includes all qualifications or restrictions as to the persons who

may inherit as heirs; thus distinguishing it from a fee tail, as well as from an estate which, though inheritable, is subject to condition or collateral determination." *Marden v. Lyons*, 12 Atl. 408, 409, 118 Pa. 396.

An estate which, because by possibility, may endure forever in a man and his heirs is called a "fee"; yet as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is, therefore, a qualified or base fee. *Kelso v. Stigar*, 24 Atl. 18, 22, 75 Md. 376.

Without going into the derivation and original meaning of the word "fee," it is sufficient to say that in modern English tenures a fee signifies an estate of inheritance, and a fee simple imports an absolute inheritance, clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs generally. There are also limited fees, (1) qualified or base fees, (2) fees conditional at the common law. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277.

An estate in fee is every estate which is not for life, for years, or at will. *Phoenix v. Emigration Com'rs* (N. Y.) 12 How. Prac. 1, 10.

The term "title in fee" means a full and absolute estate, beyond and outside of which there was no other interest, or even shadow of right. *Earnest v. Little River Land & Lumber Co.*, 75 S. W. 1122, 1124, 109 Tenn. 427.

"Of fee simple it is commonly holden that there be three kinds, viz., fee simple absolute, fee simple conditional, and fee simple qualified, or a base fee. But the more genuine and apt division were to divide fee—that is, inheritance—into three parts, viz., simple or absolute, conditional, and qualified or base; for this word 'simple' properly excludeth both conditions and limitations that defeat or abridge the fee." 1 Inst. 1b. Chancellor Kent, after using the words "qualified," "base," or "determinable" fee promiscuously as defining an estate which may continue forever, but is liable to be determined without the aid of a conveyance by some act or event circumscribing its continuance or extent, adds: "Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold." *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 763, 62 N. J. Law, 254, 42 L. R. A. 572 (citing 4 Kent, Comm. 9).

#### As fee simple or fee simple absolute.

The terms "fee," "fee simple," and "fee simple absolute" are equivalent terms, and an estate in fee simple is the greatest which one can possess in lands. *Bowen v. John*, 66 N. E. 357, 358, 201 Ill. 292.

Every estate of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or absolute fee. Civ. Code Cal. 1903, § 762; Rev. Codes N. D. 1899, § 3326; Civ. Code S. D. 1903, § 242; Rev. St. Okl. 1903, § 4027.

Every estate of inheritance shall continue to be termed a fee simple or fee, and every such estate, when not defeasible or continual, shall be a fee simple absolute or absolute fee. Rev. St. Wis. 1898, § 2026.

Fee, fee simple, and fee simple absolute are synonymous, and all describe an estate in lands which is opposed to a conditional fee. *Lott v. Wykoff*, 2 N. Y. (2 Comst.) 355, 357.

The terms "fee simple" and "fee" are often used as convertible terms. *People v. White* (N. Y.) 11 Barb. 26, 28.

"The terms 'fee' and 'fee simple' are used indifferently by the best law writers to express the same quantity of estate. A fee in general signifies an estate of inheritance, being the highest and most extensive interest that a man can have in a feud; and when the term is used simply without any other adjunct, but has the adjunct of 'simple' annexed to it, as a fee or a 'fee simple,' it is used in contradistinction to a fee conditional at common law, or a fee tail by the statute. 2 Bl. Comm. 104. Where the term 'simple' is applied, it means no more than fee when standing by itself, as understood in respect to modern estates." *Jordan v. Record*, 70 Me. 529, 531 (citing Washb. Real Prop. [1st Ed.] 51).

The word is used interchangeably with "fee simple" and "fee simple absolute." It implies an unlimited estate of inheritance when used without any qualifying adjective. *Blevins v. Smith*, 16 S. W. 213, 218, 104 Mo. 583, 13 L. R. A. 441.

The term "fee," as used in a will giving property to a certain person for life, with remainder to her eldest son in fee, imports a fee simple, for, as laid down by Littleton (section 293), it is to be understood, when it is said "that a man is seized in fee, without more said, it shall be intended in fee simple, for it shall not be intended by this word 'in fee' that a man is seized in fee tail, unless there be added to it this addition: 'fee tail.'" *Pennington v. Pennington*, 17 Atl. 329, 330, 70 Md. 418, 3 L. R. A. 816.

The word "fee," as used in a deed to trustees to sell and convey the land in fee,

imports a fee simple absolute. The term "fee" implies an inheritable estate, and the addition of the word "simple," forming the compound word "fee simple," as used in modern estates and conveyances, adds nothing to the force and comprehensiveness of the original term. There is no distinction between an estate in fee and an estate in fee simple absolute. *Jecko v. Taussig*, 45 Mo. 167, 168.

#### As life estate.

In construing a will devising a life estate in real property to testator's widow if she remain unmarried, and giving her an estate in fee in one-half the property in case she marries, it was said that: "While a fee in one-half would properly have been called by the early lawyers an estate of higher dignity than a life estate, on the whole, I am not aware of any rule which would enable us to say as a matter of law that it was a larger or more favorable provision for the widow. That is a question of fact, which depends upon circumstances, and must always be largely a matter of individual choice." *Long v. Paul*, 17 Atl. 988, 991, 127 Pa. 456, 14 Am. St. Rep. 862.

#### As applied to easement or franchise.

In the case of *People v. O'Brien*, 111 N. Y. 1 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684, it was stated that the right acquired by a street railroad in a public street through which its road was constructed was a fee. In discussing this case the court held that, if the term "fee" is to be construed as referring to the land itself on which this structure is erected, it is not applicable to the rights of an elevated railroad in the streets of the city of Brooklyn, in which the public require really an easement, the fee of the property remaining with the original owners. Also under the elevated railroads run surface railroads, and the rights of the latter are as great as those of the former. These, too, would have a fee in the street. Thus it would be possible to have several estates in fee in the same land. We think, however, that the term "fee" is to be applied to the franchise which the railroad company obtains to construct and operate its railroad, and that, therefore, its right to maintain its railroad as against the public is as great as any obtained by railroad companies in New York, and that its franchise cannot be abrogated or destroyed by public authorities without compensation. *Brooklyn El. R. Co. v. City of Brooklyn*, 37 N. Y. Supp. 560, 2 App. Div. 98.

#### Freedom from incumbrance.

A sale of the fee does not include in the term itself a sale free from incumbrance, but only the nature of the estate as distinguished from a life estate, a remainder, a fee

tail, or any estate less than a fee simple. Land is frequently sold in fee simple subject to incumbrances, and this mode of expression is common among conveyancers and in legal proceedings, and involves no contradiction or inconsistency. *Cool's Ex'rs v. Higgins*, 23 N. J. Eq. (8 C. E. Green) 308, 311.

Where there was an agreement for a conveyance of the fee of land, the purchaser became the equitable owner of the property, subject to the payment of the purchase money, which was a lien or incumbrance on it; and this was equivalent to the fee with respect to a contract of insurance containing a condition that, if the interest in the property was a leasehold or other interest not fee simple absolute, it must be stated in the policy, otherwise the policy should be void. *Elliott v. Ashland Mut. Fire Ins. Co.*, 12 Atl. 678, 678, 117 Pa. 548, 2 Am. St. Rep. 708.

#### FEE BILL.

As process, see "Process."

As writ, see "Writ."

#### FEE DAMAGES.

Damages sustained by an abutting owner, occasioned by the construction and operation of an elevated railroad in one of the streets of a city, is usually termed "fee damages." *Dode v. Manhattan Ry. Co.*, 24 N. Y. Supp. 422, 423, 70 Hun, 374.

Damages which are awarded against elevated street railways are ordinarily designated "fee damages." They are awarded for rights acquired from others for all time to come, or at least during the existence of the railroad company. The rights acquired are the easements of light, air, and access of the abutting property owners, in the streets occupied by the elevated railroad structure. *People v. Barker*, 59 N. E. 151, 154, 165 N. Y. 303.

#### FEE FARM.

"Fee farms are lands held in fee to render for them annually the true value, or more or less, and is called a fee farm because a farm rent is reserved upon a grant in fee." *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 497, 57 Am. Dec. 470.

#### FEE FARM RENT.

"Fee farm rent is a rent issuing out of an estate in fee; a perpetual rent reserved on a conveyance in fee simple." *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 497, 57 Am. Dec. 470.

A fee farm rent is where the rent is created by deed, and a fee is granted. *Edwards v. Noel*, 88 Mo. App. 434, 440.

**FEE SIMPLE.**

"A fee simple," says Lord Coke, "is the fullest and most absolute estate which a person can have in his lands." *Robb v. Beaver* (Pa.) 8 Watts & S. 107, 126.

A fee simple is the highest estate which the law recognizes. *Gibbous v. Gibbons* (Ga.) T. U. P. Charit. 113, 116; *McMillen v. Anderson*, 95 U. S. 37, 41, 24 L. Ed. 335.

A fee simple is a power of inheritance clear of any qualification or condition, and it gives the right of succession of all the heirs. Kent, Comm. It is also defined as a state of perpetuity, and confers an unlimited power of alienation. *Friedman v. Stienner*, 107 Ill. 125, 131; *Farnum v. Loomis*, 2 Or. 29, 30, 32; *Rank v. Rank*, 13 Atl. 827, 828, 120 Pa. 191; and when not disposed of by will descends to the heirs generally. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277. It gives a right to all his heirs generally, provided they be of the blood of the first purchaser and the blood of the person last seised. *Moody v. Walker*, 3 Ark. 147, 190.

A fee simple is the largest estate known to the law, and when this term is used, and no words of qualification or limitation are added, it necessarily implies an estate owned in severalty and an estate in possession. *Brckett v. Redlon*, 54 Me. 426, 434.

Littleton says, "A tenant in fee simple is he who hath lands or tenements to hold to him and his heirs forever," and it is called "fee simple" or "fœdum simplex," because it signifies a lawful and pure inheritance. Coke adopts the same definition, and says that "simple" is added to "fee" for the purpose of showing that it is descendible to the heirs generally, without restraint to the heirs of the body or the like; and he uses the terms "simple" and "absolute" as synonymous when subjoined to "fee." *Jackson v. Van Zandt* (N. Y.) 12 Johns. 169; *Overbagh v. Patrie* (N. Y.) 8 Barb. 28, 37; *Adams v. Ross*, 30 N. J. Law (1 Vroom) 505, 511, 82 Am. Dec. 237.

Kent says, "fee simple is a pure inheritance, clear of any qualifications or condition, and it gives the right of succession to all heirs generally;" and "it is an estate of perpetuity, and confers an unlimited power of alienation." In view of this, where a will provided that the testator's natural son should be his principal heir, and that the brother of testator should hold the property until the son reached the age of 25, and, in case the son should die before reaching such age, the brother of the testator or his heirs should be the heirs of the son, and in case of the son's death after his twenty-fifth year, without any issue surviving him, the estate should go to the brother of the testator or his heirs, but that the son should have full disposition of the estate after reaching the age of 25, the son did not receive a fee simple

absolute, but an estate in fee simple determinable. *Koeffler v. Koeffler*, 56 N. E. 1094, 1096, 185 Ill. 261.

Tenant in fee simple is defined by Blackstone to be "he that hath lands, tenements, or hereditaments, to hold to him and heirs forever, generally, absolutely, simply, without mentioning what heirs, but referring that to his own pleasure, or the disposition of the law." *Lehndorf v. Cope*, 13 N. E. 505, 509, 122 Ill. 325 (citing 2 Bl. Comm. 104). And hence it is that in the most solemn acts of law we express the strongest and highest estates that any subject can have by these words: "He is seized thereof in his demesne as of fee." *Jordan v. Record*, 70 Me. 529 (citing 2 Bl. Comm. 104-106).

Fee simple denotes an estate of inheritance without condition or restriction. It is an absolute estate in perpetuity, and the largest possible estate a person can have. *Woodberry v. Matherson*, 19 Fla. 778, 785.

The owner of a fee-simple estate in possession in land has all the property of which the thing is susceptible. *Van Rensselaer v. Poucher* (N. Y.) 5 Denio, 35, 40.

"A fee simple is an estate to a man and his heirs generally, comprehending those of all branches, classes, and kinds." *Somers v. Pierson*, 16 N. J. Law (1 Har.) 181, 182.

Every estate in land which shall be granted, conveyed, or devised, although other words heretofore necessary to transfer an estate of inheritance be not granted, shall be deemed a fee-simple estate of inheritance if a less estate be not limited by express words or by operation of law. Rev. St. p. 105, § 13. *Frisby v. Ballance*, 7 Ill. (2 Gilman) 141, 149.

In Coke upon Littleton it is said: "Of fee simple it is commonly holden that there be three kinds—fee simple absolute, fee simple conditional, and fee simple qualified or base fee." *Jordan v. Goldman*, 34 Pac. 371, 377, 1 Okl. 406; *United States Pipe-Line Co. v. Delaware, L. & W. R. Co.*, 41 Atl. 759, 763, 62 N. J. Law, 254, 42 L. R. A. 572.

A fee simple is the largest estate which a person can have, and may be divided into different parts, consisting of particular estates; and when the limited or constitutional estates unite again in the same person they form again one entire estate. *Lyle v. Richards* (Pa.) 9 Serg. & R. 322, 374.

Under the English rule an estate to one and his heirs is a fee simple. Under our new rule an estate to one generally is a fee simple. Under the English rule the fee simple is not cut down to a fee tail by attaching to it a condition that it shall go over if the first taker dies without issue. It remains a fee simple, but it is determinable on the event named. I must think that whenever a fee simple is first conveyed, whether

conveyed in such terms as the English rules require for the purpose or in such as our statute has made sufficient for the purpose, it will not be cut down into any smaller estate by attaching to it a condition which would not have that effect under the English rules. *Burton v. Black*, 30 Ga. 638, 644.

The term "fee simple" has never been used to distinguish between legal and equitable estates. It is used to denote the quantity or duration of estates, whether the enjoyment is limited or unlimited in point of continuance or duration, which defines the largest estate in land known to the law. It is an estate of inheritance, unlimited in duration, descendible to all the heirs alike of the owner to the remotest generations. It may be of legal or equitable nature. *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 115, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17.

As used in 2 Rev. St. 541, § 1, providing that all controversies existing between person which might be the subject of an action at law may be submitted to arbitrators, except those respecting the claim of any person to "any estate in fee or for life" to real estate, means legal title, and does not include those interests which are called equitable estates and title. The terms in question were originally used only to determine legal titles, and when equitable rights afterwards grew up and gained recognition and were molded in forms and analogous to legal estates, they came to be designated as equitable estates in fee or for life, but the original sense has been preserved as the proper and legal force of the words. *Olcott v. Wood*, 14 N. Y. (4 Kern.) 32, 37.

A "title in fee simple" means a title to the whole of the thing absolutely. *Dumont v. Dufore*, 27 Ind. 263, 267. This statement of the law has been quoted with approval in *Stockton v. Lockwood*, 82 Ind. 158; *Arnold v. Smith*, 80 Ind. 417. *Indiana, B. & W. Ry. Co. v. Allen*, 113 Ind. 581, 590, 15 N. E. 446.

A "tenant in fee simple" is he that hath lands, tenements, or hereditaments, to hold to him and his heirs, forever. *Gibbons v. Gibbons* (Ga.) T. U. P. Charit. 113, 116.

#### As fee simple absolute.

Fee simple has the same meaning as fee simple absolute. *Vanderheyden v. Crandall* (N. Y.) 2 Denio, 924; *Jackson v. Van Zandt* (N. Y.) 12 Johns. 169; *People v. White* (N. Y.) 11 Barb. 28, 28.

#### Conditional fee distinguished.

A fee-simple is the largest estate a man can have in lands, being an absolute estate in perpetuity, and is contradistinguished from other estates as a fee simple absolute. A determinable fee, a conditional fee, a qualified fee, and a base fee are all classed under the same general head, and partake of the

nature of a fee simple, and are each distinguishable by the words of limitation used in defining the estate conveyed. The essential matter in the creation of a fee is that such an estate is brought into existence as may continue forever. When it becomes an established fact that the event which may terminate an estate will never occur, a terminable fee enlarges into a fee simple absolute. *Fletcher v. Fletcher*, 88 Ind. 418, 420.

A fee simple, in modern English tenures, imports an absolute inheritance clear of any condition or limitation whatever, and, when not disposed of by will, descends to the heirs generally. It is distinguished from limited fees, which consist of qualified or base fees, which are fees confined to the person as tenant of a particular place, and fees conditional at common law, which are fees restrained to particular heirs, as the heirs of a man's body. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277.

#### As free from incumbrances.

Fee simple is defined by Bouvier to be a pure estate of inheritance, not restrained by any heirs, nor subject to any condition or collateral determination except the law of escheat. The word "simple" adds no meaning to the word "fee" standing by itself, but it excludes all qualification or restriction as to the persons who may inherit it as heirs; thus distinguishing it from fee tail as well as from an estate which, though inheritable, is subject to conditions or collateral determination. The phrase does not mean that the fee is to be absolutely free from all incumbrances or charges; and where, by a codicil of a will, a testator gave the widow one equal third of the real estate in fee simple, the widow took the third subject to its proportionate share of an annuity which had been charged upon it in the will. *Kinkele v. Wilson*, 29 N. Y. Supp. 27, 29, 9 Misc. Rep. 139.

#### As applied to easement.

As used in a grant of a right of way through certain premises in fee simple, the words "fee simple" will be construed, in connection with the other clauses in the deed, to mean a grant of an easement in fee simple, and not a grant of land in fee simple. *Uhl v. Ohio River R. Co.*, 41 S. E. 340, 344, 51 W. Va. 106.

#### Equitable interest.

Where a policy provided that, if the interest of the insured be other than absolute fee-simple title, or if any other person or persons had any interest in the property, whether inquired about or not, it must be so represented to the company, or the policy should be void. Held, that the paragraph relating to fee-simple title could not be held to apply to an insurance which was taken by a mortgagee to cover his interest only,



even though the name of the mortgagor was in the policy as insured; the interest of the insured, as those words were used in the policy, referring to one who takes insurance ostensibly as owner. *Phenix Ins. Co. v. Mechanics' & Traders' Savings, Loan & Building Ass'n*, 51 Ill. App. 479, 481.

#### Limitation to heirs of body.

In *V. S. 1823*, giving a surviving husband an estate by the curtesy in any real estate which his wife held in fee simple, the Legislature used the words "of any real estate in fee simple" to signify an inheritance clear from any qualification or condition, giving a right of succession to all the heirs generally according to rules established by the laws of the state for the descent of such real property; and where the wife held land under a deed from her father, the granting part of which read, "Unto said Almena and heirs of her body, forever," the words "heirs of her body" are words of descent, and, taken in connection with the other parts of the deed, create what would be by the common law and the statute *de bonis* an estate tail; or, in other words, the deed creates an estate of inheritance by force of the statute *de bonis*, limited and restrained to "the heirs of her body" in exclusion of all others, and therefore the deed did not create an estate in fee simple, and the husband was not entitled to curtesy in the land. *Haynes v. Bourn*, 42 Vt. 686, 690.

#### Power of disposition.

Chancellor Kent says (4 Comm. 5): "A fee simple is a pure inheritance, clear of any qualification or condition. It is an estate of perpetuity, and confers an unlimited power of alienation. Every restraint upon alienation is inconsistent with the nature of a fee simple, and if a partial restraint be annexed to a fee as a condition not to alien for a certain time, or not to a particular person, it ceases to become a fee simple, and becomes a fee subject to condition." *Lott v. Wyckoff* (N. Y.) 1 Barb. 565, 575; *Koeffler v. Koeffler*, 56 N. E. 1094, 1096, 185 Ill. 261.

A fee-simple title carries with it the power of disposition. Our Supreme Court have further said that: "The only exception to this rule is where the testator gives to the first taker an estate for life only by certain and express terms, and annexes to it the power of disposition. In the particular and special case the devisee for life could not take an estate in fee, notwithstanding the naked gift of the power of disposition." *Benninghoff v. Evangelical Ass'n*, 61 N. E. 952, 953, 28 Ind. App. 374 (quoting *Mulvane v. Rude*, 45 N. E. 659, 146 Ind. 476).

#### Reservations.

A fee-simple estate is the largest in land known to law. It is an absolute estate in

perpetuity, and excludes any qualification, restriction, or limitation. A grant of land reserving all mineral lands does not convey a fee simple. *Adams v. Reed*, 40 Pac. 720, 722, 11 Utah, 480.

#### Reversion or remainder.

"A fee simple of the land is the largest possible estate. 1 Coke, c. 1, § 11. And although there may be a remainder or reversion in fee, it is not the entire property, or, in popular language, the land itself, that is held in fee in such case, but only the reversion or remainder. A reversion or a remainder is described as such; the quality, value, and sometimes the validity being dependent on the precedent estate." Thus, the use of the word "fee" in an appraiser's certificate in execution proceedings does not properly describe a reversion or a remainder. *Stinson v. Rouse*, 52 Me. 261, 266; *Brackett v. Ridlon*, 54 Me. 426, 434.

A fee simple, being the highest estate known to the law, is the entire and absolute property. It is a freehold estate of inheritance free from conditions and of indefinite duration; so that it is impossible for one to own a fee simple in land while another owns a life estate in the same property at the same time. Hence, where a complaint alleged that one plaintiff had a fee-simple estate and that the other plaintiff had a life estate in the property damaged, the owner of the life estate could not recover damages. *Yeager v. Town of Fairmont*, 27 S. E. 234, 43 W. Va. 259.

Where real property was devised to a son of testator, in trust for the use of his daughter "during her life, and to her issue who might be living at the time of her death, such real estate in fee simple, but, should she die leaving no child, then" to testator's two sons, one of such sons, who died before his sister, had no title or right, legal or equitable, in fee simple, in such land, to which a right of dower to his wife could attach. *Bush v. Bush* (Del.) 5 Houst. 245, 276.

#### FEE SIMPLE ABSOLUTE.

A fee simple absolute is an estate in lands to a man and to his heirs generally. *Baltimore & Ohio R. Co. v. Patterson*, 13 Atl. 369, 68 Md. 606.

"An estate in fee simple absolute means a perfect title. It is the entire and absolute interest in property or land, from which it follows that no one can have a greater estate." *Fink v. Darst*, 14 Ill. (4 Peck) 304, 308, 58 Am. Dec. 575 (quoting *Cruise*, Dig. tit. "Estate in Fee Simple," § 44).

Sir Matthew Hale, in his *Analysis of the Common Law*, says (page 57, § 30): "An absolute fee simple is such as has no bounds or limits annexed, and is an estate to

a man and his heirs absolutely thereafter." Powell, in his work on Devises, says (page 230): "A fee simple absolute is where lands are given to a man and his heirs absolutely without any end or limitation put to the estate." *Lott v. Wyckoff* (N. Y.) 1 Barb. 565, 575.

An estate in fee simple absolute is one which is limited absolutely to a man and his heirs and assigns, forever, without limitation or condition. Thus, a conveyance to A., habendum to him and his heirs and assigns, forever, conveys an estate in fee simple absolute, there being no qualification or limitation thereon. *Frisby v. Ballance*, 7 Ill. (2 Gilman) 141, 144.

In *Bogy v. Shoab*, 13 Mo. 385, in discussing the statute providing that, if any person shall convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, it shall immediately pass to the grantee, the court said, in regard to the words "fee simple absolute," that it depends upon the character of the deed whether it is to be affected by the statute. It must be a conveyance purporting to show the fee simple absolute. The term "fee simple" is known at common law as one which defines the quantity of an estate. It is used in contradistinction from fee, fee tail, a life estate, or a term of years. It was evidently not employed in this sense in this provision, as it surely was not intended that a quitclaim deed, although the deed uses language to pass the fee, and not any smaller estate, would therefore pass a new title not belonging to the grantor when he makes the deed. It was hardly intended to apply to a deed conveying all the right, title, and interest of the grantor. Such a deed would undoubtedly pass the land itself if the grantor had an estate therein at the time of the conveyance, but it passes no estate which was not then possessed. *Ford v. Unity Church Soc.*, 25 S. W. 394, 396, 120 Mo. 498, 23 L. R. A. 561, 41 Am. St. Rep. 711.

The statute of 1786 abolishing entails converted the primary estates in tail into a fee simple absolute. The cross-remainders fell with the primary estates upon which they were dependent, as the remainder could not have been limited after an absolute fee. Held, that the word "absolute" in such statute was synonymous with "or unconditional," and that the statute was equivalent to a declaration that the estate entailed should be deemed an unconditional fee in the person seised of the estate tail. *Lott v. Wyckoff*, 2 N. Y. (2 Comst.) 355, 357.

In 1 Rev. St. (Edmonds' Ed.) p. 670, it is provided that every estate of inheritance

shall be termed a fee simple or fee, and every such estate, when not defeasible or conditional, shall be a fee simple absolute, or absolute fee. Laws 1895, c. 987, authorizing the construction of a bridge, and empowering the city to acquire title in fee, does not operate to make a taking of property to construct a street alongside the bridge pass title in fee simple absolute to the city, in view of the distinction which, as shown, exists. What was unquestionably intended by the act in conformity with the general policy of the law was to confer on the public authorities the right to acquire such interest in the land, more or less, as might be necessary to carry out the act. In *re Harlem River Bridge*, 77 N. Y. Supp. 737, 742, 74 App. Div. 197.

#### FEE TAIL.

A fee tail is a feodum talliatum; a fee from which the general heirs were taille—cut off. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277. It is simply a conditional fee at the common law, so modified by the statute *de bonis conditionalibus*, known as the "Statute of Westminster I," that the estate can descend only to certain classes of heirs which are held not to take a conditional fee simple, but a particular estate which has been denominated in fee tail, the donor holding the ultimate fee expectant on the failure of issue; in other words, the reversion. This estate corresponds to the feodum talliatum of the feudal law; that is, a fee from which the general heirs are taille, or cut off. *Wilman v. Robinson*, 55 S. W. 950, 951, 67 Ark. 517. It is an estate restricted to heirs of only one definite class, from which it can never depart; for, if such class runs out, or happens to become extinct, rather than pass into any kind different from that designated, the estate shall revert or turn back to the heirs of the donor or giver. Where a will gave land to the testator's son and to his heirs by his present wife, Anne, it creates an estate in fee tail. *Somers v. Pierson*, 18 N. J. Law (1 Har.) 181, 182.

#### As fee simple or fee simple absolute.

Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple, and, if no valid remainder is limited thereon, is a fee simple absolute. Rev. St. Okl. 1903, § 4028.

#### FEE TAIL GENERAL.

An estate tail male is not within the meaning of the term "fee tail general," as employed in the act to direct descents which converts estates tail general into fee-simple estates, and saves them from lapsing. *Pennington v. Pennington*, 17 Atl. 329, 331, 70 Md. 418, 3 L. R. A. 816.

## FEEBLE HEALTH.

The words "being in feeble health" import that the person in such health is weak, sickly, debilitated by disease or by age or decline of life; but they do not mean that the person is incapable of travel and appearing at court, as required by Gen. St. c. 38, § 3, providing that the deposition of a witness may be taken when by reason of age, sickness, or other bodily infirmities he is rendered incapable of traveling and appearing at court. *Lund v. Dawes*, 41 Vt. 370, 372.

## FEED.

"To lend additional support; to strengthen ex post facto. 'The interest when it accrues feeds the estoppel.'" *Black, Law Dict.* (quoting *Christmas v. Oliver*, 5 Man. & R. 202, 207).

## FEED STABLE.

A feed stable, within Code 1880, § 585, requiring a license for keeping a livery or feed stable, includes the stable of a person who had exposed a sign, and who let stalls at a certain price per day to those desiring their use, and where a person renting a stall could either supply the food for the stock or the defendant could furnish it from his store, charging only its market value, and where the stable was locked at night by the defendant, and no stock was permitted to be taken out until both the stall rent and the account for food furnished was paid. *Morgan v. State*, 1 South. 749, 750, 64 Miss. 511.

## FEED WIRE.

A feed wire is a wire charged with a high potential current of electricity, used to conduct and distribute the electricity throughout a city. *Atlanta Consol. St. Ry. Co. v. Owings*, 25 S. E. 377, 97 Ga. 603, 33 L. R. A. 798.

## FEEDER.

A feeder, according to Webster, is a fountain, stream, or channel that supplies a main canal with water; and hence Act March 17, 1869, providing for the construction of new feeders, applied only to canals, and not to railroads. *Graff v. Evergreen R. Co.*, 2 Pa. Co. Rep. 502, 504.

## FEEL—FELT.

All who may feel interested, see "All."

A bond promising to pay as soon as the maker, a corporation, might feel able, means when the corporation's officers, directors, or agents, whoever they may be, that have charge of such matters, feel able; that is to

say, as the use of that term is understood, when they are conscious of being able, or know it is able. *Pistel v. Imperial Mut. Life Ins. Co. of America*, 42 Atl. 210, 212, 88 Md. 552, 43 L. R. A. 219.

The words "feels unsafe and insecure," as used in a chattel mortgage providing that, in the event the mortgagee "feels unsafe and insecure" he may foreclose, do not mean that he may arbitrarily and without cause declare that he feels unsafe and insecure. He has not an arbitrary discretion in the premises, but the grantor must be about to do, or has done, some act which tends to impair the security. *Lichtenberger v. Johnson*, 49 N. W. 336, 32 Neb. 185; *J. I. Case Plow Works v. Marr*, 49 N. W. 1119, 1120, 33 Neb. 215; *Newlean v. Olson*, 22 Neb. 717, 36 N. W. 155, 157, 3 Am. St. Rep. 286 (cited and approved *Musser v. King*, 59 N. W. 744, 746, 40 Neb. 892, 42 Am. St. Rep. 700; and *Hull v. Godfrey*, 47 N. W. 850, 851, 31 Neb. 204); *Humpfner v. D. M. Osborne & Co.*, 50 N. W. 88, 89, 2 S. D. 310.

The word "felt," as used in a statement by a person that another felt in through a window and struck her, indicates deliberation, and an intent to deliver the blow which followed. *Thillman v. Neal*, 42 Atl. 242, 245, 88 Md. 525.

## FEELINGS.

See "Bad Feeling."

In a charge authorizing an award of damages for injured feelings, the term "feelings" properly includes both mental and bodily feelings. *Western Union Telegraph Co. v. Sweetman*, 47 S. W. 676, 677, 19 Tex. Civ. App. 435.

Injured feelings following an injury is a part of the pain naturally attending it, and are too remote to be considered an element of damage. *Bovee v. Town of Danville*, 53 Vt. 183, 191.

## FEES.

See "Attorney's Fees"; "Docket Fee"; "Harbor Fees"; "License Fee"; "Probate Fee."

Fees, clerk hire or otherwise, see "Otherwise."

Other fees, see "Other."

A fee is a reward or compensation for services, rendered or to be rendered; a payment in money for official or professional services, whether the amount be optional or fixed by custom or law. *Crawford v. Bradford*, 2 South. 782, 783, 23 Fla. 404.

The word "fee" denotes compensation paid to professional men. *Cochran v. A. S.*

Baker Co., 61 N. Y. Supp. 724, 725, 30 Misc. Rep. 48.

The term "fees" is used to designate the sums prescribed by law as charges for services rendered by public officers. *City of St. Louis v. Meints*, 18 S. W. 80, 81, 107 Mo. 611.

"Fees are the rewards or compensation to be paid by individuals to public officers for their own, or for the use of the public, for official services rendered." *Commonwealth v. Bailey*, 3 Ky. Law Rep. 110, 114.

Fees are compensation for particular acts or services; as, the fees of clerks, sheriffs, lawyers, doctors, etc. *Board of City of Indianapolis School Com'rs v. Wasson*, 74 Ind. 133, 142 (quoting *Webst. Dict.*; *Worcester, Dict.*); *Seller v. State*, 65 N. E. 922, 927, 160 Ind. 605; *Cowdin v. Huff*, 10 Ind. 83, 85; *Callaway County v. Henderson*, 24 S. W. 437, 438, 119 Mo. 32.

Fees are compensation for services rendered or to be rendered, and hence it is proper to speak of the recompense of a county clerk for services rendered the board of county commissioners as fees. *State v. Russell*, 71 N. W. 785, 787, 51 Neb. 774.

"Fees for collection" are understood to mean fees to be paid when a debt is collected. It is not unusual, when an attorney receives a claim for collection, for him to look for the payment of his fees exclusively to the sum collected. *Gaither v. Tolson*, 36 Atl. 449, 450, 84 Md. 637.

The fees of an attorney and solicitor and counsel, as at present allowed and taxed, are sums fixed by the Legislature as compensation to be paid by the client to the attorney or solicitor in the suit for the services specified. They are recoverable by the successful party against the unsuccessful party as compensation to the client, and not as a reward to the attorney or solicitor, contingent upon his success in the suit. In the absence of any express agreement on the subject, the duty of the client to pay them, and the right of the attorney or solicitor to demand them from his client, does not depend upon success in the suit, or the recovery of costs. *Ely v. Peet*, 29 Atl. 817, 818, 52 N. J. Eq. (7 Dick.) 734.

#### **Allowance.**

See "Allowance."

#### **As charges.**

The term "fees," as used in Laws 1865, c. 284, § 1, relating to the jailor's fees, and providing that the jailor's fees of the different counties of the state for the entire support of each prisoner shall be, etc., is synonymous with and signifies the same as

"charges." *McPheters v. Morrill*, 66 Me. 123, 124.

Charges for weighing and gauging merchandise entered for export, when provided by Act Cong. July 26, 1866, were denominated as "fees." But in subsequent legislation the sections fixing the salary of weighers and gaugers had become inapplicable, and the word "fees" was dropped out of the statute, and it was contended that these charges were fees, and hence abrogated by the customs administrative act. The court held that the fact that the omission in the Revised Statutes to denominate these charges as fees was of no significance; that, inasmuch as the charges were in their inception treated and denominated in the statute as fees, and as they were "fees" in the ordinary definition of the word, being a recompense prescribed by law for services, they were included within the fees abolished by the customs administrative act. *United States v. Jahn* (U. S.) 65 Fed. 792, 794, 13 O. C. A. 134.

#### **Commissions.**

"Fees," as defined by Burrill, are the required compensation or wages allowed by law for services performed by one in the discharge of official duties. 1 Burrill, Law Dict. p. 474; 1 Bouv. Law Dict. p. 577. Power to allow fees gives power to allow commissions. *City of Austin v. Johns*, 62 Tex. 179, 182.

"Fees," as used in Act March 14, 1883, § 165, providing that all salaried officers of the several counties of the state should charge and collect and pay into the county treasury the fees allowed by law in all cases, should be construed in its popular and common acceptation, which includes the commissions estimated by a percentage allowed by law on sums of money received or collected. *Smith v. Dunn*, 8 Pac. 625, 626, 68 Cal. 54.

#### **As compensation for all services.**

In determining whether an officer was liable to a county for certain sums received for services in connection with his official capacity, it was held that fees are compensation for particular acts or services rendered by public officers in the line of their duty, as expressly designated and authorized by law; but, while this is true as far as it goes, yet where it appears that the schedule of fees in a statute shall be in full for all services rendered by the officer in his official capacity, that payments for any services which are rendered in his official capacity will be included in the term "fees." *Hennepin County Com'rs v. Dickey*, 90 N. W. 775, 776, 86 Minn. 331.

In a statute providing that the aggregate amount of fees that any clerk shall be al-

lowed to retain for a year's services shall not exceed a certain sum, the word "fees" will be held to include compensation allowed to him for any and all acts done in his official capacity. *Callaway County v. Henderson*, 24 S. W. 437, 438, 119 Mo. 32.

"Fees," as used in a statute declaring all fees which the county officers were entitled to charge or receive shall belong to the county in and for which they were severally elected or appointed, means the fees pertaining to the county office, and which, from the character of the office, the incumbent earned and received. It does not mean one-half of the fees over and above a certain amount. *Commonwealth v. Mann*, 31 Atl. 1003, 1005, 168 Pa. 290.

Fees are a reward or wages given to one as a compensation for his labor and trouble for the execution of his office. Another definition quoted with approval is as follows: "Reward or compensation for services rendered or to be rendered; especially payment for professional services, of optional amount, or fixed by custom or law; charge; pay; perquisite; as, the fees of lawyers and physicians, the fees of office, clerk's fees, sheriff's fees, marriage fees," etc. The term "fees" in the statute requiring probate judges to report all fees and compensation received for services performed by them by virtue of their office includes all compensation or charges received by virtue of the office, even though such compensation is received while the probate judge is acting in town-site matters. *Finley v. Territory*, 73 Pac. 273, 278, 12 Okl. 621.

Under *Sayles' Civ. St. art. 2495c*, prescribing the maximum amount of fees of all kinds that may be retained by county officers, the words "fees of all kinds" embrace every kind of compensation allowed by law to any of the officers included in the provision. *Ellis County v. Thompson*, 68 S. W. 48, 51, 95 Tex. 22.

#### **Costs distinguished.**

Costs and fees were originally altogether different in their nature. One is an allowance to a party for expenses incurred in prosecuting or defending a suit; the other a compensation to an officer for services rendered in the progress of the cause. There is in our statute a manifest difference between costs and fees in another respect. Costs are an allowance to a party for the expenses incurred in prosecuting or defending a suit, and incident to the judgment; while fees are compensations to public officers for services rendered individuals not in the course of litigation. *Tillman v. Wood*, 58 Ala. 578, 579.

"Costs are an allowance to a party for expenses incurred in conducting his suit, while fees are a compensation to an officer

for services rendered in the progress of the cause." *Musser v. Good* (Pa.) 11 Serg. & R. 247; *Howard Building & Loan Ass'n v. Philadelphia R. R. Co.*, 102 Pa. 220, 222; *Bradley v. State*, 69 Ala. 318, 321.

The terms "fees" and "costs" are often used interchangeably as having the same application, but, accurately speaking, the term "fees" is applicable to the items chargeable by law as between the officers or witnesses and the party whom he serves, while the term "costs" has reference to the expenses of litigation as between litigants. *Alexander v. Harrison*, 28 N. E. 119, 2 Ind. App. 47 (citing *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law [9 Vroom] 272).

Fees are distinguished from costs in being always a compensation for services, while costs are an indemnification for money paid out and expended in a suit. *Crawford v. Bradford*, 2 South. 782, 783, 23 Fla. 404.

In common parlance the compensation paid an attorney is denominated a "fee" in contradistinction to the costs incident to the judgment, but in its legal sense the term "costs" denotes not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover for his services; and in a stipulation to pay all costs for collecting a note an attorney's fee for bringing suit is included. *Williams v. Flowers*, 90 Ala. 136, 7 South. 439, 24 Am. St. Rep. 772.

#### **As disbursements or expenses.**

Within Act July 20, 1892, c. 209, 27 Stat. 252 [U. S. Comp. St. 1901, p. 706], allowing any citizen to prosecute any suit or action in the federal courts without prepaying fees and costs, "fees" means the fees of the clerk in the strict sense of the word, and does not relate to his disbursements. *Columb v. Webster Mfg. Co.* (U. S.) 76 Fed. 198, 200.

The term "fees," as used in a statute providing that the fact that an officer levying an execution shall have indorsed thereon other and greater fees than said officer shall be entitled to, shall not invalidate the levy, but that the liability of such officer for receiving more than his lawful fees shall not be affected by the act, "is not restricted to the charges of the officer for his personal services, but embraces also all the expenses attending the levy and included in it." *Camp v. Bates*, 13 Conn. 1, 5.

Const. art. 6, § 10, prohibiting judges from receiving to their own use "any fees or perquisites of office," does not include the necessary expenses actually paid by them for traveling by public conveyance in going to and from the place of holding court. *State v. Atherton*, 10 Pac. 901, 910, 19 Nev. 332.

**Mileage.**

By section 792 of Hill's Ann. Laws the word "fees" is defined to include both the mileage and per diem to which a witness is entitled, and hence, as used in section 795, providing that a witness residing more than 20 miles from the place of trial shall be entitled to double fees, the mileage is included in the term. *Burrows v. Balfour*, 65 Pac. 1062, 1063, 39 Or. 488.

**Official services imported.**

"Fees," as used in an indictment under the Indiana statutes against an officer for receiving excessive fees, will not be construed of itself to import that the fees were claimed to be due as fees for official services, and hence such facts should be charged in the indictment. *State v. Oden*, 37 N. E. 731, 732, 10 Ind. App. 136.

The term "fees," as used in Rev. St. § 833 [U. S. Comp. St. 1901, p. 642], providing that every clerk of the district court shall make a written return of all the "fees and emoluments of his office" of every name and character, cannot be construed to include the sum received as fees in naturalization proceedings, for they do not accrue to the clerk by reason of his official capacity, and are for work which might as well have been done when out of office as when in. *United States v. Hill*, 7 Sup. Ct. 510, 512, 120 U. S. 169, 30 L. Ed. 627.

**As payment after performance.**

Fees are a compensation allowed by law for specific services by an officer, and fixed by acts of assembly, and are not due until the services are rendered. *Williams v. State*, 34 Tenn. (2 Sneed) 160, 162.

The meaning of the word "fees" is the recompense allowed by law to officers for their labor and trouble (2 Bac. Abr. 463); so that where there is no labor or trouble, no necessary services rendered or offered to be rendered, no fees can be allowed. *City of Mobile v. Southerland*, 47 Ala. 511, 517.

**Per diem.**

"Fees," as used in Const. 1870, art. 10, § 11, does not apply to the per diem allowance of county superintendents of schools. This is to be regarded as compensation. *Board of Sup'rs of Jefferson County v. Johnson*, 64 Ill. 149, 150.

The per diem allowed a county clerk for his services as clerk of the board of county commissioners is a fee within the meaning of the act of April 6, 1891, requiring all the fees collected by such officer to be paid in to the county treasurer; for while a per diem, technically speaking, is improperly called a fee, yet, where the Legislature has classified it as such, it will be held to

constitute a fee when used in a statute. *Henderson v. Pueblo County Com'rs*, 35 Pac. 880, 881, 4 Colo. App. 301.

An allowance fixed by law at a definite amount per day to compensate a person for discharging public duties certainly cannot be regarded as a fee, within the accepted meaning of the term, but falls more properly within the definition of the word "wages," and, as used in the salary law of 1895, requiring county auditors to tax on their books the fees for services performed, the word "fees" should be construed to mean compensation for particular acts and services performed by the auditor, and not to apply to a per diem allowance to such auditor for his services as a member of the board of review. *Seiler v. State*, 65 N. E. 922, 927, 160 Ind. 605.

**Salary and wages distinguished.**

The statute fixed the compensation of the officers of a new county by providing that they should receive the same fees as are now allowed by law in another county. Subsequently it was enacted that the officers of the other county should receive a fixed annual salary, and it was contended that the word "fees" should be construed to signify compensation, and should take the form of the compensation received by the officers of the other county, whether by the receipt of fees or by a fixed salary thereafter as established. It was said that by the ordinary acceptance of the term "fees" as heretofore and now used in the statute we understand it to signify compensation or remuneration for particular acts or services rendered by public officers in the line of their duties to be paid by the parties, whether persons or municipalities obtaining the benefit of the acts or receiving the services, or at whose instance they were performed, while the term "salary" denotes a recompense or consideration to be paid for continuous, as contradistinguished from particular, services, and may be denominated annual or periodical wages or pay. Lexicographers and some authorities class "salary" and "wages" as synonymous, but not so with "salary" and "fees." The term "fees" is not so inflexible as that it may not have been used in the sense of "salary" or "wages." As used in such act, it will not be so construed, since it is apparent that the act contemplated not the receiving of the same amount of compensation, but the receiving of the same amount for the particular services rendered. *Landis v. Lincoln County*, 50 Pac. 530, 31 Or. 424.

Fees are distinguished from wages in being compensation paid to professional men, while wages is applied to the payment for manual labor or other labor of manual or mechanical kind. In re *Stryker*, 53 N. E. 525, 158 N. Y. 526, 70 Am. St. Rep. 489.

Fees are distinguished from wages in being a compensation for particular services. *Crawford v. Bradford*, 2 South. 782, 783, 23 Fla. 404.

As tax.

See "Tax—Taxation."

## FEIGNED ACCOMPLICE.

Pen. Code, § 1111, requiring the testimony of an "accomplice" to be corroborated, does not apply to a "feigned accomplice," and hence the discredit of an accomplice does not attach to a detective who joins a criminal organization for the purpose of exposing it, even though, in order to aid in such exposure, he united in and apparently approved its plans. *People v. Bolanger*, 11 Pac. 799, 800, 71 Cal. 17.

## FEIGNED ISSUE.

The feigned issue which was abolished by the Constitution in actions for seduction is the loss of services and for damages based thereon. For centuries damages have been awarded on that basis, and a more transparent fiction than that the action of seduction was for the value of services was not known to the law. *Hood v. Sudderth*, 16 S. E. 397, 399, 111 N. C. 215.

## FELLOW SERVANT.

See "Vice Principal"; "Superior Fellow Servant."

All servants of the same master are prima facie co-servants, within the rule exempting the master from liability when one servant is injured by the negligence of a co-servant. *Swadley v. Missouri Pac. Ry. Co.*, 24 S. W. 140, 141, 118 Mo. 268, 40 Am. St. Rep. 366.

A fellow servant is any one engaged in the same common employment, who serves and is controlled by the same master. *McAndrews v. Burns*, 39 N. J. Law (10 Vroom) 117, 119; *Jansen v. Jersey City*, 39 Atl. 1025, 1026, 61 N. J. Law, 243; *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 31 Atl. 619, 621, 57 N. J. Law, 400, 51 Am. St. Rep. 604; *St. Louis, I. M. & S. R. Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 25 L. R. A. 833.

All servants in the employ of the same common master, subject to the same general control, paid from a common fund, and engaged in promoting or accomplishing the same common object, are fellow servants: *Justice v. Pennsylvania Co.*, 30 N. E. 303, 304, 130 Ind. 321 (citing *Beach*, *Contrib. Neg.* p. 338).

Servants are "fellow servants," within the rule that the master is not liable for the injuries of the servant received through the negligence of a fellow servant, if "they are in the employment of the same master, engaged in the same common enterprise, and are both employed to perform duties and services tending to accomplish the same general purpose, as maintaining and operating a railroad, operating a factory, working a mine, or erecting a building. *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 565.

"All the decisions that have been rendered and all the text-books that have been written have not succeeded in giving a definition of who are fellow servants which is plain and broad and comprehensive enough to be universally applicable or to be universally accepted. The power to employ and discharge is not always a conclusive test. The opportunity to observe and influence and report delinquencies to a common correcting power is one of the tests employed, as is a consideration of the act to be done by the two persons; but no absolute, unfailing rule has ever yet been announced which has been accepted as the alpha and omega of the law on this subject, and perhaps none such will ever be promulgated, the reason for all which arises from the fact that the relations between the two persons employed by the same master vary in almost every case. "Fellow servant" is, therefore, a relative term, which must be applied to the special conditions presented in each case, and a result worked out from precedents applicable to exactly similar conditions, or from the power of discrimination of the writer of each opinion; and hence it is unnatural and unreasonable to expect the same results in all cases. *Glover v. Kansas City Bolt & Nut Co.*, 55 S. W. 88, 92, 153 Mo. 327.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who take the risk of each other's negligence. *Brunell v. Southern Pac. Co.*, 56 Pac. 129, 131, 34 Or. 256; *Kirk v. Atlanta & C. Air Line Ry. Co.*, 94 N. C. 625, 627, 55 Am. Rep. 621; *Olmstead v. City of Raleigh*, 41 S. E. 292, 130 N. C. 243; *Brown v. Central Pac. Ry. Co.*, 7 Pac. 447, 449, 68 Cal. 171; *Mele v. Delaware & H. Canal Co.*, 14 N. Y. Supp. 630, 631, 59 N. Y. Super. Ct. 367; *Missouri Pac. Ry. Co. v. Watts*, 63 Tex. 549, 551; *Missouri, K. & T. Ry. Co. of Texas v. Whitaker*, 33 S. W. 716, 717, 11 Tex. Civ. App. 668; *Norfolk & W. R. Co. v. Donnelly's Adm'r*, 14 S. E. 692, 694, 88 Va. 853; *Jenkins v. Richmond & D. R. Co.*, 18 S. E. 182, 183, 39 S. C. 507, 39 Am. St. Rep. 750; *Adams v. Iron Cliffs Co.*, 44 N. W. 270, 276, 78 Mich. 271, 18 Am. St. Rep. 441; *Justice v. Pennsylvania Co.*, 30 N. E.

303, 304, 130 Ind. 821; *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143, 146.

Whether a servant is the fellow servant of an employé injured by the carelessness of the former depends, not on the relative rank of the servants, but on the character of the work the negligence with respect to which resulted in the injury. *Ell v. Northern Pac. R. Co.*, 1 N. D. 336, 48 N. W. 222, 223, 12 L. R. A. 97, 26 Am. St. Rep. 621.

One who contracts with a mining company to break down rock for a certain distance, to disclose the vein, at a stipulated price per foot, the company to furnish steam drills and keep the drift clear of rock as the contractor broke it down, is to be regarded as a contractor with, and not a servant of, the company; and hence he is not a fellow servant with the superintendent of the company under whose direction his work is performed. *Mayhew v. Sullivan Min. Co.*, 76 Me. 100, 106.

#### Association promotive of caution.

A servant cannot maintain an action against his master for an injury caused by the negligence of a fellow servant, though he had no opportunity to control or influence the conduct of the other servant. This rule extends to cases in which the two, deriving their authority and their compensation from the same source, are engaged in the same business, though in different departments of duty. *Holden v. Fitchburg R. Co.*, 129 Mass. 268, 271, 278, 37 Am. Rep. 297 (citing *Farwell v. Boston & W. R. Corp.*, 45 Mass. [4 Metc.] 49, 38 Am. Dec. 339; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Morgan v. Vale of Neath Ry.*, 5 Best. & S. 570, 736, and L. R. 1 Q. B. 149; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *King v. Boston & W. R. Corp.*, 63 Mass. [9 Cush.] 112; *Gillshannon v. Stoney Brook R. Corp.*, 64 Mass. 228 [10 Cush.] 228; *Seaver v. Boston & M. R.*, 80 Mass. [14 Gray] 466; *Gilman v. Eastern R. Corp.*, 92 Mass. [10 Allen] 233, 87 Am. Dec. 635; and *Id.*, 95 Mass. [13 Allen] 433, 90 Am. Dec. 210); *Neal v. Northern Pac. Ry. Co.*, 59 N. W. 812, 813, 57 Minn. 365.

When the ordinary duties and occupation of the servants of a common master are such that one is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risk of such possible carelessness when they entered the service, and must be regarded as fellow servants. A car repairer is a fellow servant with the engineer of a switch engine. *Chicago & A. R. Co. v. Murphy*, 53 Ill. 336, 338, 340, 5 Am. Rep. 48; *Valtez v. Ohio & M. Ry. Co.*, 85 Ill. 500, 502.

Fellow servants are defined as those who are so far working together as to be practically co-operating and to have opportunity to control or influence the conduct of each

other, and have no superiority of the one over the other. *Madden's Adm'r v. Chesapeake & O. Ry. Co.*, 28 W. Va. 610, 619, 57 Am. Rep. 695; *Flannegan v. Chesapeake & O. Ry. Co.*, 21 S. E. 1028, 1029, 40 W. Va. 436, 52 Am. St. Rep. 896; *Armstrong v. Oregon Short Line & U. N. Ry. Co.*, 32 Pac. 693, 694, 8 Utah, 420.

"Fellow servants," within the meaning of the law relevant to the liability of masters for the negligence of their servants for injuries to fellow servants, means servants in the same line of employment, whose duties bring them into habitual association with each other, so that they may exercise a mutual influence upon each other promotive of proper caution. *Chicago & E. I. R. Co. v. Kneirim*, 39 N. E. 324, 326, 152 Ill. 458, 43 Am. St. Rep. 259; *Wenona Coal Co. v. Holmquist*, 152 Ill. 581, 591, 38 N. E. 946; *Whitney & Starrette Co. v. O'Rourke*, 50 N. E. 242, 246, 172 Ill. 177; *Chicago & A. R. Co. v. O'Brien*, 40 N. E. 1023, 1024, 155 Ill. 630; *Pagels v. Meyer*, 61 N. E. 1111, 1112, 193 Ill. 172; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill. 576; *Id.*, 98 Ill. 302, 34 Am. Rep. 168; *Joliet Steel Co. v. Shields*, 34 N. E. 1108, 1110, 146 Ill. 603. But men employed by a steel manufacturing company to keep in repair the railroad tracks in the mill, who do their work while the workmen who make steel in the mill are away, are not the fellow servants of such workmen. *Joliet Steel Co. v. Shields*, 34 N. E. 1108, 1110, 146 Ill. 603.

Those are fellow servants who are so related and associated in their work that they can observe and influence each other's conduct and report delinquencies to a common directing power. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 20 S. W. 480, 112 Mo. 86, 18 L. R. A. 817; *Hawk v. McLeod Lumber Co.*, 65 S. W. 1022, 1023, 166 Mo. 121; *Schaub v. Hannibal & St. J. R. Co.*, 16 S. W. 924, 927, 106 Mo. 74; *Ryan v. McCully*, 123 Mo. 636, 27 S. W. 533; *Card v. Eddy*, 28 S. W. 979, 980, 129 Mo. 510, 36 L. R. A. 806; *Parker v. Hannibal & St. J. R. Co.*, 19 S. W. 1119, 1123, 109 Mo. 362, 18 L. R. A. 802. Under this rule a brakeman of one freight train is the fellow servant of the fireman of another freight train running on the same division of the road. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 20 S. W. 480, 112 Mo. 86, 18 L. R. A. 817.

When servants are employed and paid by the same master, and their duties are such as to bring them into such a relation that the negligence of the one in doing his work may injure the other in the performance of his, then they are engaged in the same common business, and, being subject to the control of the same master, they are fellow servants, within the general accepted meaning of the rule, no matter how different the grade of service or compensation may be, or how diverse or distinct their duties may



be. Thus a brakeman on one train of a railroad company is the fellow servant of the employes in charge of and operating another train of the same company. *McMaster v. Illinois Cent. R. Co.*, 4 South. 59, 65 Miss. 264, 7 Am. St. Rep. 653. Under such rule a car repairer and trainmen are fellow servants. *St. Louis A. & T. Ry. Co. v. Triplett*, 15 S. W. 831, 833, 54 Ark. 289, 11 L. R. A. 773.

As to who are fellow servants there have been a great many and great variety of decisions; but, however various, the decisions agree that the weight of authority is that, in order to constitute the servants of one master fellow servants within the rule of respondeat superior, they must be engaged in the same line of work, under the control of the same foreman, employed and discharged by the same head of the department in which they work, that they labor together in such personal relation that they can exercise an influence upon each other promotive of proper caution in respect to their mutual safety, that they shall be at the time of the injury directly co-operative with each other in the particular business in hand, or that their mutual duties shall bring them into absolute co-association, as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor to some extent to supervise and watch the conduct of each other as to skill, diligence, and carefulness. Under such definition a brakeman is not a fellow servant of a car inspector; they not being associated together in their labor and under different managements. *Daniels v. Union Pac. Ry. Co.*, 23 Pac. 762, 6 Utah, 357.

#### Common master.

Prima facie, all persons engaged in one employment, in the service of one master, are fellow servants. *City of Minneapolis v. Lundin*, 58 Fed. 525, 527, 7 C. O. A. 344; *Central R. Co. of New Jersey v. Keegan*, 16 Sup. Ct. 269, 270, 160 U. S. 259, 40 L. Ed. 418.

The general rule is that those entering the service of a common master become thereby engaged in the common service and are fellow servants. *Northern Pac. R. Co. v. Peterson*, 16 Sup. Ct. 843, 845, 162 U. S. 346, 40 L. Ed. 99.

The true test of fellow servants is community in that which is the test of service, which is subjection to control and direction by the same general master in the same common object; but, unless they are subject to the same general control, the fact that they are engaged in the same common pursuit does not render them co-servants. It is subjection to the same general control, coupled with an engagement in the same common pursuit, that affords the test. Un-

less these two elements concur there can be no common service. *Ellington v. Beaver Dam Lumber Co.*, 19 S. E. 21, 22, 93 Ga. 53; *Justice v. Pennsylvania Co.*, 30 N. E. 303, 304, 130 Ind. 321; *Norfolk & W. R. Co. v. Donnelly's Adm'r*, 14 S. E. 692, 694, 88 Va. 853.

Thus a manager of a vehicle used locally by a lumber company in the transportation of its supplies and products, and another servant of the company whose business it is to repair and keep in proper condition the track upon which the vehicle is run, who according to the custom of the company is daily transported to and from his work on this vehicle, are fellow servants. *Ellington v. Beaver Dam Lumber Co.*, 19 S. E. 21, 22, 93 Ga. 53. Under this rule, also, a man employed by the owner of the lighter in receiving the cargo from a steamship and transporting the same to the shore is not a fellow servant of an employe of the steamship company who is engaged in unloading the cargo from the steamship. *Svenson v. Atlantic Mail S. S. Co.*, 57 N. Y. 108, 111.

While a coal train of a railroad company whose tracks run over the tracks of a coal company was delivering coal to the latter company, a brakeman of the coal company engaged in coupling cars of the train was injured by the negligence of the railroad company's engineer. It was held that such engineer was not a fellow servant of the injured brakeman; he not being under the power and direction of the coal company, engaged exclusively in its work, or lent to it for the occasion. *Central R. Co. of New Jersey v. Stoermer* (U. S.) 51 Fed. 518, 520, 2 C. C. A. 360. Hence an engineer of one railroad company is not a fellow servant of a switchman of another company. *Smith v. New York & H. R. Co.*, 19 N. Y. 127, 131, 75 Am. Dec. 305.

Although the servants of different contractors, while engaged in working together on a building, are in common employment, they are not fellow servants, so long as they are only under the control of their respective masters. A servant of one contractor may, by submitting to the directions and control of another, become the fellow servant of the latter and the fellow servant of his servants. *Morgan v. Smith*, 35 N. E. 101, 102, 159 Mass. 570. Under this rule a porter of a palace car, whose duties are to collect fares and wait on passengers in such car, and who by his contract with the car company and the contract between the latter and the railroad company is subject to the rules of the railway company, is not a fellow servant of the engineer and conductor of such train. *Jones v. St. Louis & S. W. Ry. Co.*, 28 S. W. 883, 884, 125 Mo. 666, 26 L. R. A. 718, 46 Am. St. Rep. 514. So, also, those employed in navigating one steamboat are not fellow servants with

those employed in navigating another. *Connolly v. Davidson*, 15 Minn. 519 (Gil. 428), 2 Am. Rep. 154.

#### Control and direction of work and men.

Prima facie, all who enter the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants. An engineer in charge of a locomotive which is running detached from any train cannot be regarded as in control of a department of the company's business, so as to render him a vice principal in relation to the fireman of the locomotive; but the two are fellow servants, though the company's rules declare that under such circumstances the engineer shall be regarded as a conductor. *Baltimore & O. R. Co. v. Baugh*, 13 Sup. Ct. 914, 920, 149 U. S. 368, 37 L. Ed. 772.

The fact that one servant is superior in point of authority to another, who is under his direction and control, does not prevent the relation between them from being that of fellow servants. *Robinson v. Houston & T. C. Ry. Co.*, 46 Tex. 550; *Northern Pac. Ry. Co. v. Peterson*, 16 Sup. Ct. 843, 845, 162 U. S. 346, 40 L. Ed. 994; *Hayes v. Colchester Mills*, 37 Atl. 269, 270, 69 Vt. 1, 60 Am. St. Rep. 915; *Kefne v. Chicago & N. W. Ry. Co.*, 17 N. W. 420, 421, 58 Wis. 525; *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 63, 35 Am. Rep. 297. Providing they are both co-operating to effect the same common object. *New York, L. E. & W. R. Co. v. Bell*, 4 Atl. 50, 51, 112 Pa. 400; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 565; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Lewis v. Seifert*, 11 Atl. 514, 518, 116 Pa. 628, 2 Am. St. Rep. 631. "The true reason upon which I think the rule rests is that each one who enters the service of another takes on himself all the ordinary risks of the employment in which he engages, and that the negligent acts of his fellow workmen in the general course of his employment are within the ordinary risks." *New York, L. E. & W. R. Co. v. Bell*, 4 Atl. 50, 51, 112 Pa. 400. The mere fact that a track foreman has some sort of control over the rest of his gang does not destroy the relation of fellow servant with them. *Deavers v. Spencer*, 70 Fed. 480, 482, 17 C. C. A. 215; *Northern Pac. Ry. Co. v. Peterson*, 16 Sup. Ct. 843, 845, 162 U. S. 346, 40 L. Ed. 994. So, too, the conductor of a construction train and the laborer employed in surfacing with gravel the track are fellow servants. *Heine v. Chicago & N. W. Ry. Co.*, 17 N. W. 420, 421, 58 Wis. 525. A mining boss and a driver boss are fellow servants. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432. A servant working in constructing a sewer is a fellow servant of a superintendent of his employer in immediate

charge of the work. *Zeigler v. Day*, 123 Mass. 152, 153. But a train dispatcher, vested with the power and authority of moving trains, of changing the schedule time or making new schedules, as regards the employees engaged in moving trains, is a vice principal, and not a fellow servant. *Lewis v. Seifert*, 11 Atl. 514, 518, 116 Pa. 628, 2 Am. St. Rep. 631; *Crew v. St. Louis, K. & N. W. R. Co. (U. S.)* 20 Fed. 87.

It is not the rank or title of the manager which makes the company present in his person, but the authority with which he is clothed and the duty of supervision he undertakes to perform. *Bloyd v. St. Louis & S. F. Ry. Co.*, 22 S. W. 1089, 1091, 58 Ark. 68, 41 Am. St. Rep. 85 (citing *St. Louis, A. & T. Ry. Co. v. Triplett*, 54 Ark. 302, 15 S. W. 831, 16 S. W. 266, 11 L. R. A. 773; *Haugh v. Texas & P. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. May*, 15 Am. & Eng. R. Cas. 324; *Whart. Neg. § 235*). A conductor of a material train, having control of it and its movements, and the foreman over a gang of men engaged in repairing a railroad track, having power to direct them what to do and when to do it, are not fellow servants of the men composing such gang. *Miller v. Missouri Pac. Ry. Co.*, 19 S. W. 58, 59, 109 Mo. 350, 32 Am. St. Rep. 673.

The same rule of liability of a master for negligence of his servant must necessarily apply as well where the employments of the servants are distinct as to cases where they are one, and to the several grades of employments where those in the inferior are subject to the direction and control of those in the higher grades, as to cases where all occupy a common footing and possess equal authority. The principle on which the rule is founded embraces all those cases. The reasons in support of it, taken together, are equally as forcible in support of it as to either of the others. If a servant cannot look to his employer for indemnity where, notwithstanding the exercise of due care on his part, he is injured by the carelessness of a fellow servant laboring near him in the same particular employment, why should he be permitted to do so when, with the same care on his part, he suffers injury by the negligence of another servant in the same general business, but at the time engaged, equally near him, in some different duty. *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 157.

Fellow servants, within the meaning of the law, are employed in the same service and subject to the same general control; but, if a railroad company sees fit to invest one of these servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fellow servants. *Gravelle v. Minneapolis & St. L.*

Ry. Co. (U. S.) 10 Fed. 711, 715. But on the general doctrine a single exception has been grafted in this state, first by a divided court in *Little Miami R. Co. v. Stevens*, 20 Ohio, 415, and afterwards by a full court in *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201, and thenceforward recognized by this court in subsequent cases. That exception is this: that where one servant is placed in a position of subordination and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured against the master. *Pittsburg, Ft. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 197, 210.

A superintendent of the work of extending a line of railroad, who has foremen and workmen under him, whom he employs and discharges at pleasure, and who has entire control of the cars, tools, machinery, and men employed, is not a fellow servant with the workmen. *Denver, S. P. & P. R. Co. v. Discoli*, 21 Pac. 708, 709, 12 Colo. 520, 13 Am. St. Rep. 243.

The foreman of a company operating a cable street railway, whose duty was to see that the cars were started on their regular trips in the morning with the proper men in charge, and who directs the movements of the men and manipulated the grip if necessary in getting a train into position for the start, is not a fellow servant with the gripman. *Keown v. St. Louis R. Co.*, 41 S. W. 926, 928, 141 Mo. 88.

"Several servants of different grades, when employed in a common service, as an engineer and fireman, foreman of a job and common laborer, are fellow servants. The mere fact that the negligent servant is, in his grade of employment, superior to the servant injured, does not render the master liable." *East Tennessee, V. & G. R. Co. v. Rush*, 83 Tenn. (15 Lea) 145, 151; *Allen v. Goodwin*, 21 S. W. 760, 761, 92 Tenn. 385.

The foreman or superior servant, such as a boss over a gang of men, stands in a position to the men under him as a fellow servant. *O'Brien v. American Dredging Co.*, 21 Atl. 324, 327, 53 N. J. Law (24 Vroom) 291; *What Cheer Coal Co. v. Johnson* (U. S.) 56 Fed. 810, 812, 6 C. C. A. 148; *City of Minneapolis v. Lundin* (U. S.) 58 Fed. 525, 527, 7 C. C. A. 344; *Central R. Co. v. Keegan*, 16 Sup. Ct. 269, 270, 160 U. S. 259, 40 L. Ed. 418; *Lawler v. Androscoggin R. R. Co.*, 62 Me. 463, 467, 18 Am. Rep. 492; *Doughty v. Penobscot Log Driving Co.*, 76 Me. 143, 146; *Conley v. City of Portland*, 3 Atl. 658, 659, 78 Me. 217; *Hannibal & St. J. R. Co. v. Fox*, 3 Pac. 320, 322, 31 Kan.

586; *O'Connor v. Roberts*, 120 Mass. 227, 228; *Griffiths v. New Jersey & N. Y. R. Co.*, 25 N. Y. Supp. 812, 5 Misc. Rep. 320; *Marshall v. Schricker*, 63 Mo. 308, 311; *Daubert v. Pickle*, 4 Mo. App. 591. And it is immaterial whether or not he has power to employ and discharge them. *Alaska Treadwell Gold Min. Co. v. Whelan*, 18 Sup. Ct. 40, 41, 108 U. S. 86, 42 L. Ed. 390. *Contra, Armstrong v. Oregon Short Line & U. N. Ry. Co.*, 82 Pac. 693, 694, 8 Utah, 420.

An assistant foreman is a fellow servant of a workman who works with him. *McGinley v. Levering*, 25 Atl. 824, 152 Pac. 366.

Plaintiff, an engineer and electrician in defendant's hotel, who attended to all mechanical appliances, including the elevator, is a fellow servant of the elevator boy, who caused his injury by running the elevator when he was working in the elevator shaft, though the boy was working partly subject to his order, and both were subject to the order of the manager. *McCarty v. Rood Hotel Co.*, 46 S. W. 172, 173, 144 Mo. 397.

All persons engaged in the service of any person, firm, or corporation, foreign or domestic, doing business in this state, who are intrusted by such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employé in the performance of any duties of such employé, are vice principals of such employé and not fellow servants. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service, and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employés, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employés of such employer fellow servants with other employés engaged in any other department of service of such employer. Employés who do not come within the provisions of this section shall not be considered fellow servants. *Rev. St. Utah 1898, §§ 1342, 1343.*

#### Dependence on or relation to each other.

All are fellow servants who are engaged in the prosecution of the same common work, having no dependence upon or relation to each other, except as co-laborers without rank, under the direction and management of the master himself or of some servant placed by the master over him. *Missouri Pac. Ry. Co. v. Lyons*, 75 N. W. 81, 33, 54 Neb. 633; *Moore v. Wabash, St. L. & P. Ry. Co.*, 85 Mo. 588, 596.

**Different departments of service.**

"The great majority of courts, both in this country and in England, hold that mere difference in grade of employment or in authority with respect to each other does not remove persons from the class of fellow servants. If a servant is supposed to have assumed the risks which the master with due care cannot prevent, and we think it is so, then he assumes the risk from negligence of those servants who may be placed over him as superior servants or overseers, as well as those of equal grade with himself; for in respect to such overseers the master, when he has used due care in selecting them, cannot prevent their negligence any more than he can that of those of an inferior degree." *Brown v. Winona & St. P. Ry. Co.*, 6 N. W. 484, 486, 27 Minn. 338, 38 Am. Rep. 285.

Those who are engaged in different and distinct departments of work are not fellow servants. *Relyea v. Kansas City, Ft. S. & G. R. Co.*, 20 S. W. 480, 481, 112 Mo. 86, 18 L. R. A. 817; *Sullivan v. Missouri Pac. Ry. Co.*, 10 S. W. 852, 854, 97 Mo. 113; *Missouri Pac. Ry. Co. v. Dwyer*, 12 Pac. 352, 361, 36 Kan. 58.

Where employes are employed by the same master, the fact that the plaintiff and the one by whose negligence he was injured are engaged in different departments at the same service does not take the case out of the rule exempting the master from liability or injuries caused by a fellow servant. *Ewald v. Chicago & N. W. Ry. Co.*, 36 N. W. 12, 16, 70 Wis. 420, 5 Am. St. Rep. 178; *Gilman v. Eastern R. Corp.*, 92 Mass. (10 Allen) 233, 236, 238, 87 Am. Dec. 635; *Id.*, 95 Mass. (13 Allen) 433, 440, 90 Am. Dec. 210. Thus it has been held that a member of a repairing gang and an engine driver are fellow servants. *Railroad Co. v. Murphy*, 53 Ill. 336, 5 Am. Rep. 48; *Rohback v. Pacific R. R.*, 43 Mo. 187. A master mechanic and a locomotive engineer. *Hard v. Vermont & C. R. Co.*, 32 Vt. 473. And hence an engine wiper employed in the roundhouse is a fellow servant of the trainmen employed in the yard. *Ewald v. Chicago & N. W. Ry. Co.*, 36 N. W. 12, 16, 70 Wis. 420, 5 Am. St. Rep. 178. Hence it is held that a person employed by a railroad company to repair its cars is a fellow servant of a switchman. *Gilman v. Eastern R. Corp.*, 92 Mass. (10 Allen) 236, 238, 87 Am. Dec. 635; *Id.*, 95 Mass. (13 Allen) 433, 440, 90 Am. Dec. 210.

Two workmen in the employ of the same master are not fellow servants, when one of them is in charge of the work of blasting and removing certain rocks, and the other has nothing to do with such work. *Bain v. Athens Foundry Mach. Works*, 75 Ga. 718, 725.

Where the laborer on a construction train and the engineer of the train were

serving the same master, worked under the same conductor, derived their authority and compensation from the same common source, and were engaged in the same general business, though in a different grade of a common service, they were fellow servants. *Higgins v. Missouri Pac. Ry. Co.*, 16 S. W. 409, 411, 104 Mo. 413.

A chemist employed in a paper mill, who has no control over the machinery or employes, is a fellow servant of a laborer employed in the construction of an addition to a mill. *Wilson v. Hudson River Water Power & Paper Co.*, 24 N. Y. Supp. 1072, 1073, 71 Hun, 292.

A laborer working in defendant's quarry, under direction of a foreman having no connection with the train service, is not a fellow servant of employes operating a passenger train on defendant's line. *Dixon v. Chicago & A. R. Co.*, 19 S. W. 412, 413, 109 Mo. 413, 18 L. R. A. 792.

A carpenter employed by a railroad in its carpenter shops, who is killed by a locomotive while crossing the railroad tracks after his work is done, is not a fellow servant of the engineer, as they are employed in separate branches of the business. *Ryan v. Chicago & N. W. Ry. Co.*, 60 Ill. 171, 14 Am. Rep. 82.

A conductor on a train used to transfer a bridge gang and bridge materials, who had nothing to do with the work for which the bridge men were employed, was not the fellow servant of such men, while directing one of them how to remove a brake without injury to it or to the car, which it was necessary to remove in order to unload bridge timbers. *Missouri, K. & T. Ry. Co. of Texas v. Hines (Tex.)* 40 S. W. 152, 155.

A car repairer or inspector in the employment of a railway company is not a co-employe or fellow servant with a brakeman operating the brakes of a car. *Missouri Pac. Ry. Co. v. Dwyer*, 12 Pac. 352, 361, 36 Kan. 58.

A section man and the trainmen in charge of a passenger train are engaged in different departments of the general business of their employer, and are not fellow servants. *Sullivan v. Missouri Pac. Ry. Co.*, 10 S. W. 852, 854, 97 Mo. 113.

One engaged in hauling rock by means of a team, and those who are engaged in blasting such rock, all employed by a common master, are fellow servants. *Bogard v. Louisville, El. & St. L. Ry. Co.*, 100 Ind. 491, 493.

The operator of the elevator in a hotel is a fellow servant of a chambermaid riding on the elevator in the discharge of her duties. *Oriental Inv. Co. v. Sline*, 41 S. W. 130, 132, 17 Tex. Civ. App. 692.

**Dual capacity.**

An individual may act in a dual capacity, not, it is true, at the same moment and in the same act; but he may, while generally acting as vice principal and standing in the place of master, lay aside that character and authority, and occupy for the time being the place and do the work of a fellow servant, and while thus engaged in the particular act he is in the eye of the law a fellow servant. Thus a section boss, in operating the brake on a hand car, is a fellow servant of the section hands under him, who under his orders are traveling with him on the car; but a section boss, in not providing a proper brake for the hand car for those under him, occupies the position of a master. *Nashville, C. & St. L. R. Co. v. Gann*, 47 S. W. 493, 494, 101 Tenn. 380, 70 Am. St. Rep. 687.

The question as to whether the relation of fellow servant exists in a given case is determined by an inquiry into the nature of the service at the particular time in question. If, at the time the offending servant performed the act by which another servant was injured, he was performing a duty which the master owed to his servants, he was not a fellow servant; for the rule is fundamental that a master cannot rid himself of the duty he owes to his servants by delegating his authority to another. If at the time of the alleged negligence the servant was not engaged in the performance of a duty which the master owed to his servants, but was in the discharge of a duty which the servant acting owed to the master, he will be held to be a fellow servant with others engaged in the same common business. Thus a section foreman on a railroad, with power to employ and discharge track hands, who work under him, was a vice principal in the matter of hiring and discharging hands, and a fellow servant when transporting the men to and from their work. *Justice v. Pennsylvania Co.*, 30 N. E. 803, 804, 130 Ind. 321.

An employé or servant, who is clothed with special powers and authority with respect to the management of the master's business and the control of his fellow servants in the matter of the performance of their work, and to whom is delegated the performance of the master's absolute duties to other servants with reference to the obligation to provide them with the several instruments and several places to work, is as to such other servants or employes a vice principal, when engaged in the performance of the said powers and authority conferred upon him; but he is a fellow servant when engaged in the common employment of the master. *Perras v. A. Booth & Co.*, 84 N. W. 739, 741, 82 Minn. 191.

A servant stands in the place of the principal only when such duties or powers

pertaining to a principal and which are elements in causing the injury complained of are delegated to him. As to all such matters he is a co-servant. An employé in a foundry is a co-servant with the foreman while such foreman is throwing a box on a pile of iron posts. *Di Marcho v. Builders' Iron Foundry*, 28 Atl. 661, 662, 18 R. I. 514.

While in those respects which demand of the owners the rendition of certain duties toward the crew the master of the crew must and does represent them, and by his failure or neglect would entail consequences upon them for the breach of the obligation, he is, notwithstanding his representative and superior position, but a servant employed with the others of the ship's company upon the vessel in the service of its owners; but the scope of the service varies as the position of individuals employed differs, but relatively to the general undertaking they are fellow servants engaged in a common employment. *Gabrielson v. Waydell*, 31 N. E. 969, 970, 135 N. Y. 1, 17 L. R. A. 228, 31 Am. St. Rep. 793.

It does not follow, from the fact that those engaged in the repair of the track are the representatives of the company, so that the trainmen can recover from the company for their negligence, that those engaged in the repair of the track can recover for the negligence of the trainmen. A servant may be a representative of the company in one relation, and fellow servant and co-employé in another. *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521. Under these principles the foreman of a bridge gang upon a railroad and employes operating a train on the road are fellow servants, in the sense that precludes the former from recovering from the company for injuries resulting from the negligence of the latter. *St. Louis, A. & T. R. Co. v. Welch*, 10 S. W. 529, 72 Tex. 298, 2 L. R. A. 839.

**Engaged in same particular work.**

To constitute fellow servants the parties under consideration need not at the time be engaged in the same particular work. It is sufficient if they are in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purpose. *Spees v. Boggs*, 47 Atl. 875, 876, 198 Pa. 112, 52 L. R. A. 933, 82 Am. St. Rep. 702; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, 439; *New York, L. E. & W. R. Co. v. Bell*, 4 Atl. 50, 51, 112 Pa. 400; *Lewis v. Selfert*, 11 Atl. 514, 518, 116 Pa. 628, 2 Am. St. Rep. 631; *South Florida R. Co. v. Weese*, 13 So. 436, 441, 32 Fla. 212; *Wright v. New York Cent. R. Co.*, 25 N. Y. 562, 565. It is enough to bring a case within the rule that the master is not liable to one servant for injuries resulting from the negligence of a fellow servant, if they are in the employment of

the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end. Within this rule a conductor of a freight train and a brakeman on such train are fellow servants. *New England R. Co. v. Conroy*, 20 Sup. Ct. 85, 87, 175 U. S. 323, 44 L. Ed. 181.

By the phrase "servants working together and at the same time and place and to a common purpose," in Fellow Servant Act, § 2 (Gen. Laws 1891, c. 24), providing that all persons who are engaged in the common service of certain railway corporations, and who while so engaged are working together at the same time and place, to a common purpose, etc., shall be fellow servants, is not meant that two servants must engage in the same kind of work, or in work which brings them at all times in the same place. The phrase includes a railroad hostler, whose duty it is to bring engines into the roundhouse, and a boiler washer employed therein, where neither exercises any control over the other. *Missouri, K. & T. Ry. Co. of Texas v. Whitaker*, 33 S. W. 716, 717, 11 Tex. Civ. App. 668.

While it cannot be said of any particular duty appertaining to the service of a single employé upon a railroad train that the other employés are his co-servants engaged in the discharge of duty as a common duty, they may all properly be regarded as fellow servants in the common service of operating the road; and in this sense those employed in facilitating the running of the trains by ballasting the track, removing obstructions, tending to the switches, and other duties of a like nature, as well as those upon the trains operating, may all be regarded as fellow servants in the common service. *Marville v. Cleveland & T. R. Co.*, 11 Ohio St. 417, 425. See, also, *Ohio & M. R. Co. v. Tendall*, 13 Ind. 366, 74 Am. Dec. 259; *Wilson v. Madison, etc., R. Co.*, 18 Ind. 226; *Slattery's Adm'r v. Toledo & W. Ry. Co.*, 23 Ind. 81, 84.

In *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 89 Tex. 475, it was held that service means the thing or work being performed for the employer at the time of the accident, and common service means that which pertains equally to the employés said to be held as fellow servants, and that therefore common service means the particular thing or work being performed for the employer at the time of the accident, and out of which it grew, jointly by the employés said to be held as fellow servants. Under such definition the crews of separate engines, one engaged in switching and the other having additional work, were not engaged in com-

mon service, so as to be fellow servants. *Masterson v. Galveston, H. & S. A. Ry. Co.* (Tex.) 42 S. W. 1001, 1002.

All persons who are engaged in the common service of a railroad corporation, and who while so engaged are working together at the same time and place to a common purpose of same grade, neither of such being intrusted by such corporation with any superintendence or control over their fellow employés, are fellow servants with each other: provided that nothing herein contained shall be so construed as to make any agent or servant of such corporation in the service of such corporation a fellow servant with any other agent or servant of such corporation engaged in any other department or service of such corporation. *Rev. St. Mo. 1890, § 2875.*

A servant may be engaged by the day, week, year, or by piecework; yet, if his employment is in the way of accomplishing a result which other employés are also working to bring about, their service is common. *Ewan v. Lippencott*, 47 N. J. Law (18 Vroom) 192, 198, 54 Am. Rep. 148.

#### Equality of authority.

A fellow servant is one on an equality with the injured person, under the same or common control, engaged in a common employment or the same line of employment. *Kirk v. Atlanta & C. Air Line Ry. Co.*, 94 N. C. 625, 627, 55 Am. Rep. 621.

Fellow Servant Act (Gen. Laws 1891, c. 24) § 2, reads as follows: "That all persons who are engaged in the common service of a railway corporation, and who are working together at the same time and place to a common purpose, of same grade, neither of such persons being intrusted by such corporations with any superintendence or control over his fellow employés, are fellow servants with each other, providing that nothing shall be construed as to make employés of such corporation fellow servants with other employés of such corporations engaged in any other department or service of such corporation." *Mexican Nat. Ry. Co. v. Finch*, 27 S. W. 1028, 1030, 8 Tex. Civ. App. 409; *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 178, 20 Tex. Civ. App. 504. Thus, under the statute, a railroad hostler, whose duty it is to bring engines into the roundhouse, and a boiler washer, having a duty of cleaning the engines, having no authority over each other, are fellow servants as a matter of law. *Missouri, K. & T. Ry. Co. of Texas v. Whitaker*, 33 S. W. 716, 717, 11 Tex. Civ. App. 668.

The meaning of fellow servants is that they are of equal authority and engaged in a like or similar service for a common employer, and engaged in such manner as that

their several employments, united, will accomplish one common result for the employer, and a superior fellow servant is one higher in authority than another, and one whose commands and directions his inferiors are in duty bound to respect, although engaged at the same manual work. *Illinois Cent. R. Co. v. Coleman* (Ky.) 59 S. W. 13, 14.

#### Exercise of master's duties.

At common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, the performance of any duty which devolves upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, and is not a fellow servant with the other employées. *Hannibal & St. J. Ry. Co. v. Fox*, 3 Pac. 320, 322, 31 Kan. 586; *Howard v. Denver & R. G. R. Co.* (U. S.) 26 Fed. 837, 838.

The true test whether an employé occupies the position of a fellow servant to another employé or is the representative of the master is to be found not from the grade or rank of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant which caused the injury. There are certain positive duties which the master must perform, and the person who discharges any of these duties, no matter what his rank or grade, no matter by what name he may be designated, cannot be a fellow servant. He is an agent, and the rule applicable to principal and agent must apply; and the brakeman of a train, while signaling the train following his own, acts as the fellow servant of the fireman of the train to be signaled. *Wheatley v. Philadelphia, W. & B. R. Co.* (Del.) 30 Atl. 660, 661, 1 Marv. 305.

"Fellow servants" are defined to be those engaged in the same common pursuit, under the same general control, as persons employed in the same general business by a common employer. It is, however, recognized that, if a master delegates the performance of his legal and contractual duty to prepare the place or apparatus for use, the delegatee, in performing that duty, is not deemed a fellow servant with those who may afterwards use the place or apparatus so prepared. The rank or grade of the person doing the work, or, indeed, the character of his general duties, does not control the question whether he is a co-employé with others in doing any specific act. That depends on the character of the particular service in the performance of which he is charged with negligence. *Okonski v. Pennsylvania & Ohio Fuel Co.*, 90 N. W. 429, 431, 114 Wis. 448; *Adams v. Iron Cliffs Co.*, 44 N. W. 270, 278, 78 Mich. 271, 18 Am. St. Rep. 441;

*Jackson v. Norfolk & W. R. Co.*, 27 S. E. 278, 279, 43 W. Va. 380, 46 L. R. A. 337; *Flannegan v. Chesapeake & O. Ry. Co.*, 21 S. E. 1028, 1029, 40 W. Va. 436, 52 Am. St. Rep. 896; *Wilson v. Banner Lumber Co.*, 32 South. 460, 461, 108 La. 590.

The general rule that all servants employed by the same master and working under the same control and in a common employment are fellow servants has been the subject of much dispute as to its proper limitations, and in many of the states has been relaxed and modified in consequence of the hardships and injustices ground out of its too general application, so that the later current of judicial decision, as well as legislative action, indicates a marked departure from that rule, and a disposition to so limit and restrict it as shall make the master answerable for his just share of responsibility to his servant for injuries sustained in his employment. Several tests have been applied in determining the line of demarcation between the representative of the master and the mere servant, and among them is the ruling that the master is chargeable for any act of negligence in so far as the servant is charged in performance of the master's duty to his servants, such as the selection of competent servants, the furnishing of suitable tools and instrumentalities, the providing of a reasonably safe place in which to work, which may be guarded against by proper diligence, etc. Thus, where a person was not only the foreman to direct the work of the hands under him, but also was to provide a reasonably safe place for them to work consistent with the exigencies of the situation, he was a vice principal, and not a fellow servant of those working under him. *Anderson v. Bennett*, 19 Pac. 765, 769, 16 Or. 515, 8 Am. St. Rep. 311; *Gilmore v. Northern Pac. R. Co.* (U. S.) 18 Fed. 866, 870.

A person employed to perform any of the master's duties toward his servant is, while that relation continues and in respect to such duties, not a fellow servant of the latter. So it is held that, where one employé was in charge of a certain part of a roundhouse, the engines there, and the men necessary to care for them, he was not a fellow servant of a laborer working at the time under his orders, at least in respect to acts done by the foreman in pursuance of his authority over the branch of business under his charge. *Dayharsh v. Hannibal & St. J. R. Co.*, 15 S. W. 554, 555, 103 Mo. 570, 23 Am. St. Rep. 900.

If the duty of a railroad company to use due care in keeping the road and cars in repair is devolved upon servants, their negligence in respect thereto is, as to other employées, not the negligence of fellow servants, but the negligence of the company.

Nevertheless one employed by a cable car company to watch at a curve of the track and signal trains to stop or continue is a fellow servant with a gripman of a motor car. In such a case the gripman and the watchman are both in a proper sense engaged in operating the car. *Murray v. St. Louis, C. & W. Ry. Co.*, 12 S. W. 252, 253, 98 Mo. 573, 5 L. R. A. 735, 14 Am. St. Rep. 661.

The conductor of a train is the representative of the company, and not a fellow servant with the other employes operating the same train under his orders. *Boatwright v. Northeastern R. Co.*, 25 S. C. 128, 133.

Conductors who are charged with the duty of handling switches or of driving trains are, so far as actions against the common master for negligence are concerned, not vice principals, but the fellow servants of all other employes engaged in the common object of securing a safe passage of trains. *St. Louis, I. M. & S. R. Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 25 L. R. A. 833. Contra, see *Mase v. Northern Pac. R. Co.* (U. S.) 57 Fed. 283, 286.

The supervisors of the track of a railroad company and the inspectors of its machinery virtually represent the company, and the company is not excused from answering to one of the employes, injured by their negligence, on the ground that they were fellow servants of said injured employe. *Long v. Pacific R. R.*, 65 Mo. 225, 229.

A roadmaster of a railroad, upon whom is imposed the duty of directing the repairs of the road and keeping the road in safe condition, is in the line of his duty the representative of the master, the representative of the company, and is not a fellow servant with brakemen on a train. *Atchison, T. & S. F. R. Co. v. Moore*, 1 Pac. 644, 645, 81 Kan. 197.

A fellow servant is generally held to be any one serving the same master and under his control, whether equal, inferior, or superior. Where a railroad company puts a foreman in charge of a gang of laborers, with power to discharge them, subject to the approval of the supervisor, and makes it his duty to see that the laborers faithfully perform their duty, such foreman must, in the performance of his duties to those laborers under him, be regarded as the representative of the railroad company, and not a fellow servant, and therefore, if through his neglect of duty one of the laborers in the performance of his duty is injured, he may recover of the railroad company all damages sustained. *Criswell v. Pittsburg, St. L. & C. Ry. Co.*, 30 W. Va. 798, 814, 6 S. E. 81.

### Keeping machinery, etc., in repair.

Where an employer provides some other person than himself to see that his servants are furnished with a safe place to work, and with suitable machinery and appliances kept in good repair, the person to whom such duty is delegated, no matter what his rank or grade, cannot be a servant in the sense or nature of the rule applicable to injuries occasioned by fellow servants. Such person is an agent, and is generally called in the law a "vice principal." Under this definition one employed to see that docks on which lumber was moved, and which were from 7 to 16 feet above the ground, were kept in good repair, was a vice principal, and not a fellow servant, as to such duties. *Van Dusen v. Letellier*, 44 N. W. 572, 575, 78 Mich. 492.

When a master has furnished suitable structures, means, and appliances for the prosecution of a business, all persons employed by him in carrying on the business by the use of the means furnished, including those who use the means directly in the prosecution of the business, those who maintain them in a condition to be used, and those who adapt them to use by new appliances and adaptations incidental to their use, are fellow servants in the general employment and business. One employed in the care, supervision, and keeping in ordinary repair of the means and appliances used in a business, is engaged in the common service. Thus, a person charged with the duty of keeping the track of a railway in repair (*Waller v. Southeastern Ry. Co.*, 2 Hurl. & C. 102), the chief engineer on a steam vessel, whose duty it was to see that the machinery was kept in order (*Searle v. Lindsay*, 11 O. B. [N. S.] 429), an "underlooker" in a mine, whose duty it was to examine the roof of the mine and prop it when dangerous (*Hall v. Johnson*, 3 Hurl. & C. 589), the general foreman and manager of extensive builders and contractors (*Gallagher v. Piper*, 16 C. B. [N. S.] 669), and the superintendent having the general charge and management of a large manufacturing establishment, and having the management of lighting the mill and manufacturing gas for that purpose (*Albro v. Agawam Canal*, 60 Mass. [6 Cush.] 75), were all held to be servants. In all the above cases the persons employed to have the charge and superintendence of structures, machines, or appliances were held to be fellow servants with those employed in using them. *Johnson v. Boston Towboat Co.*, 135 Mass. 209, 212, 46 Am. Rep. 458.

The business of providing safe machinery and keeping it in repair is distinct from the business of handling and moving it, and these are separate and independent departments of service, though the same per-



son may by turns render service in each, and the person engaged in the former represents the employer, and in that business is not the fellow servant with one engaged in the latter. *Northern Pac. Ry. Co. v. Herbert*, 6 Sup. Ct. 590, 596, 116 U. S. 642, 29 L. Ed. 755.

A person employed to keep machinery in order is not a fellow servant of one employed to operate the machinery. "To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common results. The one can properly be said to begin only when the other ends. The two persons may indeed work under the same master and receive pay from the same source. But this is not sufficient. They must be at the time engaged in a common purpose or employment in the same general business." *Shanny v. Androscoggin Mills*, 66 Me. 420, 426.

It is a well-known fact that in many manufacturing establishments, as well as in divers other lines of employment, the ordinary employes are expected and required to set up, adjust, repair, or even manufacture the tools, implements, and machinery with which their work is done. In such cases there can be no doubt that setting up and adjusting the machinery and using it are parts of the same employment, and the person doing the one is a fellow servant with him who does the other, and the employer may at his pleasure divide these species of service into two departments or combine them in one. Where they are divided, and committed to different bodies of service, undoubtedly an injury to a servant of one class, resulting from the negligence of a servant of the other class, entitles the servant injured to invoke the doctrine of respondent superior. Whether in any given case the two species of service form two departments or one depends upon whether the same servants are employed by the master to perform both lines of service, and so becomes a question of fact and not law. Thus, where a machinist was injured by the bursting of a new emery wheel, which had just been set, the bursting being caused by the imperfect and improper manner in which it was set, the question whether the machinist and the servants who set the wheel were fellow servants was one of fact for the jury. *Holton v. Daly*, 4 Ill. App. (4 Bradw.) 25, 27, 28.

Employers of labor do not guaranty to their employes the faithfulness and diligence of their co-laborers in carrying on the business, or in keeping the machinery in such repair or the works in such condition that they shall be always safe. This is a part of the hazard which the employes im-

pliedly assume themselves whenever they enter into services with each other. *Beau- lieu v. Portland Co.*, 48 Me. 291, 295, 296.

#### **Laborers on buildings.**

It is only when the servant by whose acts of negligence other servants of the common employer have received injury is the "alter ego" of the master, to whom the employer has left everything, that the middleman's negligence is the negligence of the employer, for which the latter is liable; for example, where the middleman or superior servant employs and discharges the subalterns, and the principal withdraws from the business, or where the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglect or omissions of duty of the superior servant, in selecting such servants. But the mere fact that the careless and negligent servant is placed in superintendence over the others does not constitute an exception to the general rule. Where partners themselves operated a brewery, and employed a competent carpenter to make repairs for the purpose of keeping the brewery in a safe condition, they were not liable for the negligence of such carpenter in omitting to examine and keep the building in repair, in consequence of which another servant was injured. *Malone v. Hathaway*, 64 N. Y. 5, 9.

A laborer, employed in mixing mortar by a contractor on a building, was a fellow servant of the carpenters and masons employed on the same building by the same contractor, and where he was injured through the falling of a stage on which the masons were at work, whether the falling was caused by the negligence of the carpenters or of the masons, it was the negligence of a fellow servant, for which the contractor was not liable. *Kelley v. Norcross*, 121 Mass. 508, 509, 510.

Where an employer furnishes suitable materials and employs competent carpenters to construct scaffolding to be used by them in putting the cornice upon a building, and the same scaffolding is subsequently used by painters hired to paint the cornice, the carpenters who construct the scaffolding and the painters are fellow servants. *Hoar v. Merritt*, 29 N. W. 15, 16, 62 Mich. 386.

The owners of a building employed a carpenter to superintend the job of making certain repairs. When it became necessary to put on the gutters they told the carpenter a staging was needed for that purpose, and one was erected under his direction. The owner then employed a coppersmith to put on the gutters, and the man employed for that purpose was injured by the fall of the staging, which had been improperly constructed. The owners did not retain any

charge or direction of the work of putting up the staging, but intrusted that entirely to the carpenter. Under these circumstances the carpenter and the man employed to put on the gutters were fellow servants, and the owners were not liable for the injury resulting from the negligence of the carpenter. *Killea v. Faxon*, 125 Mass. 485, 486.

If a foreman had the full charge and control of a building and the men employed therein delegated to him by defendant, and his agency covered the entire building, and his capacity and discretion dominated over it, he was not a fellow servant of the carpenters employed. *Slater v. Chapman*, 35 N. W. 106, 108, 67 Mich. 523, 11 Am. St. Rep. 598.

A person engaged to superintend the carpenter work on a city building and a mason employed in knocking out the underpinning are fellow servants. *Olmstead v. City of Raleigh*, 41 S. E. 292, 130 N. C. 243.

#### **Length of employment.**

It is the quality, not the length of time, or the extent of the work, which fixes the existence or nonexistence of fellow servants. The servant may be engaged by the day, week, or year, or by piece work; yet, if his employment is in the way of accomplishing a result which other employés are also working to bring about, their service is common. The length of time in which the person is engaged in work does not determine the nature of the service in respect to the liability of the master for the servant's acts or for injuries to him. Defendant, the owner of a sawmill, gave an order to certain machinists to make some alterations in the gear of the water wheel. These machinists sent the plaintiff and another workman to do the work, and it was understood between these workmen and defendant that the mill would run at such times as they were not actually at work upon the wheel. While they were at work on the wheel the engineer of the defendant negligently started the wheel, injuring the plaintiff. Held, that plaintiff was a servant of the defendant engaged in a common employment with the engineer. *Ewan v. Lippincott*, 47 N. J. Law (18 Vroom) 192, 198, 54 Am. Rep. 148.

#### **Mill employés.**

The overseer of the slashing room in a cotton mill is a fellow servant of the second foreman in the machine shop department, whose duty it is to oversee the repairing of the machinery of any of the departments, and to report to the overseer of that department, subject, however, to the order of his immediate foreman and the general superintendent, who has control and direction of all the employés. *Brodeur v. Valley Falls Co.*, 17 Atl. 54, 16 R. I. 448.

An operative in the employment of a cotton mill is a fellow servant with the superintendent of the mill, so that the company cannot be held liable for injuries sustained by the operative, caused by the negligence of the superintendent. *Albro v. Agawam Canal Co.*, 60 Mass. (6 Cush.) 75.

The operator of a blast furnace, having charge of the inside work of a furnace, is a fellow servant with the engineer of a locomotive used by the same company in moving cars on its premises, though the foundry department and the department in which the engineer works are separate and under the charge of different foremen. *Adams v. Iron Cliffs Co.*, 44 N. W. 270, 276, 78 Mich. 271, 18 Am. St. Rep. 441.

One who works at odd jobs around the mill yard of a corporation operating a sawmill and salt block, and occasionally loads salt on a barge for market, is a fellow servant of men in the salt warehouse handling barrels. *Sell v. Charles Reitz & Bros. Lumber Co.*, 70 Mich. 479, 38 N. W. 451.

#### **Miners and other employés.**

Where an injury is caused to a workman in a mine by reason of the negligence of one who is not in any true sense a mere foreman, or department leader or subchief in a given sphere of mining operation, but whose agency covers the entire mine and the entire control of the work, such negligence is not the negligence of a fellow servant. *Ryan v. Bagaley*, 15 N. W. 72, 50 Mich. 179, 45 Am. Rep. 35.

A foreman in a coal mine, whose duty it is to direct 10 or 12 men what to do and to prop the roofs of rooms with timber, to inspect them and to see if they are safe, and to drill holes in the face of the rooms, charging them with powder, and fire them, but who is subject to the orders of the pit boss and superintendent, is the fellow servant of the laborer under his direction, who is injured in performing his duty of shoveling and removing coal and dirt and assisting the foreman in his work. *What Cheer Coal Co. v. Johnson* (U. S.) 56 Fed. 810, 812, 6 C. C. A. 148.

The runner of a steam engine employed in lowering men and material, hoisting rock in sinking a shaft, is a fellow servant in the same line or department of service, within the rule exempting the employer from liability for the negligence of those in the same line of employment, with the men in the shaft engaged in excavating it and loading the rock to be hoisted. He was as truly in the same line of employment as though he had been engaged in carrying the material up on his back as in the early days of life. *Buckley v. Gould & Curry Silver Min. Co.* (U. S.) 14 Fed. 833, 834.

A laborer employed in various kinds of work about a mine on the surface is not a fellow servant with the miners. *James v. Emmett Min. Co.*, 21 N. W. 361, 365, 55 Mich. 335.

A running boss and a driver boss are fellow servants. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, 439.

#### Officers, crew, etc., of vessel.

One to whom his employer commits the entire charge of the business, with power to choose his own assistants and to control and discharge them as freely and fully as the principal himself could, is not a fellow servant with those employed under him. Thus, where a stevedore commits the entire charge of unloading a vessel to his foreman, with power to choose his own assistants, with the power to control and discharge them as fully and freely as the principal could, such foreman is not a fellow servant with those employed under him. *Brown v. Sennett*, 9 Pac. 74, 76, 68 Cal. 225, 58 Am. Rep. 8.

Though conflicting decisions on the question may be found in courts, there are numerous respectable authorities which classify the subordinate officers of a ship as fellow servants with the members of the crew, who are subject to their orders, and the prevailing opinion is that, when the master is on board, the subordinate officers and seamen are fellow servants. *United States v. Huff* (U. S.) 13 Fed. 630; *Halverson v. Nisen* (U. S.) 11 Fed. Cas. 810; *Olson v. Clyde*, 32 Hun, 425; *The City of Alexandria* (U. S.) 17 Fed. 390; *Loughlin v. State*, 105 N. Y. 159, 11 N. E. 371; *Malone v. Western Transp. Co.*, 16 Fed. Cas. 561; *The El. B. Ward, Jr.* (U. S.) 20 Fed. 702; *Benson v. Goodwin*, 147 Mass. 237, 17 N. E. 517. Under these definitions, where the master is on board, the second mate, who superintends the reeling man of a hawser, is a fellow servant with the reel man turning the reel. *The Egyptian Monarch* (U. S.) 36 Fed. 773, 776.

The carpenter, the porter, and the stewardess of a steamship, all of whom have signed shipping articles, are fellow servants, though the former belongs to that division of the ship's company known as the deck department, and the two latter to the steward's department; such division being made merely for the convenience of administration. *Quebec S. S. Co. v. Merchant*, 10 Sup. Ct. 397, 398, 133 U. S. 375, 33 L. Ed. 656.

A grain trimmer, employed by a contractor to assist in trimming the grain with which the vessel is being loaded, is not a fellow servant of a sailor on the ship. *Crawford v. The Wells City* (U. S.) 38 Fed. 47, 48.

A person engaged as the mate of a boat and the captain thereof are fellow servants. *Caniff v. Blanchard Nav. Co.*, 33 N. W. 744, 748, 66 Mich. 638, 11 Am. St. Rep. 541.

#### Railroad employes.

Prima facie all servants of a common master employed in the railway service are fellow servants. *Mele v. Delaware & H. Canal Co.*, 14 N. Y. Supp. 630, 631, 59 N. Y. Super. Ct. (27 Jones & S.) 367; *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528, 532.

"All who are engaged in accomplishing the ultimate purpose in view—that is, the running of the road—must be regarded as engaged in the same general business, within the meaning of the rule." *Hard v. Vermont & C. R. Co.*, 32 Vt. 473; *Lagrone v. Mobile & O. R. Co.*, 7 South. 432, 433, 67 Miss. 592; *O'Connell v. Baltimore & O. R. Co.*, 20 Md. 212, 83 Am. Dec. 549; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411, 417, 3 Am. Rep. 143.

There is a dearth of authority as to what employes of railroad companies are fellow servants, but the general rule is that where they are employed in the same field of labor and for the common purpose of operating the train, where they receive the same orders and agree as to the movements of the train, they are fellow servants. In 3 Elliott, R. R. § 1330, it is said: "In most of the states all the trainmen engaged in the operation of the train are held to be fellow servants." A conductor and engineer on a train are fellow servants. *Edmonson v. Kentucky Cent. Ry. Co.*, 49 S. W. 200, 201, 105 Ky. 479.

As to trainmen on same train as fellow servants, see *Dow v. Kansas Pac. Ry. Co.*, 8 Kan. 642, 644; *Congrave v. Southern Pac. R. Co.*, 26 Pac. 175, 176, 88 Cal. 360; *International & G. N. R. Co. v. Moore*, 41 S. W. 70, 16 Tex. Civ. App. 51; *Nashville, C. & St. L. Ry. Co. v. Wheless*, 78 Tenn. (10 Lea) 741, 744, 43 Am. Rep. 317; *McGowan v. St. Louis & I. M. R. Co.*, 61 Mo. 528, 532; *St. Louis, I. M. & S. Ry. Co. v. Needham*, 63 Fed. 107, 109, 11 C. C. A. 56, 25 L. R. A. 833; *New England R. Co. v. Conroy*, 20 Sup. Ct. 85, 87, 175 U. S. 323, 44 L. Ed. 181; *Baltimore & O. R. Co. v. Baugh*, 18 Sup. Ct. 914, 920, 149 U. S. 368, 37 L. Ed. 772; *Jackson v. Norfolk & N. R. Co.*, 27 S. E. 278, 279, 43 W. Va. 380, 46 L. R. A. 337; *Sherman v. Rochester & S. R. Co.*, 17 N. Y. 153, 157. Contra, see *Rose v. Chicago, M. & St. P. Ry. Co.* (U. S.) 8 Fed. 544; *Mase v. Northern Pac. R. Co.* (U. S.) 57 Fed. 283, 286; *Chicago, M. & St. P. Ry. Co. v. Ross*, 5 Sup. Ct. 184, 190, 112 U. S. 377, 28 L. Ed. 787; *Boatwright v. Northeastern R. Co.*, 25 S. C. 128, 133.

Trainmen on one train are fellow servants of trainmen on another train belonging to the same company. *Randall v. Baltimore & O. R. Co.*, 3 Sup. Ct. 322, 325, 109 U. S. 478, 27 L. Ed. 1003. See, also, *Grattis v. Kansas City, P. & G. R. Co.*, 55 S. W. 108, 153 Mo. 380, 48 L. R. A. 399, 77 Am. St. Rep.

721; *Masterson v. Galveston, H. & S. A. Ry. Co. (Tex.)* 42 S. W. 1001, 1002; *Baltimore Trust & Guaranty Co. v. Atlantic Traction Co. (U. S.)* 69 Fed. 358, 359; *Baltimore & O. R. Co. v. Andrews*, 50 Fed. 728, 733, 1 C. C. A. 636, 17 L. R. A. 190; *Van Avery v. Union Pac. Ry. Co. (U. S.)* 85 Fed. 40; *Howard v. Denver & R. G. Ry. Co. (U. S.)* 26 Fed. 837, 838; *Oakes v. Mase*, 17 Sup. Ct. 345, 165 U. S. 363, 41 L. Ed. 746; *Northern Pac. R. Co. v. Poirier*, 17 Sup. Ct. 741, 743, 167 U. S. 48, 42 L. Ed. 72; *Wheatley v. Philadelphia, W. & B. R. Co. (Del.)* 80 Atl. 660, 661, 1 Marv. 805; *Jenkins v. Richmond & D. R. Co.*, 18 S. E. 182, 183, 39 S. C. 507, 39 Am. St. Rep. 750; *Norfolk & W. R. Co. v. Donnelly's Adm'r*, 14 S. E. 692, 694, 88 Va. 853; *McMaster v. Illinois Cent. Ry. Co.*, 4 South. 59, 65 Miss. 264, 7 Am. St. Rep. 653; *Pittsburg, H. W. & C. Ry. Co. v. Devinney*, 17 Ohio St. 197, 210.

Trainmen and yardmen are fellow servants. *Beuhring's Adm'r v. Chesapeake & O. Ry. Co.*, 16 S. E. 435, 37 W. Va. 502; *New York & N. E. R. Co. v. Hyde (U. S.)* 56 Fed. 188, 192, 5 C. C. A. 461; *Keyes v. Pennsylvania Co. (Pa.)* 3 Atl. 15, 16; *Rutledge v. Missouri Pac. Ry. Co.*, 24 S. W. 1053, 1056, 123 Mo. 121.

Trackmen are not fellow servants of those in charge of the train. *Howard v. Delaware & H. Canal Co. (U. S.)* 40 Fed. 195, 197, 6 L. R. A. 75; *Schlereth v. Missouri Pac. Ry. Co.*, 21 S. W. 1110, 1113, 115 Mo. 87; *Swadley v. Same*, 24 S. W. 140, 141, 118 Mo. 268, 40 Am. St. Rep. 366; *Sullivan v. Same*, 10 S. W. 852, 854, 97 Mo. 113; *St. Louis & S. F. Ry. Co. v. Weaver*, 11 Pac. 408, 417, 35 Kan. 412, 57 Am. Rep. 176. Contra, see *Schultz v. Chicago & N. W. Ry. Co.*, 31 N. W. 321, 323, 67 Wis. 616, 58 Am. Rep. 881; *Howland v. Milwaukee, L. S. & W. Ry. Co.*, 11 N. W. 529, 530, 54 Wis. 226; *Heine v. Chicago & N. W. Ry. Co.*, 17 N. W. 420, 421, 58 Wis. 525; *Clifford v. Old Colony R. Co.*, 6 N. E. 751, 752, 141 Mass. 564; *King v. Boston & W. R. Corp.*, 63 Mass. (9 Cush.) 112, 114; *Farwell v. Boston & W. R. Corp.*, 45 Mass. (4 Metc.) 49, 61, 38 Am. Dec. 339; *Connelly v. Minneapolis E. Ry. Co.*, 35 N. W. 582, 583, 38 Minn. 80; *Collins v. St. Paul & S. O. R. Co.*, 14 N. W. 60, 61, 30 Minn. 31; *Foster v. Minnesota Cent. Ry. Co.*, 14 Minn. 360, 364 (Gil. 277, 281); *Parker v. Hannibal & St. J. R. Co.*, 19 S. W. 1119, 1123, 109 Mo. 362, 18 L. R. A. 802; *Naylor v. New York Cent. & H. R. R. Co. (U. S.)* 33 Fed. 801; *Van Wickle v. Manhattan Ry. Co. (U. S.)* 32 Fed. 278; *Northern Pac. R. Co. v. Hambly*, 14 Sup. Ct. 983, 984, 154 U. S. 349, 38 L. Ed. 1009; *Elliott v. Chicago, M. & St. P. Ry. Co.*, 41 N. W. 758, 760, 5 Dak. 523, 3 L. R. A. 363; *Fagundes v. Central Pac. R. Co.*, 21 Pac. 437, 79 Cal. 97, 3 L. R. A. 824; *Mele v. Delaware & H. Canal Co.*, 14 N. Y. Supp. 630, 631, 59 N. Y. Super. Ct. 367; *Whaalan*

*v. Mad River & L. E. R. Co.*, 8 Ohio St. 249, 256.

Car inspectors and repairers are not fellow servants with the trainmen. *Condon v. Missouri Pac. Ry. Co.*, 78 Mo. 567, 573; *Missouri Pac. Ry. Co. v. Dwyer*, 12 Pac. 352, 361, 36 Kan. 58; *St. Louis, A. & T. Ry. Co. of Texas v. Putnam*, 20 S. W. 1002, 1 Tex. Civ. App. 142; *Daniels v. Union Pac. Ry. Co.*, 23 Pac. 762, 6 Utah, 357. Contra, see *Smith v. Potter*, 9 N. W. 273, 275, 46 Mich. 253, 41 Am. Rep. 161; *Peterson v. Chicago & N. W. Ry. Co.*, 34 N. W. 260, 263, 67 Mich. 102, 11 Am. St. Rep. 564; *Besel v. New York Cent. & H. R. R. Co.*, 70 N. Y. 171, 173; *Nashville, C. & St. L. Ry. Co. v. Foster*, 78 Tenn. (10 Lea) 351; *St. Louis, A. & T. Ry. Co. v. Triplett*, 15 S. W. 831, 833, 54 Ark. 289, 11 L. R. A. 773; *Gilman v. Eastern R. Corp.*, 92 Mass. (10 Allen) 236, 238, 87 Am. Dec. 635; *Id.*, 95 Mass. (13 Allen) 433, 440, 90 Am. Dec. 210.

The master mechanic and mechanics are fellow servants with the trainmen. *Hard v. Vermont & C. R. Co.*, 32 Vt. 473, 481; *Columbus & I. C. Ry. Co. v. Arnold*, 31 Ind. 174, 179, 99 Am. Dec. 615; *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411, 417, 418, 3 Am. Rep. 143. So, also, of a hostler. *Louisville, N. O. & T. Ry. Co. v. Petty*, 7 South. 351, 352, 67 Miss. 255, 19 Am. St. Rep. 304; *Ewald v. Chicago & N. W. Ry. Co.*, 36 N. W. 12, 16, 70 Wis. 420, 5 Am. St. Rep. 178. Contra, as to carpenter in shops. *Ryan v. Chicago & N. W. Ry. Co.*, 60 Ill. 171, 175.

Trainmen and telegraph operators are not fellow servants. *Illinois Cent. R. Co. v. Bentz*, 69 S. W. 317, 319, 108 Tenn. 670, 58 L. R. A. 690, 91 Am. St. Rep. 763 (citing *East Tennessee, V. & G. R. Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, 6 Am. St. Rep. 616; *Louisville & N. R. Co. v. Jackson*, 106 Tenn. 438, 61 S. W. 771); *Hall v. Galveston, H. & S. A. Ry. Co. (U. S.)* 39 Fed. 18, 20. Contra, see *Slater v. Jewett*, 85 N. Y. 61, 69, 39 Am. Rep. 627; *Flannegan v. Chesapeake & O. Ry. Co.*, 21 S. E. 1028, 1029, 40 W. Va. 436, 52 Am. St. Rep. 896; *Cincinnati, N. O. & T. P. R. Co. v. Clark (U. S.)* 57 Fed. 125, 126, 6 C. C. A. 281.

A railroad train dispatcher, having authority to employ and discharge men, is not a fellow employé with a track laborer, within the meaning of Civ. Code, § 1970, providing that railroad companies shall not be liable for injuries caused by fellow employées. *McKune v. California South. R. Co.*, 5 Pac. 482, 483, 66 Cal. 302; *Crew v. St. Louis, K. & N. W. Ry. Co. (U. S.)* 20 Fed. 87; *Lewis v. Selfert*, 11 Atl. 514, 518, 116 Pa. 628, 2 Am. St. Rep. 631.

A laborer employed on a construction train and the trainmen of such train are fellow servants. *Evansville & R. R. Co. v.*

Henderson, 33 N. E. 1021, 1023, 134 Ind. 636. See, also, *Cassidy v. Maine Cent. R. Co.*, 76 Me. 488; *McDermott v. Pacific R. Co.*, 30 Mo. 115, 116. Contra, see *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. C. 446, 450, 60 Am. Rep. 516; *Miller v. Missouri Pac. Ry. Co.*, 19 S. W. 58, 59, 109 Mo. 350, 32 Am. St. Rep. 673; *Bloyd v. St. Louis & S. F. Ry. Co.*, 22 S. W. 1089, 1090, 1091, 58 Ark. 66, 41 Am. St. Rep. 85; *Missouri, K. & T. Ry. Co. of Texas v. Hines (Tex.)* 40 S. W. 152, 155; *Higgins v. Missouri Pac. Ry. Co.*, 16 S. W. 409, 411, 104 Mo. 413.

A section master employed by a railroad company and a section hand working under him, both of whom are engaged at the same manual labor, are fellow servants. *Lagrone v. Mobile & O. R. Co.*, 7 South. 432, 433, 67 Miss. 592; *Northern Pac. Ry. Co. v. Peterson*, 16 Sup. Ct. 843, 845, 162 U. S. 346, 40 L. Ed. 994; *Deavers v. Spencer (U. S.)* 70 Fed. 480, 482, 17 C. C. A. 215; *Nashville, C. & St. L. R. Co. v. Gann*, 47 S. W. 493, 494, 101 Tenn. 380, 70 Am. St. Rep. 687; *Armstrong v. Oregon Short Line & U. N. Ry. Co.*, 32 Pac. 693, 694, 8 Utah, 420; *Daves v. Southern Pac. Co.*, 32 Pac. 708, 709, 98 Cal. 19, 35 Am. St. Rep. 133. Contra, see *Wilson v. Banner Lumber Co.*, 82 South. 460, 461, 108 La. 590.

A yardmaster in charge of switchyards of a railroad, who is subordinate to a general yardmaster, who is in turn subordinate to a trainmaster, and he to a superintendent, is not a vice principal, but a fellow servant, in his relation to other employes engaged in switching in the yard. *Pennsylvania Co. v. Fishack (U. S.)* 123 Fed. 465, 471, 59 C. C. A. 269.

Employes of railroad, while going to and from their labors, are fellow servants of the trainmen. *Dallas v. Gulf, C. & S. F. Ry. Co.*, 61 Tex. 196, 201. See, also, *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202, 210, 211, 53 Am. Rep. 616; *Gormley v. Ohio & M. Ry. Co.*, 72 Ind. 31, 32; *Manville v. Cleveland & T. R. Co.*, 11 Ohio St. 417, 424; *Houston & T. C. Ry. Co. v. Rider*, 62 Tex. 267, 270; *Blake v. Maine Cent. R. Co.*, 70 Me. 60, 63, 35 Am. Rep. 297. Contra, see *McGill v. Southern Pac. Co. (Ariz.)* 33 Pac. 821; *Fletcher v. Baltimore & P. R. Co.*, 18 Sup. Ct. 35, 168 U. S. 135, 42 L. Ed. 411.

A guard employed to ride on an express car to protect it from robbers is a fellow servant of the express messenger. *Wells, Fargo & Co. v. Page*, 68 S. W. 528, 29 Tex. Civ. App. 489.

The engineer and the fireman of a locomotive and a common laborer, all of whom are engaged in moving cars from a spur track, are fellow servants. *Watts v. Hart*, 34 Pac. 423, 426, 7 Wash. 178.

A member of one section gang and the boss of another section gang, employed by

the same railroad company, are fellow servants; they being engaged in the same general service and in the same line of duty. *Clarke v. Pennsylvania Co.*, 31 N. E. 808, 132 Ind. 199, 17 L. R. A. 811.

### FELLOW SERVANTCY.

"Fellow servantcy," which the court coined in order to briefly express the idea, means that where there are two servants or employes of a common master or employer, and one of them from the negligent act of the other receives an injury, the master is not liable for the same. *Jackson v. Norfolk & W. R. Co.*, 27 S. E. 278, 279, 43 W. Va. 380, 46 L. R. A. 337.

### FELO DE SE.

"Felo de se," or suicide, is where a man of the age of discretion and compos mentis voluntarily kills himself. *Hale, P. C.* 411. Felo de se, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death. The party must be of years of discretion and in his senses, else it is no crime. 4 Bl. Comm. 189. It is something more than self-sought or self-inflicted death. It is a species of crime or wickedness, something wrong, a kind of self-murder. *Life Ass'n of America v. Waller*, 57 Ga. 533, 536.

### FELONIOUS—FELONIOUSLY.

Felonious or otherwise, see "Otherwise."

"Felonious" is defined by Webster to be "malignant, malicious, villainous, traitorous, perfidious." *People v. Moore*, 37 Hun, 84, 93, 3 N. Y. Cr. Rep. 458, 469. See, also, *Whitman v. State*, 17 Neb. 224, 227, 22 N. W. 459.

"Feloniously" is a technical word, used in indictments charging offenses punishable by death or imprisonment in the penitentiary. *Anderson v. Territory*, 13 Pac. 21, 24, 4 N. M. (Johns.) 108.

"Felonious," in connection with the intent to convert property stolen, was defined by Baron Parke to mean "that there was no color of right or excuse for the act," and the intent must be to deprive the owner, not temporarily, but permanently, of his property. *State v. Rutherford*, 152 Mo. 124, 131, 53 S. W. 417.

The term "feloniously" has no synonym, as it describes a peculiar disposition and intent essential to the existence of crimes of a certain grade, and determines the privileges of the accused on his trial, and the degree and consequences of the punishment. It admits of no substitute. *State v. Jesse*, 19 N. C. 297, 300.

**Criminal intent implied.**

The word "feloniously" is descriptive of the act charged. It means that the act was done with the mind bent on that which is wrong, or, as it has been sometimes said, with a guilty mind. *State v. Rechnitz*, 52 Pac. 264, 265, 20 Mont. 488.

The word "feloniously" means with criminal intent. *People v. Dumar*, 5 N. Y. Cr. Rep. 55, 57.

"Feloniously" means with intent to commit a crime. *State v. Smith*, 71 Pac. 767, 768, 31 Wash. 245.

The word "feloniously," in an indictment, means with criminal intent. *People v. Dumar* (N. Y.) 42 Hun, 80, 83.

The technical word "feloniously," as used in an indictment, when applied to an act, means that the act was done with intent to commit the crime named in the indictment. *State v. Halpin* (S. D.) 91 N. W. 605.

"Felonious," as ordinarily used, indicates a criminal intent; an intent to commit a crime; and it was claimed that, as used in an indictment for receiving stolen property, charging that defendant feloniously received such property, the word "felonious" indicated that the receiving of the property was with the knowledge that it was stolen, but the court held that this did not necessarily follow. A person may receive property from another, and at the time of receiving it may intend to retain it, and thus feloniously deprive the owner thereof, and still have no knowledge that the property was stolen. Hence the charge was not sufficient. *People v. Hartwell*, 59 N. E. 929, 931, 166 N. Y. 361.

Robbery is a crime defined by the common law as the felonious and violent taking of any money or goods from the person of another, putting him in fear. The epithet "felonious" has reference to the intention, which must be "animo furandi," for the purpose of stealing or appropriating the thing taken. *United States v. Smith* (U. S.) 26 Fed. Cas. 1134, 1135.

In an indictment the term "felonious" means that the "act was done with the intent to commit the crime; that is, with a design on the part of the perpetrator to commit the felony with which he is charged." *State v. Boyle*, 28 Iowa, 522, 525.

The word "feloniously," in the statute defining the offense of larceny, was intended to supply that element of the ordinary definition of larceny implying criminal intent; and the word is equivalent to an allegation of intent in an information charging that defendant did unlawfully and feloniously take, steal, and carry away of the personal property, etc. *Hamilton v. State*, 41 N. E. 588, 142 Ind. 276.

In *Holloway's Case*, 1 Denison, Cr. Cas. 376, Parke, J., defined "felonious," in reference to larceny, to mean that there was no color of right or excuse for the act, and said that the intent must be to deprive the owner, not temporarily, but permanently, of the property. *State v. Slingerland*, 7 Pac. 280, 283, 19 Nev. 135.

The use of the word "feloniously" has uniformly been held to be a sufficient averment of the intent necessary to constitute the crime. *People v. Willett*, 6 N. E. 301, 102 N. Y. 251; *Phelps v. People*, 72 N. Y. 334; *In re Van Orden*, 65 N. Y. Supp. 720, 721, 32 Misc. Rep. 215; *People v. Butler*, 1 Idaho, 231, 234; *Commonwealth v. Adams*, 127 Mass. 15, 17. In *People v. Conroy*, 97 N. Y. 68, the court said: "It has never been required, under the strictest and most technical rules of pleading, that the particular intent with which a homicide was committed should be set forth in the indictment; but it has uniformly been deemed sufficient to allege it to have been done feloniously, with malice aforethought, and contrary to the form of the statute." *People v. Mosier*, 76 N. Y. Supp. 65, 68, 73 App. Div. 5.

**Criminal, criminally, synonymous.**

The term "felonious," when used in the statute, shall be construed as synonymous in meaning with the word "criminal," and the word "feloniously," when so used, as synonymous in meaning with the word "criminally." *Comp. Laws Mich. 1897*, § 11, 792.

In the construction of statutes the word "felonious" shall mean "criminal," and the word "feloniously" shall mean "criminally." *Gen. St. Minn. 1894*, § 255, subd. 18.

**Deliberation implied.**

"Feloniously" means with a deliberate intent to do a wrongful act. But an indictment charging that the embezzlement is done with the intent then and there to injure does not express precisely the same meaning as "feloniously," because in the latter the element of deliberation is implied. *United States v. Greve* (U. S.) 65 Fed. 488, 489.

The word "felonious" is defined by lexicographers as meaning "malignant" or "malicious"; and when an act is charged to have been done feloniously it certainly embraces the idea that it was done with a deliberate evil intent. An act could not be felonious without being both malicious and unlawful. *Aikman v. Commonwealth* (Ky.) 18 S. W. 937, 938.

The word "feloniously" is defined as "having the quality of a felony; malignant; malicious; done with intent to commit a crime." The word "feloniously" means, in law, in a felonious manner, with deliberate intention to commit a crime; and hence to

American text-writers seem to be in accord in laying down the principle that if an indictment sets out the facts of an offense, and lays it as a felony, yet, in matter of law it is found to be a misdemeanor only, a judgment for the misdemeanor may be sustained notwithstanding there can be no conviction of misdemeanor or an indictment for felony; the word "feloniously" being rejected as surplusage. *Davis v. United States*, 16 App. D. C. 442, 449.

**Necessity of use of word "feloniously" in indictments for felonies.**

The word "feloniously" is essential to all indictments for a felony; for it alone can express the intent, the very offense. *Kaelin v. Commonwealth*, 1 S. W. 594, 595, 84 Ky. 354; *State v. Deffenbacher*, 51 Mo. 26, 27; *State v. Rechnitz*, 52 Pac. 264, 265, 20 Mont. 488.

The word "feloniously" must be used in the indictment in all cases of felony at common law or those made felony by statute. *Curtis v. People* (Ill.) Breesse, 256; 1 Chit. Cr. Law, § 242; *Moore, Cr. Law*, § 790; 1 Bish. Cr. Law, 693; 1 Whart. Cr. Law, 1283, 1287; 1 Bish. Cr. Proc. 534. This rule applies to an indictment for an assault with an intent to commit murder. *Ervington v. People*, 54 N. E. 981, 982, 181 Ill. 408.

The omission of the word "feloniously" in indictments for obtaining goods by false pretenses, which is a felony, is a fatal defect. *State v. Bryan*, 16 S. E. 909, 112 N. C. 848.

Pen. Code, §§ 325, 326, provides imprisonment in the territorial prison as punishment for rape. Section 292 provides that every person guilty of assault with intent to commit any felony, with certain immaterial exceptions, may be punished by imprisonment in the territorial prison, or in the county jail, or by fine. Code Cr. Proc. § 4, defines "felony" as a crime which may be punished by death or by imprisonment in the territorial prison. Held, that an indictment charging an assault on a female with an intent to ravish and carnally know her, contrary to the form of the statute, is sufficient to charge a felony, without the use therein of the word "feloniously." *Territory v. Godfrey*, 50 N. W. 481, 6 Dak. 48.

**As purposely.**

Feloniously, as used in an indictment charging that the defendant did unlawfully and feloniously make an assault upon another with intent to murder, is equivalent to the word "purposely." *Carder v. State*, 17 Ind. 307, 308.

**Specific intent implied.**

The words "willfully, unlawfully, feloniously, and maliciously" are properly used

in an information for arson. Such words import only that criminal intent which is a necessary part of every felony or other crime; but they do not necessarily include the specific purpose to destroy the building, which is an element of the crime of arson. *People v. Mooney*, 59 Pac. 761, 762, 127 Cal. 339.

A charge that defendant feloniously took certain property from the person of another was sufficient to charge robbery, without any charge that defendant did "steal, take, and carry away"; the court remarking that the language used imported a stealing and an asportation with intent to deprive the person of the lawful possession of the property and the goods. *Keeton v. State*, 66 S. W. 645, 70 Ark. 163.

An indictment for robbery, charging that the defendant "feloniously did seize, take, and carry away" certain property, is not equivalent to the averment that the defendant "did seize, take, and carry away with intent to rob," and hence the indictment is insufficient in failing to show intent to commit a felony. *Matthews v. State*, 4 Ohio St. 539, 542.

Rev. St. 1889, §§ 3633, 3634, provide that any person who shall sell any falsely made draft purporting to be issued by a bank, knowing the same to be falsely made, with intent to have the same passed, shall be guilty of a forgery. Held, that an indictment alleging that defendant did "falsely, fraudulently, and feloniously" sell such a draft, with knowledge that it was falsely made, "with intent to have the same passed," was sufficient; no allegation being necessary that the selling was done with a felonious intent to have the draft passed. *State v. Taylor*, 22 S. W. 1103, 1104, 117 Mo. 181.

The term "feloniously," as employed in an indictment charging that a person feloniously bought, received, and concealed, etc., property, knowing it to have been stolen, is merely the statement of the result of the facts, including the intent, prescribed by the statute, and is not a sufficient statement to supply the omission to allege that the defendant did not have the intent to restore the property to the owner. *Holt v. State*, 5 South. 793, 794, 86 Ala. 599.

**Title of purchaser of property feloniously obtained.**

Property which has been obtained by means of false pretenses is obtained feloniously, within the rule that, if property be taken feloniously, no title passes from the felon to a bona fide purchaser. *Andrew v. Dieterich* (N. Y.) 14 Wend. 31, 36.

**As unlawfully.**

The word "feloniously" includes "unlawfully" in its meaning, for we cannot say

that an act feloniously done is not also unlawfully done. *Carroll v. State*, 75 S. W. 471, 71 Ark. 403.

"Feloniously" is a word of far broader and more criminal meaning than the word "unlawfully," as the word is used in an indictment charging that an act was "feloniously" done. An act cannot be "feloniously," and not "unlawfully," done, but it may be "unlawfully" done, without being "feloniously" done. *Weinzorpfen v. State* (Ind.) 7 Blackf. 188, 195.

A charge in an indictment for bigamy that the second marriage was "felonious" charges that such marriage was unlawful. While the word "unlawful" is generally inserted in connection with the word "felonious," it would be overnice to hold that a felonious act needed any further qualification. *Kopke v. People*, 4 N. W. 551, 43 Mich. 41.

"Feloniously" is a technical word, which at common law was essential to every indictment for a felony, charging the offense to have been committed feloniously; but where the statute uses the word "unlawfully," the word "feloniously" cannot be used to supply the omission of the word "unlawfully." *Territory v. Armijo*, 37 Pac. 1117, 1119, 7 N. M. 571; *Territory v. Miera*, 1 N. M. 387.

"Feloniously," as used in an indictment charging that certain acts were feloniously done, includes and is equivalent to "unlawfully." *Shinn v. State*, 68 Ind. 423, 425.

The word "unlawfully," in an instruction relative to embezzlement, will not supply the place of the word "feloniously." *State v. Cunningham*, 55 S. W. 282, 287, 154 Mo. 161.

#### As wantonly.

The word "feloniously" implies that the acts charged to have been done proceeded from an evil mind and wicked purpose, and that such offenses are felonious in their nature, and are done with the deliberate intent to commit a crime. The word "feloniously" does not supply the omission of the word "wantonly," where the latter word is required to constitute an offense. *State v. Morgan*, 3 S. E. 927, 928, 98 N. C. 641.

#### As wickedly and against admonitions of the law.

By the term "feloniously" is meant wickedly and against the admonition of the law; i. e., wickedly and unlawfully. *State v. Brooks*, 5 S. W. 257, 260, 92 Mo. 542; *State v. Knock*, 44 S. W. 235, 236, 142 Mo. 515; *State v. Schaefer*, 22 S. W. 447, 450, 116 Mo. 96; *State v. Howell*, 23 S. W. 263, 267, 117 Mo. 307; *State v. Adair*, 160 Mo. 391, 394, 61 S. W. 187; *State v. Wilkerson*, 70 S. W. 478, 479, 170 Mo. 184; *State v. Allen*, 71 S. W. 1000, 1001, 171 Mo. 562.

"Feloniously" means wrongfully and wickedly, and also refers to the punishment imposed by law. *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207.

The word "felonious," as used in an instruction that, although the jury believe from the evidence that defendant began the quarrel with the deceased, yet if they also believe from the evidence that this was done by defendant without any felonious purpose, and that thereupon the deceased attacked him and compelled him, in order to save his own life, to take that of deceased, etc., means wickedly and against the admonition of the law—unlawfully. *State v. Parker*, 17 S. W. 180, 181, 106 Mo. 217.

#### FELONIOUS ASSAULT.

A felonious assault upon one's person is such an assault as, if consummated, would subject the party making it, upon conviction, to imprisonment in the penitentiary. 'An assault with intent to murder by using any weapon likely to produce death would be punished by imprisonment in the penitentiary, and would consequently be a felonious assault. *Hinkle v. State*, 21 S. E. 595, 602, 94 Ga. 595.

#### FELONIOUS ARSON.

See "Arson."

#### FELONIOUS HOMICIDE.

"Felonious homicide," or murder, is the killing of any person with malice aforethought, either express or implied. There can be no murder where the killing is not done with malice. *State v. Symmes*, 19 S. E. 16, 17, 40 S. C. 383.

Wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting it is guilty of a "felonious homicide"; and it is immaterial whether the action be of the mind or of the body, whether it was consented to by the person on whom it was operated or not, or whether it was an unlawful confinement, or leaving a dependent person in a place of exposure, or any omission of duty which the laws enjoin. *Territory v. Manton*, 19 Pac. 387, 392, 8 Mont. 95.

Under the common law felonious homicide was divided into murder, voluntary manslaughter, and involuntary manslaughter. *Conner v. Commonwealth*, 76 Ky. (13 Bush) 714, 718.

"Felonious homicide" at common law is of two kinds, namely, manslaughter and murder, the difference between which consists principally in this: that in murder there is the ingredient of malice, while in manslaughter there is none; for manslaughter



ter, when voluntary, arises from the sudden heat of the passions, but murder from the wickedness and malignity of the heart. *State v. Miller* (Del.) 32 Atl. 137, 138, 9 *Houst.* 564; *Id.*, 1 Del. Term R. 183, 187.

### FELONIOUS INTENT.

"Felonious intent," when used in penal statutes, means criminal intent, and criminal intent is an intent to deprive or defraud the true owner of his property. *People v. Moore*, 3 N. Y. Cr. R. 458, 469, 37 *Hun.* 84, 98.

A felonious intent to kill is an unlawful and wicked intent. *State v. White*, 14 Kan. 538, 540.

#### In false pretenses.

An intention to obtain money under a fraudulent and false pretense, meaning at the time to appropriate the money under this pretense, is evidence from which the jury may infer the animus furandi necessary to constitute larceny; but it is not the animus furandi itself. There may be a fraudulent intent to obtain money which is not a felonious intent; so there may be a taking of money by a man with intention to obtain it under a fraudulent and false pretense, and to appropriate it to himself under that pretense, which might not be a felonious taking. An instruction in such a case in larceny, without finding the felonious intent or the intent to steal, is not perfectly correct in law. *Weston v. United States* (U. S.) 29 Fed. Cas. 823, 824.

#### In larceny.

"Felonious intent" is sufficiently defined in a prosecution for larceny by an instruction that the defendant, to be guilty, must have taken the goods with the fraudulent purpose to take the property of another and a consciousness that he had no right to take them. *Bodee v. State*, 30 Atl. 681, 682, 57 N. J. Law (28 *Vroom*) 140.

A taking with the intent to permanently deprive the owner of the property, and without an intention to return the same, is a "taking with felonious intent" and, to constitute larceny, need not be done *lucri causa*. *State v. Slingerland*, 7 Pac. 280, 281, 19 Nev. 135.

The term "felonious intent," as used in relation to larceny, means to deprive the owner, not temporarily, but permanently, of his property, without color of right or lawful excuse for the act, and to convert it to the taker's use without the consent of the owner. *State v. Shepherd*, 66 Pac. 236, 237, 63 Kan. 545 (citing *In re Mutchler*, 40 Pac. 283, 55 Kan. 164).

"Felonious intent," which distinguishes trespass from stealing, is an intent to con-

ceal from the owner who took the property, so that he may not know against whom he may bring his action or whom to indict. Where there is an attempt to do the thing slyly, or do it by force under the circumstances of disguise, the community needs protection, and these acts are treated as being done with a felonious intent, and are punished accordingly. *State v. Deal*, 64 N. C. 270, 273.

### FELONIOUS RAPE.

See "Rape."

### FELONY.

See "Substantive Felony."

Any other felony, see "Any Other."

Other felony, see "Other."

It is said that "felony" is derived from "fee," which signifies the feud or land, and "lon," forfeiture. Hence, felony is a crime which forfeits land. *United States v. Williams*, 28 Fed. Cas. 645, 646 (citing *Cr. Cir. Comp.* [6th Ed.] 95, 96, 104).

By the common law, felony is an offense which occasions a total forfeiture of either lands or goods, or both, to which capital or other punishment may be superadded according to the degree of guilt. *Mary v. State*, 24 Ark. 44, 45, 81 Am. Dec. 60 (quoting *Bouv. Law Dict.*); *Butler v. State*, 34 Ark. 480, 481; *Fassett v. Smith*, 23 N. Y. 252, 257; *People v. Reilly*, 49 App. Div. 218, 223, 63 N. Y. Supp. 18, 22; *People v. Lyon*, 1 N. Y. Cr. R. 400, 405; *Matthews v. State*, 4 Ohio St. 539, 542; *Ex parte Wilson*, 5 Sup. Ct. 935, 938, 114 U. S. 417, 29 L. Ed. 89; *Holton v. State*, 2 Fla. 476, 506; *State v. Murphy*, 17 R. I. 698, 701, 24 Atl. 473, 474, 475, 16 L. R. A. 550.

Originally a felony was an offense which was followed by forfeiture. Yet a century ago the English courts repudiated that test, and so have the American courts since. It is said that it is not the grade of the punishment, but the nature and quality of the offense, which must determine its classification. If so, the rule is very uncertain. Many offenses comparatively trivial were felonies, and punishable at common law with death and forfeiture, which at the present time are not felonies, or so punishable, either in England or the United States. Although forfeitures ceased to be the consequence of most felonies before the adoption of the United States Constitution, yet the designation "felony" remains. *United States v. Wynn* (U. S.) 9 Fed. 886, 888.

Felonies, in England, comprised originally every species of crime punishable with forfeiture of lands and goods. At common law the principal, if not all, felonies, after

treason, were murder, manslaughter, mayhem, and larceny. *Commonwealth v. Schall*, 12 Pa. Co. Ct. R. 554, 556.

The word "felony" appears to have been long used to signify the degree or class of crime committed, rather than the penal consequences of the forfeiture occasioned by the crime, according to its original signification. Capital punishment by no means enters into the true definition of "felony." Strictly speaking, the term comprised every species of crime which occasioned at common law the total forfeiture of either lands or goods, or both. That was the only test. Felonies by common law are such as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, etc. 1 Hale, P. C. 411. These crimes were of such enormity that the common law punished them by forfeiture: (1) The offender's wife lost her dower; (2) his children became base and ignoble, and his blood corrupted; (3) he forfeited his goods and chattels, lands and tenements. The superadded punishment was either capital or otherwise, according to the degree of guilt; that is, the turpitude of the offense. There were felonies not punishable with death, and, on the other hand, there were offenses, not felonies, which were so punishable. However, the idea of felony was so generally connected with capital punishment that erroneously it came to be understood that all crimes punishable with death were felonies; and so, if a statute created a new offense and declared it a felony, but prescribed no punishment, by implication of law it was punishable with death. Tested by the common law, then, this term has no very exact and determinate meaning, and can apply to no cases in this country except treason, where limited forfeiture of estate is allowed. But technically that is a crime of a higher grade than felony, although it imports, also, felony. If it be conceded that capital punishment imports a felony, there can be none, at common law, except capital crimes. But that test is untechnical, and founded in error. It does not always apply, and it is as arbitrary to say that a crime punished capitally is a felony as it is to say that one punished by imprisonment in the penitentiary is a felony. In American law, forfeiture as a consequence of crime being generally abolished, the word "felony" has lost its original and characteristic meaning, and it is rather used to denote any high crime punishable by death or imprisonment; and as used in a statute providing that, on a trial of a felony, the defendant shall be entitled to 10 peremptory challenges, a felony includes cases (1) where the offense is declared by statute expressly or impliedly to be a felony; (2) where Congress does not define an offense,

but simply punishes it at common law, and at common law it is a felony; (3) where Congress adopts a state law as to its offense, and under such law it is a felony. Within such rule the uttering and passing of counterfeit coin is not a felony. *United States v. Coppersmith* (U. S.) 4 Fed. 198, 205; *Considine v. United States* (U. S.) 112 Fed. 342, 343, 50 C. C. A. 272.

Originally the word "felony" had a meaning. It denoted all offenses the penalty of which includes forfeiture of goods, but subsequent acts of Parliament have declared various offenses to be felonies without enjoining that penalty, and have taken away the penalty from others which continued nevertheless to be called "felonies," inasmuch that the acts so called have now no property whatever in common save that of being unlawful and punishable. There is no statutory definition of felonies in the legislation of the United States, and in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender. *Bannon v. United States*, 15 Sup. Ct. 467, 469, 156 U. S. 464, 39 L. Ed. 494; *Reagan v. United States*, 15 Sup. Ct. 610, 157 U. S. 301, 39 L. Ed. 709.

"The term 'felony,' said Bartley, J., in *Matthews v. State*, 4 Ohio St. 539, has no distinct and well-defined meaning applicable to our system of jurisprudence. In England it has a well-known and extensive signification, and comprises every species of crime which at common law worked a forfeiture of goods and lands; but under our Criminal Code the word 'felonious,' although occasionally used, expresses a signification no less vague and indefinite than the word 'criminal.'" *Mitchell v. State*, 42 Ohio St. 383, 386.

By the statutes of many states any crime punishable by hard labor is a "felony"; but no such test is furnished by the statutes of the United States. Indeed, a provision declaring that "a felony under any law of the United States is a crime punishable with death, or by imprisonment at hard labor," and that "every other crime is a misdemeanor," was submitted by the revisors of the statutes in their draft and was rejected. See Second Draft Rev. St. § 2561, title "Claims." *United States v. Yates* (U. S.) 6 Fed. 861, 865.

A felony is an offense against the laws of the state which is punishable by death or confinement in the penitentiary. *Hinkle v. State*, 21 S. E. 595, 602, 94 Ga. 595; *Butler v. State*, 34 Ark. 480, 481; *Keeton v. State*, 66 S. W. 645, 70 Ark. 163; *State v. Waller*, 43 Ark. 381, 383; *In re Pratt*, 34 Pac. 680, 681, 19 Colo. 138; *Williams v. People*, 57 Pac. 701, 702, 28 Colo. 272; *In re Lowrie*, 9 Pac. 489, 490, 8 Colo. 499, 54 Am. Rep. 558; *Ter*

ritory v. Godfrey, 50 N. W. 481, 6 Dak. 46; Territory v. Guthrie, 17 Pac. 39, 41, 2 Idaho (Hasb.) 482; Kelly v. People, 24 N. E. 56, 132 Ill. 363; People v. George, 57 N. E. 804, 806, 186 Ill. 122; Lamkin v. People, 94 Ill. 501, 504; Baits v. People, 16 N. E. 483, 484, 123 Ill. 428; Brewster v. People, 183 Ill. 143, 146, 55 N. E. 640; Beattie v. People, 33 Ill. App. 651, 661; Weinzorpfm v. State (Ind.) 7 Blackf. 186, 188; State v. Smith (Ind.) 8 Blackf. 489, 490; Skelton v. State, 49 N. E. 901, 902, 149 Ind. 641; Stevens v. Anderson, 44 N. E. 460, 461, 145 Ind. 304; Sutherland v. Sutherland, 61 N. E. 206, 27 Ind. App. 301; Short v. State, 63 Ind. 376, 378; State v. Reeves, 10 S. W. 841, 843, 97 Mo. 668, 10 Am. St. Rep. 349; State v. McCarron, 51 Mo. 27, 28; State v. Deffenbacher, 51 Mo. 26, 27; State v. Nicholson, 56 Mo. App. 412, 415; State v. Melton, 53 Mo. App. 646, 647; United States v. Vigil, 34 Pac. 530, 531, 7 N. M. 296; Keyser v. Harbeck, 12 N. Y. Leg. Obs. 201; People v. Borges (N. Y.) 6 Abb. Prac. 132, 134; People v. Markell, 45 N. Y. Supp. 904, 907, 20 Misc. Rep. 149; Shay v. People, 22 N. Y. 317, 318; People v. Rellly, 63 N. Y. Supp. 18, 22, 49 App. Div. 218; People v. Lyon, 1 N. Y. Cr. R. 400, 405; Shay v. People (N. Y.) 4 Parker, Cr. R. 353, 376; People v. Park (N. Y.) 1 Cow. Cr. R. 227, 228; People v. Johnson, 110 N. Y. 134, 141, 17 N. E. 684, 686; Park v. People (N. Y.) 1 Lans. 263, 264; People v. Park, 41 N. Y. 21, 24; Andrew v. Dieterich (N. Y.) 14 Wend. 31, 36; People v. Shay (N. Y.) 10 Abb. Prac. 413, 415; Griffin v. State, 34 Ohio St. 299, 300; Mitchell v. State, 42 Ohio St. 383, 387; In re Kirby, 73 N. W. 92, 94, 10 S. D. 322, 39 L. R. A. 856; United States v. Jones, 18 Pac. 233, 234, 5 Utah, 552; State v. Setter, 18 Atl. 782, 57 Conn. 461, 14 Am. St. Rep. 121; State v. McCormick, 24 Atl. 938, 939, 84 Me. 566; Smith v. State, 33 Me. 48, 59, 54 Am. Dec. 807; In re Hogan, 78 N. W. 1051, 1052, 8 N. D. 301, 45 L. R. A. 166, 73 Am. St. Rep. 759; In re Stevens, 34 Pac. 459, 460, 52 Kan. 56; State v. Warner, 55 Pac. 342, 344, 60 Kan. 94; State v. Allphin, 42 Pac. 55, 57, 2 Kan. App. 28; Territory v. Duncan, 6 Pac. 353, 5 Mont. 478; People v. Cole, 11 Pac. 481, 484, 70 Cal. 59; People v. War, 20 Cal. 117, 120; Benton v. Commonwealth, 16 S. E. 725, 89 Va. 570; Campbell v. State, 2 S. W. 825, 827, 22 Tex. App. 262; Pitner v. State, 5 S. W. 210, 213, 23 Tex. App. 366; Ward v. White, 23 S. W. 981, 982, 86 Tex. 170; Walsh v. State, 3 Tex. App. 114, 115; Corbett v. Sullivan, 54 Vt. 619, 622; State v. Hammond, 35 Wis. 315, 318; Queenan v. Territory, 71 Pac. 218, 223, 11 Okl. 261, 61 L. R. A. 324; State v. Corliss, 85 Iowa, 18, 19, 51 N. W. 1154; State v. Grant, 86 Iowa, 216, 220, 53 N. W. 120; State v. McCormick, 14 Nev. 347, 348; Turner v. State, 40 Ala. 21, 29; People v. Brigham, 2 Mich. 550, 556; Shannon v. People, 5 Mich. 71, 83; State v. Felch, 58 N. H. 1, 2; Code Mass. 1892, § 1503; Pen. Code,

N. Y. 1903, §§ 5, 6; Code W. Va. 1899, p. 998, c. 152, § 1; Ballinger's Ann Codes & St. Wash. 1897, § 6773; Gen. St. Minn. 1894, § 6289; Rev. Codes N. D. 1899, §§ 6804, 7743; Pen. Code S. D. 1903, §§ 5, 6; Pen. Code Ga. 1895, § 2; Comp. Laws Nev. 1900, § 3388; Rev. St. Okl. 1903, §§ 1926, 5140, 5141; Pen. Code Ariz. 1901, par. 17; Shannon's Code Tenn. 1896, § 7185; Rev. St. Mo. 1899, § 2393; Pen. Code Tex. 1895, art. 55; V. S. 1894, 5166; Bates' Ann. St. Ohio, 1904, § 6795; Cr. Code Ala. 1896, § 4652; Hurd's Rev. St. Ill. 1901, p. 645, c. 38, § 277; Code Va. 1887, § 3879; Rev. St. Utah 1898, § 4063; Rev. St. Wis. 1898, § 4637; Comp. Laws Mich. 1897, § 11-791.

"Offenses are either felonies or misdemeanors. Such offenses as are punishable with death or confinement in the penitentiary are felonies. All other offenses, either at common law or made so by statute, are misdemeanors. \* \* \* A common-law offense for which punishment is prescribed shall be punished only in the mode so prescribed." Ky. St. § 1127. Commonwealth v. Rowe, 66 S. W. 29, 31, 112 Ky. 482, 23 Ky. Law Rep. 1718, 1721.

A felony is a crime which is liable to be punished by imprisonment in the penitentiary, not one which must be thus punished. State v. Clayton, 13 S. W. 819, 820, 100 Mo. 516, 18 Am. St. Rep. 565; Johnston v. State, 7 Mo. 183; Ingram v. State, 7 Mo. 293.

A "felony" is an offense punishable by death, or confinement and hard labor in the penitentiary. Gen. St. Kan. 1901, § 5444.

A felony is a public offense punishable with death, or which is, or in the discretion of the court may be, punishable by imprisonment in the penitentiary or territorial prison; or any other public offense which is, or may be, expressly declared by law to be a felony. Every other public offense is a misdemeanor. Comp. Laws N. M. 1897, §§ 1043, 1044.

A felony is a crime which is punishable with death, or by imprisonment in the penitentiary of this state. When a crime punishable by imprisonment in the penitentiary is also punishable by a fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary. Every other crime is misdemeanor. Ann. Codes & St. Or. 1901, § 1230, 1231.

What is a felony and what a misdemeanor by our law, and in the criminal jurisprudence of many other states of the Union, is not always easy to determine. In some states the distinction is made and defined by statute. But it is not so in New Hampshire, and it may seriously be doubted whether felony, in any proper or practical use of the

term, is or can be recognized in our criminal jurisprudence. And, since here, as in the United States generally, there can be no forfeiture of estate or goods as a punishment for crime, the word "felony" has lost its characteristic and original meaning. Offenses, as to their designation in this respect, if the distinction becomes important, must be defined by the interpretation of the common law, and in that light the term "felony" here is perhaps generally used to denote any high crime, punishable by death or imprisonment in the state's prison; offenses of that character being such only as by the English law formerly had the penalty of forfeiture attached to an additional punishment. Such a criterion would not, however, be strictly correct, because larceny, for example, is undoubtedly regarded as felony, though the value of the money or goods stolen may not be so large as to render the offense punishable by imprisonment in the state prison. *State v. Lincoln*, 49 N. H. 464, 469 (citing 2 *Bish. Cr. Law*, § 875).

"Felony" is a generic term, not sufficiently definite to constitute an accurate charge in an indictment, although, if the particular offense be made distinct and certain by a statement of the facts and circumstances of its commission, the indictment is sufficient. *Johnson v. State*, 36 Ark. 242, 246.

Treason, felony, or other crime, within the meaning of the clause of the Constitution of the United States requiring fugitives from justice, charged with treason, felony, or other crime, to be delivered up, etc., is to be construed to include acts made criminal by amendments in the laws of the several states, and not limited to such only as were crimes at common law. *In re Hughes*, 61 N. C. 57, 64.

#### **Common-law offenses as affected by statutory definition.**

Under Rev. St. c. 170, § 14, providing that the term "felony," when used in any statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by imprisonment in the state prison, it is held that the statute does not make an offense a felony which was only a misdemeanor at common law, but that it merely furnishes a definition of the term "felony" when the same is used in any statute. *Wilson v. State*, 1 Wis. 184, 186; *Nichols v. State*, 35 Wis. 308, 310.

2 Rev. St. p. 702, § 30, provides that the word "felony," when used in any statute, shall be construed to mean any offense for which the offender shall be liable by law to be punished by death or imprisonment in the state prison. Held, that the definition of the term "felony" found in the statute was enacted for the mere purpose of giving it a

definite meaning when found in statutory law, and without any design of affecting by it the rights or liabilities of third persons resulting from ordinary and bona fide business transactions, and any one who may have obtained the property to which the transactions relate by acts which were not a felony at common law, but which by the Revised Statutes may possibly be an offense coming within their definition of a felony. *Keyser v. Harbeck*, 10 N. Y. Super. Ct. (3 Duer) 373, 386.

Comp. Laws, § 5954, declaring that "the term 'felony,' when used in this title or in any other statute, shall be construed to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or imprisonment in the state's prison," must be understood as intended to apply only to those provisions where neither the particular offense nor its grade is otherwise indicated than by the use of the term "felony," and where, therefore, the definition became necessary, as it was not intended to be used merely in the common-law sense. While this definition by reference includes not only statute offenses, but all offenses at common law which by our statutes are made punishable in the manner indicated, whether felonies or misdemeanors at common law, it is clear that even as to those common-law felonies thus punishable it can have no other effect than to render them subject to the particular provisions of the statute, where the word "felony" is thus used, neither adding to nor taking from them any of the common-law incidents of felony, except so far as these particular provisions may have that effect. As to those common-law felonies not thus punishable by our statutes, they are in no way affected either by the definition or by the provisions to which that definition refers, for the plain reason that they do not come within either, but remain felonies at common law in the same manner as if this statute definition had never been adopted. *Drennan v. People*, 10 Mich. 169, 173, 174, 175, 182.

#### **Felonious intent.**

Where an offense is punishable by imprisonment in the penitentiary, the indictment must state that the act was committed with a felonious intent, because without a felonious intent there can be no felony. *State v. Clayton*, 13 S. W. 819, 820, 100 Mo. 516, 18 Am. St. Rep. 565; *United States v. Staats*, 49 U. S. (8 How.) 41, 45, 12 L. Ed. 979.

#### **Fine or imprisonment.**

Pen. Code, art. 54, defines "felony" to be any offense punishable by death or imprisonment in the penitentiary, either absolutely or in the alternative. *Ward v. White*, 23

S. W. 981, 982, 86 Tex. 170; *Campbell v. State*, 2 S. W. 825, 827, 22 Tex. App. 262.

Under the statute declaring that the term "felony" includes every offense punishable by imprisonment in the state's prison, it has been uniformly held that an offense that is liable to be so punished must be regarded as a felony, although not necessarily so punished. *State v. McCormick*, 24 Atl. 938, 939, 84 Me. 566; *Benton v. Commonwealth*, 16 S. E. 725, 80 Va. 570; *In re Stevens*, 34 Pac. 459, 460, 52 Kan. 56.

The maximum punishment to which the offender is liable—that is, may be punished or is liable—is the test by which the degree of the offense is determined. *In re Stevens*, 34 Pac. 459, 460, 52 Kan. 56. *Contra*, see *Baits v. People*, 16 N. E. 483, 484, 123 Ill. 428; *Lamkin v. People*, 94 Ill. 501, 504.

Under Rev. St. 1879, § 1676, providing that the term "felony" shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or with imprisonment in the penitentiary, it is not necessary, to constitute a felony, that the offense be one which must be thus punished. *State v. Clayton*, 13 S. W. 819, 820, 100 Mo. 516, 18 Am. St. Rep. 565 (citing *Johnston v. State*, 7 Mo. 183; *Ingram v. State*, Id. 293; *State v. Murdock*, 9 Mo. 739; *State v. Green*, 66 Mo. 632; *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 349); *State v. Deffenbacher*, 51 Mo. 26, 27.

Const. Cal. art. 6, § 4, providing that the Supreme Court shall have appellate jurisdiction in all criminal cases amounting to felony, means that the defendant must be convicted of and sentenced for a crime which was punishable by law by imprisonment in the penitentiary; and the fact that he was otherwise punished for it was immaterial, because the jurisdiction does not depend on the kind or measure of punishment actually inflicted, but the kind that might have been inflicted, and the kind for which the defendant was liable, and which the court was authorized to impose. *United States v. Watkins* (U. S.) 6 Fed. 152, 160.

#### **As fixing imprisonment in penitentiary.**

Const. art. 18, § 4, provides that the term "felony" shall mean any offense punishable by death or imprisonment in the penitentiary, and none other. Hence a statute providing that any person stealing cattle shall be deemed guilty of a felony, and shall be punished by imprisonment, fixes the imprisonment in the penitentiary. *In re Pratt*, 34 Pac. 680, 681, 19 Colo. 138.

#### **Imprisonment as making.**

The mere fact that an offense is punishable by imprisonment and was rendered an

infamous crime does not make it a felony. *Bannon v. United States*, 15 Sup. Ct. 467, 469, 156 U. S. 464, 39 L. Ed. 494.

The term "felony" appears to have been long used to signify the degree or class of crime committed, rather than the final consequence of its commission. In cases where the statute declares that the offender shall be deemed to have feloniously committed the act, it makes the offense a felony. Originally the term "felony" had a meaning quite different; but it has become vague and misunderstood, being controlled entirely by the statutes of the different states. Acts of Parliament and statutes of states by their peculiar phraseology make certain offenses felonies which were not felonies by the common law. But under a statute prohibiting the sale of liquor to Indians, fixing the punishment at imprisonment and by fine, but which does not declare it to be a felony, such offense is not a felony. *Bruguier v. United States*, 46 N. W. 502, 1 Dak. 5.

Stealing a letter from a postal car is not a felony, within Rev. St. § 5469 [U. S. Comp. St. 1901, p. 3692], making it an offense punishable by imprisonment for a person in the postal service to steal a letter from a postal car. *United States v. Falkenhainer* (U. S.) 21 Fed. 624, 627.

#### **Imprisonment in penitentiary or county jail.**

Felony is a crime which is punishable by death or imprisonment in the territorial prison. When a crime punishable by imprisonment in the territorial prison is also punishable by imprisonment in the county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the territorial prison. Rev. St. § 6311; *Territory v. Guthrie*, 17 Pac. 39, 41, 2 Idaho (Hasb.) 432.

#### **Misdemeanor distinguished.**

Felony, as existing at common law, is not known under the laws of this state, as crimes do not work a forfeiture of the estate. But offenses are distinguishable into what may be termed "crimes" and "misdemeanors"; the former punishable capitalily, or by confinement in the state prison, and the latter by fine, or imprisonment in the county jail. On the trial of these cases, there is no difference in the mode of trial or the right of the respondent, and no reason exists in this state why one indicted for that which would be a felony at common law may not be convicted of a misdemeanor. The conviction would bar a subsequent prosecution, as well as a conviction for theft under an indictment for burglary or robbery. *State v. Scott*, 24 Vt. 127, 130.

Offenses punishable by death or confinement in the penitentiary are denominated

"felonies." The distinction between felonies and misdemeanors rests on the character of the punishment. *State v. Warner*, 55 Pac. 342, 344, 60 Kan. 94.

"Felony" is defined to be an offense of which the punishment is death or confinement in the penitentiary. All other crimes are misdemeanors. They are of a distinct grade and nature, and their boundaries must be defined by law. The same acts cannot at the same time constitute a felony and a misdemeanor. The crime must be one or the other, not both or either. *State v. Waller*, 43 Ark. 381, 383.

The difference between a felony and a misdemeanor is that a felony imputes malice, while the latter does not, so that, where death is caused while committing a felony, the act is murder, and if while committing a misdemeanor it is manslaughter. *Pleimling v. State*, 1 N. W. 278, 281, 46 Wis. 516.

In England the term "felony" comprises every species of crime which at common law worked a forfeiture of goods and lands, but under the Ohio Criminal Code, the word "felony," aside from statutory definitions, expresses a signification no less vague than the word "criminal." Rev. St. § 6795, provides, however, that offenses which may be punished by death or imprisonment in the penitentiary are felonies, and all other offenses are misdemeanors. This statutory definition does not, however, affirm or establish the common-law distinctions between felony and misdemeanor. *Mitchell v. State*, 42 Ohio St. 383, 387.

#### Offense must be declared to be a felony.

No crime created by statute can be made a felony, unless it is so defined by the terms of its creation as to constitute the felony. Where a statute declares that the offender shall under the particular circumstances be deemed to have feloniously committed the act, it makes the offense a felony, and embraces all the common and ordinary consequences attending a felony. In some of the states every crime is held to be a felony where the punishment prescribed is confinement in the penitentiary, but that doctrine does not obtain in North Carolina. *State v. Hill*, 91 N. C. 561, 563.

If the act constituting the offense against the laws of the United States was not criminal at common law, and is not wrong per se, it is to be deemed a misdemeanor and not a felony, unless the law expressly denominates it a felony. *United States v. Vigil*, 34 Pac. 530, 531, 7 N. M. 296.

The term "felony," as used in Rev. St. § 819 [U. S. Comp. St. 1901, p. 629], providing that on the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory chal-

lenges, and in all other cases each party shall be entitled to three challenges, includes cases (1) where the offense is declared to be felonious, expressly or by implication; (2) where the offense is not defined by statute, but is designated by its common-law name, known as such at the common law; (3) when Congress adopts a law as to an offense made by the law of the state a felony. *United States v. Coppersmith* (U. S.) 4 Fed. 198. Under such a rule Rev. St. § 5478 [U. S. Comp. St. 1901, p. 3696], making the breaking into a post office a crime punishable by fine and imprisonment at hard labor for not more than five years, does not create a felony. *Considine v. United States*, 112 Fed. 342, 344, 50 C. C. A. 272.

#### Assault with intent to kill.

An assault with a dangerous weapon, with intent to murder, is punishable by imprisonment in the state prison not exceeding 20 years. It is therefore a felony. *Commonwealth v. Wright*, 33 N. E. 82, 158 Mass. 149, 19 L. R. A. 206, 35 Am. St. Rep. 475. See, also, *State v. Clayton*, 13 S. W. 819, 820, 100 Mo. 516, 18 Am. St. Rep. 565.

An assault with intent to kill is a felony, under Wag. St. p. 516, § 33, providing that, "where the term 'felony' is used in this or any other statute, it shall be construed to mean any offense for which the defendant shall be liable by law to be punished with death or imprisonment, and no other," although punishable either by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, or both. *State v. Green*, 66 Mo. 631, 647, 648.

#### Assault with intent to maim.

"Felony," as used in Wag. St. p. 450, § 32, punishing assaults made with intent to commit any robbery, rape, burglary, manslaughter, or "other felony," includes an assault with intent to maim, wound, or disfigure any person; felonious maiming, wounding, or disfiguring being made a felony by statute. *State v. Brown*, 60 Mo. 141, 142.

#### Bribery.

Bribery was not a felony at the common law. *State v. Polacheck*, 77 N. W. 708, 709, 101 Wis. 427.

By the territorial statutes of Utah a felony is a crime which may be punished with death or imprisonment in the penitentiary. Hence bribery, under Rev. St. U. S. § 5451 [U. S. Comp. St. 1901, p. 3680], being punished by fine and imprisonment, is a felony. *United States v. Jones*, 18 Pac. 233, 234, 5 Utah, 552.

The word "felony," as used in Const. art. 4, § 15, providing that members of the Legislature shall in all cases, except treason, felony, and breach of the peace, be privileged

from arrest, must be limited to such offenses as were felonies at the time the Constitution was adopted, and hence does not include bribery. *State v. Polacheck*, 77 N. W. 708, 709, 101 Wis. 427.

#### **Contempt of court.**

Under the federal criminal law procedure no offense against the United States is a felony, unless specially declared to be such by statute. Under such rule contempt of court is not felony. *In re Acker* (U. S.) 66 Fed. 290, 293.

#### **Counterfeiting.**

The offense of uttering and passing counterfeit coin is not a felony within the provisions of Rev. St. § 819 [U. S. Comp. St. 1901, p. 629], entitling a defendant on the trial of any other felony to 10 peremptory challenges. *United States v. Coppersmith* (U. S.) 4 Fed. 198, 207.

In holding that a person convicted of counterfeiting the securities of the United States was not disfranchised under a statute prohibiting persons from voting if they have been convicted of any infamous crime "deemed by the laws of the state a felony," unless they have been pardoned, the court say that it doubts "whether it can be said that any mere statutory offense created by a law of the United States is deemed by the laws of the state a felony." *United States v. Barnabo* (U. S.) 24 Fed. Cas. 1007, 1008.

The statutory definition of "felony" not making misdemeanors at common law felonies, it is held that a statute making the offense of uttering counterfeit coin, which at common law was a misdemeanor only, punishable by imprisonment in the state prison, does not make that offense a felony, so as to make an indictment for uttering counterfeit coin defective for failure to allege that the offense was committed feloniously. *Wilson v. State*, 1 Wis. 184, 186.

#### **Driving stock from range.**

Under the definition in Pen. Code, art. 54, the offense of unlawfully driving stock on its accustomed range, which provides for an alternative punishment by fine, imprisonment, or by both fine and imprisonment, is a felony. *Campbell v. State*, 2 S. W. 825, 827, 22 Tex. App. 262.

#### **Embezzlement.**

By Comp. Laws, § 5204, a "felony" is defined to be a crime which is or may be punishable with death or by imprisonment in the territorial prison; in other words, it is a penitentiary offense, and embezzlement, being punished by imprisonment in the penitentiary, is therefore a felony. *In re Kirby*, 73 N. W. 92, 94, 10 S. D. 322, 39 L. R. A. 856, 859.

Offenses which are punishable by imprisonment for a term of years in the penitentiary are according to the common classification felonies, though our laws do not in general recognize the usual common-law characterization of a felony as being a crime a conviction for which induces a forfeiture of goods. Thus a statute making embezzlement, abstraction, and willful misapplication of the moneys, funds, etc., of a national bank, punishable by imprisonment for a term of years, makes them felonies, though they are denominated in the statute as misdemeanors. *United States v. Cadwallader* (U. S.) 59 Fed. 677, 679.

The term "felony," in the general acceptance of the English law, comprises every species of crime which at common law occasioned a total forfeiture of lands or goods, or both, and to which might be superadded capital or other punishment, according to the degree of guilt. 4 Bl. Comm. 94, 95. In England the rule with regard to felonies created by statutes seems to be that not only those crimes which are declared in express words to be felonies, but also those which are decreed to undergo judgment of life and member by any statute, become felonies thereby, whether the word "felony" be omitted or mentioned. In this state forfeitures of property on conviction of crime have been abolished, and the common-law definition of felony is inapplicable; but the principle of determining the grade of the offense by the character of the punishment is recognized in the clearest manner. By Rev. St. p. 702, § 30, it is provided that the term "felony," when used in this act or any other statute, shall be considered to mean an offense for which the offender, on conviction, shall be liable by law to be punished by death or by imprisonment in a state prison. The same rule for determining what is a felony is preserved by Pen. Code, § 5. The crimes of forgery and embezzlement are felonies, and under Laws 1875, c. 19, where one fraudulently and feloniously obtains and receives money from a county treasurer and converts the same to his own use, it is a felony. *People v. Lyon*, 1 N. E. 673, 674, 99 N. Y. 210.

#### **Forgery.**

The crime of forgery was not a felony, any more than was the obtaining of goods under false pretenses, as it did not involve forfeiture of the goods, which was an inseparable incident to felony. Hence there never was any rule of the common law that a party who had acquired goods by a sale and delivery to him, although such sale and delivery may have been induced by forgery or false pretenses on his part, acquired no title which he could convey to a third innocent person. *Bell v. Cafferty*, 21 Ind. 411, 416, 417.

Forgery is not a felony at common law. *State v. Murphy*, 17 R. I. 698, 702, 24 Atl. 473, 474, 16 L. R. A. 550 (citing 4 Bl. Comm. 247).

Forgery is an infamous offense. It is classed with other infamous felonies and misdemeanors, the compounding of which is a misdemeanor, punishable by fine and imprisonment. *In re Bredin's Appeal*, 92 Pa. 241, 246, 37 Am. Rep. 677.

By provisions of Pen. Code, art. 54, every offense which is punishable by death or by imprisonment in the penitentiary, either absolutely or as an alternative, is a felony. Forgeries, being punishable absolutely by confinement in the penitentiary, are felonies. *Pitner v. State*, 5 S. W. 210, 213, 23 Tex. App. 366.

#### Grand larceny.

The word "felony" is a technical word, and is to be understood in its recognized legal sense, unless the Legislature, in some statute in which the word is found, has, by an interpretation clause or otherwise, given the sense in which it is to be understood in the statute. When this is done, the word is to be understood in the prescribed sense, whether this be an enlargement or contraction of its usually recognized legal sense, and the word will be so applied in the sense given to it by the statute, unless to do so would be repugnant to reason; and hence under Crimes Act (74 Ohio Laws, p. 241, c. 1) tit. 1, § 2, providing that offenses punishable by imprisonment in the penitentiary are felonies, grand larceny, which is punishable by imprisonment in the penitentiary, is a felony. *Griffin v. State*, 34 Ohio St. 299, 300.

Under Const. art. 18, § 4, providing that the term "felony," wherever it may occur in the Constitution or in the laws of the state, shall be construed to mean any criminal offense punishable by death or imprisonment in the penitentiary, and no other, grand larceny, being punishable by imprisonment in the penitentiary for a term of not less than one and not more than ten years, is a felony. *In re Lowrie*, 9 Pac. 489, 490, 8 Colo. 499, 54 Am. Rep. 558.

Crimes which subject the offender to imprisonment in the territorial prison or to death shall be classed as felonies. Rev. St. p. 288, § 4. Under such definition grand larceny is a felony. *Territory v. Duncan*, 6 Pac. 353, 5 Mont. 478.

#### Housebreaking.

Under Code, § 3879, providing that offenses punishable with death or confinement in the penitentiary are felonies, an offense which may be punished in such manner is a felony, though it may not necessarily be so

punished. Thus housebreaking with intent to commit larceny, which is punishable by confinement in the penitentiary, is a felony, though in a particular case the jury, in the exercise of its discretion, fixes a lighter punishment. *Benton v. Commonwealth*, 16 S. E. 725, 89 Va. 570.

#### Inflicting great bodily harm.

To willfully and maliciously inflict great bodily harm upon another is a felony under the Missouri statute of crimes and punishments. *State v. Nueslein*, 25 Mo. 111, 126.

#### Jail breaking.

By Cr. Proc. § 4, a felony is an offense punishable by death or confinement at hard labor in the penitentiary; so that, under a statute providing that the breaking of a jail before conviction may be punished by confinement and hard labor in the penitentiary, such offense is a felony, and it is not necessary that it must be so punishable. *In re Stevens*, 34 Pac. 459, 460, 52 Kan. 56.

#### Larceny by slave.

Under the Criminal Code, defining a felony to be an offense of which the punishment is death or confinement in the penitentiary, and declaring that all other offenses are misdemeanors, and the statute declaring that, if a slave shall commit a larceny, he shall be punishable with stripes not exceeding a specified number, a larceny committed by a slave is a misdemeanor only. *Munford v. Taylor*, 59 Ky. (2 Metc.) 599, 604.

#### Mayhem

See "Mayhem."

#### Petit larceny.

Originally the term "felony" imported all those offenses of which the feudal consequence was the forfeiture of all the offender's lands and goods, to which in later times capital or other punishment was sometimes added. In American law the word has no clearly defined meaning, except as it is given a meaning by some statutes. In Massachusetts there is a statute that any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered. There is a similar statute in New York and in some of the other states. While the word "felony" does not with precision comprehend any class or description of crimes in Connecticut law, it may be safely asserted that petit larceny is not a felony in this state; so that where an information was for a conspiracy to commit a theft, and the theft proved to be petit larceny, and both the conspiracy and the petit larceny proved to be misdemeanors, there was no merger of offenses. *State v. Setter*, 18 Atl. 782, 57 Conn. 461, 14 Am. St. Rep. 121.



Petit larceny, which is not punishable with death or by imprisonment in the state prison, is not a felony under 2 Rev. St. p. 701, § 90, providing that the term "felony" shall be construed to mean an offense for which the offender shall be liable by law to be punished by death or by imprisonment in the state prison; and therefore one convicted of such offense is not incompetent to testify under the twenty-third section of the same act, declaring that no person convicted of felony shall be competent to testify, etc. *Shay v. People*, 22 N. Y. 317, 318; *People v. Shay* (N. Y.) 10 Abb. Prac. 413, 415.

Petit larceny, punishable by imprisonment in the state's prison, is a felony, under Rev. St. 1894, § 1642 (Rev. St. 1881, § 1573). *Skelton v. State*, 49 N. E. 901, 902, 149 Ind. 641; *Short v. State*, 63 Ind. 376; *Stevens v. Anderson*, 44 N. E. 460, 461, 145 Ind. 304.

#### Poisoning swine.

Poisoning swine was not a felony at common law. *Town of Baltimore v. Town of Chester*, 53 Vt. 315, 319, 38 Am. Rep. 677.

#### Rape.

Murder is a felony at common law, but it may be doubted if rape is: it having been made so by statute. *United States v. Copperamith* (U. S.) 4 Fed. 198, 201.

Pen. Code, §§ 325, 326, provides imprisonment in the territorial prison as punishment for rape. Section 292 provides that every person guilty of assault with intent to commit any felony, with certain immaterial exceptions, may be punished by imprisonment in the territorial prison, or in the county jail, or by fine. Code Cr. Proc. § 4, defines "felony" as a crime which may be punished by death or by imprisonment in the territorial prison. Held, that an indictment charging an assault on a female with an intent to ravish and carnally know her, contrary to the form of the statute, is sufficient to charge a felony, without the use therein of the word "feloniously." *Territory v. Godfrey*, 50 N. W. 481, 6 Dak. 46.

The statute provides that the word "felony" shall be construed to mean any offense for which the offender, on conviction, shall be liable by law to be punished with death or by imprisonment in the penitentiary, and no other. The twenty-eighth section of the second article of the act concerning crimes and punishments declares the punishment for rape, or attempt to commit rape, by a negro or mulatto, to be castration. Such an offense, therefore, is not a felony within the meaning of the statute. *Nathan v. State*, 8 Mo. 631, 632.

#### Robbery.

A felony is a crime which is punishable with death or by imprisonment in the state

prison. Robbery is a felony. *People v. Cole*, 11 Pac. 481, 484, 70 Cal. 59.

Robbery is made a felony by statute, and the act of robbing is felonious, and all robbery is feloniously done. *State v. Spray*, 74 S. W. 846, 847, 174 Mo. 569.

#### Seduction.

Under Rev. St. § 1259, making seduction punishable either by confinement in the penitentiary or by fine and imprisonment in the county jail, and section 1676, defining a felony as any offense liable to be punished by confinement in the penitentiary or death, such offense is a felony. *State v. Reeves*, 10 S. W. 841, 843, 97 Mo. 668, 10 Am. St. Rep. 349.

Under Pen. Code, art. 54, defining a felony as any offense punishable by death or imprisonment in the penitentiary, either absolutely or as an alternative, and section 814, providing that seduction may be punished by imprisonment in the penitentiary or by fine, such offense is a felony. *Ward v. White*, 23 S. W. 981, 982, 86 Tex. 170.

#### Serious personal injury.

An act of violence committed on the person of another, which the law declares to be felonious, will always include a serious personal injury; but an act of violence so committed, although it amounts to a serious personal injury, does not necessarily come within the class of crimes known as "felonies." So that an instruction that, if the defendant hit the fatal blow in defense of his person, to prevent a serious personal injury, the killing was justifiable, was properly refused. *Battle v. State*, 29 S. E. 491, 492, 103 Ga. 53.

#### Smuggling.

The offense of receiving smuggled goods is not to be classed as a felony, especially as the act of smuggling itself is defined to be a misdemeanor. *Reagan v. United States*, 15 Sup. Ct. 610, 157 U. S. 301, 39 L. Ed. 709.

#### Subornation of perjury.

An attorney who procures false evidence, knowing it to be false, with an intention to deceive the court, is not only guilty of contempt of court, but of subornation of perjury, a felony as well. *Beattie v. People*, 33 Ill. App. 651, 661.

## FEMALE.

In an indictment charging a person with seducing an unmarried female, the term "female" is synonymous with and means "woman," though, comprehensively considered, the term "female" is generic, and includes a variety of species, while the word "woman" has a more limited signification, being of the human race. *State v. Hemm*,

48 N. W. 971, 972, 82 Iowa, 609. See, also, *Myers v. State*, 4 South. 291, 84 Ala. 11; *Jackson v. State*, 84 South. 611, 137 Ala. 80; *Gibson v. State*, 17 Tex. App. 574-577.

In Acts 1865-66, p. 82, c. 14, providing for the punishment of any person who shall carnally know a female of the age of 12 years or more against her will, "female" is not a word of technical character, and may be substituted by the use of synonymous words, or words which plainly indicate a female, such as "her" or "she," and proper names applied to females only. *Taylor v. Commonwealth*, 20 Grat. 825, 827.

#### FEMALE HEIRS.

"Female heirs," as used in Acts 1756, c. 17, entitled "An act to vest" certain entailed lands in the female heirs of a certain person, should be construed to mean the two daughters of such person. *Beall v. Harwood*, 2 Har. & J. 167, 171, 3 Am. Dec. 532.

#### FEME.

A woman. In the phrase "baron et feme" (q. v.), the word has the sense of "wife." Black, Law Dict. It was used in the feudal legal nomenclature and in the earlier text-books as properly expressing the feudal theory that the wife was subject to the husband. *Cummings v. Everett*, 19 Atl. 456, 82 Me. 280.

#### FEME COVERT.

"Feme covert" is a term derived from the French, and means, in our law, a married woman. *Hoker v. Boggs*, 63 Ill. 161, 162.

#### FEME SOLE.

The term "feme sole" is used in the law to designate an unmarried woman. *Kirkley v. Lacey* (Del.) 30 Atl. 994-995, 7 Houst. 213.

"When a married woman is acting or contracting with reference to her separate estate, it is well settled that she is to be regarded as a 'feme sole.'" *Chew v. Henrietta Mining & Smelting Co. (U. S.)* 2 Fed. 5, 8.

#### FENCE.

See "Division Fence"; "Good and Lawful Fence"; "Good and Sufficient Fence"; "Lawful Fence"; "Ordinary Fences"; "Partition Fence"; "Possession Fence"; "Sufficient Fence—Sufficiently Fenced"; "Suitable Fence"; "Water Fence."

See "Securely Fenced."

"A fence is defined to be a protection; an inclosing structure, of wood, iron, or other material, intended to prevent intrusion from without, and straying from within. 'To fence' means to inclose with a fence or other protection." *Mackie v. Central R. of Iowa*, 6 N. W. 723, 724, 54 Iowa, 540.

The common and usually accepted meaning of the word "fence" is an inclosing structure, of wood, iron, or other material; and such must have been in the mind of the Legislature in enacting Rev. St. 1895, art. 2502, providing that the owner or part owner of any fences adjoined to any fences owned by another person shall have the right to withdraw his fence after notice. *Brown v. Johnson* (Tex.) 73 S. W. 49, 50.

A fence is a visible or tangible obstruction, which may be a hedge, ditch, wall, or frame of wood, or any line of obstacles interposed between two portions of land so as to part off and shut in the land, and set it off as private property, and such is its meaning in defining inclosed lands. *Kimball v. Carter*, 27 S. E. 823, 825, 95 Va. 77, 38 L. R. A. 570.

A statute requiring towns to maintain a fence or railing on certain roads implied a barrier of sufficient strength to prevent travelers, under ordinary circumstances, from going off the bridge or embankment. *Munson v. Town of Derby*, 37 Conn. 298, 310, 9 Am. Rep. 332.

The term "fence," as used in Acts 1887, c. 348, providing that any fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the occupants of adjoining property, shall be deemed a private nuisance, does not mean a division fence. *Brostrom v. Lauppe*, 60 N. E. 785, 786, 179 Mass. 315.

#### As boundary.

Where a deed bounded certain land on the south by a line commencing at the highway on the west, on the north fence of a lane, and there was no fence on the north line of the lane for several rods from the highway, but a fence about four rods further north, and an uninclosed space between it and the lane, the words "north fence" might be considered as meaning the north line of the lane. *Scofield v. Lockwood*, 35 Conn. 425.

#### As part of realty.

A fence is generally considered to be part of the realty. *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626, 642, 25 S. E. 638, 34 L. R. A. 286, 58 Am. St. Rep. 325.

Fencing materials on a farm, which are temporarily detached from the fences, are a part thereof, and pass by a conveyance of the farm. *Goodrich v. Jones* (N. Y.) 2 Hill, 142, 143.

"A fence is a part of the realty. A division fence may belong entirely to one owner, and he may have a right to take it away. If he does own it, he owns it as a part of his land. If the owner of the adjoining tract claims title to it, he claims it as a part of his land; and, though there may be no dispute between them in respect to their respective titles to the soil itself, yet a dispute as to the title to the line fence raises a question as to the title to the real estate." *Murray v. Van Derlyn*, 24 Wis. 67.

#### **As building or structure.**

See "Building"; "Structure."

#### **Cattle guards.**

The term "fence," in a statute in reference to the duty of a railroad company to fence its tracks, includes cattle guards at places where it is the duty of the railroad to construct such guards. *Welty v. Indianapolis & V. R. Co.*, 4 N. E. 410, 411, 105 Ind. 55; *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523-526; *Pittsburgh, C. & St. L. R. Co. v. Ehrhart*, 36 Ind. 118, 119; *Toledo, St. L. & K. C. R. Co. v. Franklin*, 53 Ill. App. 632, 636.

"Fence," within the meaning of the statute requiring railroads to fence their rights of way, etc., includes cattle pits. *Louisville, N. A. & C. Ry. Co. v. Porter*, 97 Ind. 267, 270.

#### **Ditch.**

Where an occupant of land is bound to maintain a fence between his own and an adjoining inclosure, he can use a ditch, if proper, for a partition fence, cutting one-half thereof on the land of such other owner. *Newell v. Hill*, 43 Mass. (2 Metc.) 180, 184.

Within a statute directing how adjoining owners shall inclose their lands, and providing that four feet shall be allowed for a ditch for the dividing line, a ditch is treated as a common fence. *Warner v. Southworth*, 6 Conn. 471, 474.

An inclosure act provided that the allotments in lieu of tithes should be inclosed and fenced on all such parts and sides as should not be directed to be fenced by any other proprietor or as should not adjoin to any inclosed lands, or be bounded by any river "or other sufficient fence," in the judgment of the commissioners. Held, that a ditch which had been immemorially the only boundary between the common and adjoining townships was a fence, within the meaning of the act. *Ellis v. Arnison*, 1 Barn. & C. 70.

#### **Gate or bars.**

The term "fence," when used in reference to the duty of the railroad company to

fence its track, includes a gate which the company is required to maintain at a farm crossing. *Wabash R. Co. v. Kime*, 42 Ill. App. 272, 274; *Payne v. Kansas City, St. J. & C. B. Ry. Co.*, 33 N. W. 633, 634, 72 Iowa, 214; *Mackie v. Central R. Co.*, 6 N. W. 723, 724, 54 Iowa, 540; *Fremont, E. & M. V. R. Co. v. Pounder*, 54 N. W. 509, 510, 511, 36 Neb. 247; *Poler v. New York Cent. R. Co.*, 16 N. Y. 476, 480; *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308, 309. And it is the duty of the railroad to keep such gates closed, though a third person may open the gate without the company being liable, unless it has notice of the fact that the gate is open, or may know such fact by the use of ordinary care and diligence. *West v. Missouri Pac. Ry. Co.*, 26 Mo. App. 344, 348.

The term "fence," in a statute requiring a railroad company to fence its right of way, includes bars which are to be maintained at the crossings. *Illinois Cent. R. Co. v. Arnold*, 47 Ill. 173, 174; *Jacksonville, T. & K. W. Ry. Co. v. Harris*, 14 South. 726, 730, 33 Fla. 217, 39 Am. St. Rep. 127. And it is the duty of the railroad to see that the bars are kept closed, but, if taken down by a stranger, it seems that the company has a reasonable time for ascertaining the fact and restoring the bars. *Jacksonville, T. & K. W. Ry. Co. v. Harris*, 14 South. 726, 730, 33 Fla. 217, 39 Am. St. Rep. 127.

#### **Posts.**

Defendant was prosecuted for pulling down or injuring a fence, and the facts showed that the alleged fence consisted merely of posts set in the ground, on which no wire had been strung, which posts defendant pulled up. In discussing the question as to whether or not such posts constituted a fence, the court said: "There is no legal definition of 'fence' per se. Hence we must resort to its meaning in common parlance. Webster defines a 'fence' to be 'to inclose with a hedge, wall, or anything that prevents the escape or entering of cattle; to secure by an inclosure.' We take it, then, that anything that incloses land, whereby any character or kind of stock would be impeded or prevented from entering said inclosure, would be designated and called a 'fence.' Posts merely set around a piece of land, as in this case, would not and could not be termed a fence." *Burch v. State (Tex.)* 67 S. W. 500.

In Code, § 1062, providing for the punishment of any person who unlawfully and willfully burns, destroys, pulls down, injures, or removes any fence, wall, or other inclosure surrounding any yard, garden, cultivated field, or pasture, the term "fence" cannot be construed to include a line of posts on which slats were nailed, which were intended not to inclose or surround a field, but to prevent travelers from turning out of the

road and trespassing thereon. *State v. Roberts*, 7 S. E. 714, 715, 101 N. O. 744.

#### Shed.

A fence, in the ordinary meaning of the term, is a structure erected upon or near the dividing line between adjoining owners for the purpose of separating the occupancy of their lands; but in a statute forbidding the erection of a fence more than five feet high for the purpose of annoying an adjoining owner the term "fence" will not include a carriage shed built on the owner's own premises. *Lovell v. Noyes*, 46 Atl. 25, 69 N. H. 263.

#### Wall.

"A fence is nothing more than a line or obstacle, and may be composed of any material which would present a sufficient obstruction, and hence a brick wall will constitute a fence." *Allen v. Tobias*, 77 Ill. 169, 171.

A large quantity of stones on a part of a highway, though a wall within the limits of the highway, is not within Rev. St. c. 24, § 61, which provides for the removal of a fence from the highway. *Commonwealth v. King*, 54 Mass. (13 Metc.) 115, 117.

#### FENCE LAW.

What is known as the "Fence Law" was a law enacted by nearly all the states in early days, by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals, which were permitted to run at large, was prescribed. *Buford v. Houtz*, 10 Sup. Ct. 305, 308, 133 U. S. 320, 33 L. Ed. 618.

#### FENCE POLE.

Where a complaint alleged that defendant struck plaintiff with a heavy club, and the answer alleged that it was done with a piece of a fence pole, the court properly asserted judicial knowledge of the fact that a fence pole was a heavy club, and instructed that the striking was admitted substantially as charged. *Baker v. Hope*, 49 Cal. 598, 599.

#### FENCED IN COMMON.

Where two or more farms are inclosed by uniting the outside line fences, they are said to be fenced in common. *Markin v. Priddy*, 20 Pac. 474, 40 Kan. 684.

#### FENCED LAND.

A contract to convey a tract of land, to be so surveyed as to include the dwelling house of the party who was to receive the

conveyance, and also fields and fenced lands in front of and about such house, cannot be construed to include a corral within the survey that was to be made. *Hearst v. Pujol*, 44 Cal. 230, 234.

"Fenced land," as used in Code, § 1288, requiring railroad companies to erect cattle guards where its railroad enters or leaves any improved or fenced land, is not limited to fenced land outside the railroad right of way, but includes the right of way when it is fenced, and hence the company must maintain cattle guards where its track leaves such fenced right of way. *Robinson v. Chicago, R. I. & P. Ry. Co.*, 25 N. W. 249, 250, 67 Iowa, 292.

#### FENCED OFF.

"Fenced off," as used in Act March 8, 1870, providing that the machinery in and about coal mines and breakers shall be properly fenced off, means properly protected, and does not mean a fence in its literal sense. *Honor v. Albrighton*, 93 Pa. 475, 478.

#### FENDER.

Within the meaning of a city ordinance requiring that all passenger cars operated by trolley or electric power in the streets of the city should have proper and suitable fenders on the front of such cars, a fender is well defined and readily understood as a guard and protection against danger; and it is left to the railway, using reasonable discretion, and without trick or evasion, to supply a proper and reasonable device to satisfy the plain meaning of the ordinance. *Cape May, D. B. & S. P. R. Co. v. City of Cape May*, 36 Atl. 696, 699, 59 N. J. Law, 396, 36 L. R. A. 653.

#### FEOFFMENT.

"Feoffment" is derived from the word 'feoffare' or 'infeudare,' meaning to give one a feud, and is properly a donatio feudi. It may be defined as the gift of any corporeal hereditament to another. But by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called 'livery of seisin,' without which the feoffee has a mere estate at will." *Thatcher v. Omans*, 20 Mass. (3 Pick.) 521, 532.

"Feoffment" was the name given to the method of passing a fee-simple title to real estate at common law by the act of the vendor and purchaser in going on the lands, and the vendor there declaring in the presence of neighboring tenants the sale, pointing out the boundaries, and delivering possession to the purchaser. "This for ages was the only mode of passing a fee simple, and, though it

serves equally well to pass other estates of freehold, yet it was held properly to signify a conveyance in fee. Though a writing, a deed, or charter was not essentially necessary, yet in time it became usual." *Thompson v. Bennet* (N. H.) *Smith*, 827, 328; *French v. French*, 3 N. H. 234, 260.

A feoffment is defined by Blackstone to be a deed, under the seal of the grantor, whereby he grants or gives lands to the grantee. The words "enfeoff" or "grant" are sufficient words in a deed to create a feoffment. *Perry v. Price*, 1 Mo. 553, 554.

A conveyance by feoffment is attended with livery of seisin. It therefore operated on the possession, and effected a transmutation thereof; and, as "possession" and "freehold" were synonymous terms, no person being considered to have the possession of lands but he who had himself, or held for another, at least an estate of freehold in them, a conveyance which transferred the possession must necessarily be considered as transferring an estate of freehold, or, to speak more accurately, the whole fee. A feoffment, therefore, conveying the whole fee, and not merely the right or estate which a party had a right to convey, was called a "tortious conveyance." *Orndoff v. Turman* (Va.) 2 Leigh, 200, 233, 21 Am. Dec. 608 (citing *Harg. Co. Litt.* 271b, note 1, § 1).

## FERÆ NATURÆ.

"*Feræ naturæ*" means of a wild nature or disposition—animals which are by nature wild, rather than naturally tame. Animals *feræ naturæ* are the property of those who have reclaimed or tamed them, so long as they are within the immediate power of the owner; but the property right is defeasible by the animals resuming their ancient wildness and going at large, as, if deer escape from a park, or fish from a pond, and they are found at large in their proper element, they are again *feræ naturæ*, and the first person seizing them acquires the qualified property right in them to which they are subject. *Fleet v. Hegeman* (N. Y.) 14 Wend. 42, 43.

Animals *feræ naturæ* are only such as require to be reclaimed and made tame by art, industry, or education, and confined, in order to be within the immediate power of the owner. Animals such as oysters, though not strictly regarded as domestic, have no inclination or power to escape if set at liberty, and hence are not animals *feræ naturæ*, but may be the subject of private ownership. *State v. Taylor*, 27 N. J. Law (3 Dutch.) 117, 119, 72 Am. Dec. 347.

### Bees.

Bees are of a wild nature. While they remain in a tree their wild nature remains

unchanged, and they are not completely or for any valuable purpose reduced to the possession of the owner of the tree. They are not the property of such person, so as to become the subject of larceny. *Wallis v. Mease* (Pa.) 3 Bin. 546, 549.

"Animals," as defined in Black, Dict., are "any animate beings endowed with power of voluntary motion; all living creatures not human." Bees are considered by Blackstone as *feræ naturæ*, and marking a bee tree does not reclaim the bees, nor vest an exclusive right of property in the finder. *Gillet v. Mason* (N. Y.) 7 Johns. 16, 17.

### Coon.

A coon comes under the denomination of animals *feræ naturæ*, and is not the subject of larceny. *Warren v. State* (Iowa) 1 G. Greene, 106, 111.

## FERMENTED.

Act March 31, 1851, declaring that all fermented drinks and wines of every kind should be considered intoxicating, should be construed to include beer, which is a fermented liquor, and therefore, by force of the statute, an intoxicating liquor or drink. *State v. Lemp*, 16 Mo. 389, 391.

### FERMENTED BEER.

The term includes spruce beer, spring beer, ginger beer, molasses beer, etc. *State v. Biddle*, 54 N. H. 379, 383.

### FERMENTED CIDER.

Under statutes forbidding the sale of fermented cider, the state of fermentation or its intoxicating qualities is immaterial on a prosecution for its sale. *People v. Adams*, 55 N. W. 461, 95 Mich. 541.

### FERMENTED LIQUOR.

"Fermented liquor," as used in Act June 6, 1872 (17 Stat. 245), imposing certain duties on brewers, the terms "malt liquor" and "fermented liquor" are used synonymously. *United States v. Dooley*, 25 Fed. Cas. 890, 891.

"Fermented liquors," as used in Pub. Acts 1881, p. 355, No. 259, § 13, regulating the sale by druggists of spirituous, malt, brewed, fermented, and vinous liquors, includes fermented or hard cider. *People v. Foster*, 31 N. W. 596, 597, 64 Mich. 715.

The word "beer," as used in an indictment alleging the sale of one pint of beer, means beer in the common acceptation, to wit, a fermented liquor. *State v. Watts*, 74 S. W. 377, 101 Mo. App. 658.

**As malt liquor.**

The term "fermented liquor," in a city charter authorizing the city council to restrain any person from vending or dealing in spirituous, fermented, or vinous liquors, unless duly licensed by the city council, was used as including malt liquors, for malt liquor, according to the common understanding, is a fermented liquor. *State v. Gill*, 95 N. W. 449, 450, 89 Minn. 502.

**Spirituous liquors distinguished.**

Fermented liquors are not, in common parlance, spirituous liquors. The latter term is properly used to designate distilled liquors, as distinguished from fermented liquors. It implies that the beverage is composed, in part or wholly, of alcohol extracted by distillation. It does not apply to a liquid whose alcoholic properties are latent, and exist substantially in the same form as in the original material from which the liquor was made. The fact that ale contains from 4 to 10 per cent. of alcohol, which can be separated from it by distillation, does not bring ale within the class of liquors called spirituous. If that were the test, fermented milk would be spirituous, for alcohol can be obtained from it by distillation. *State v. Adams*, 51 N. H. 568, 569.

A statute authorizing the granting of licenses to persons to be innholders, with liberty to sell ale, wine, beer, and other fermented liquors, cannot be construed to authorize such innholders to sell brandy, rum, or other spirituous liquors. *Commonwealth v. Jorden*, 35 Mass. (18 Pick.) 228.

**FERRIAGE.**

"Ferriage," as used in a statute providing that certain wharves, docks, and landings should not be used by ferries for any other purpose than ferriage, means the transportation of whatever travels or is driven or led over the highways of the country, as, for example, animals, teams with their wagons and loads, carriages, horsemen and pedestrians, with their baggage and parcels, and does not include the transportation of goods, wares, and merchandise by themselves, or, in other words, the carrying trade of modern commerce. It is the transportation of persons and things for hire. Ferriage, literally speaking, is the price or fare fixed by law for the transportation of the traveling public, with such goods and chattels as they may have with them, across a river, bay, or lake; and by its use the Legislature restricted the use of the wharves by the ferry companies to the accommodation of the wants of the traveling public, in the ordinary sense of those terms. *People v. San Francisco & A. R. Co.*, 35 Cal. 606, 615.

**FERRY.**

See "Private Ferry"; "Public Ferry". "Railroad Ferry."

A ferry is nothing but a continuation of a road (*United States v. The William Pope*, 28 Fed. Cas. 629, 630), and, as far as regards the authority of the state in general governments, does not differ from a toll-bridge. And until it is made to appear that Congress has the power to regulate the traveling on the ordinary roads of the state and to license tollbridges, it would seem that it could not regulate and license the ordinary ferries on those roads. *United States v. The James Morrison*, 4 N. Y. Leg. Obs. 333, 338.

A ferry is the right of carrying passengers across streams or bodies of water or arms of the sea from one point to another for a compensation paid by way of a toll. *City of New York v. Starin*, 8 N. Y. St. Rep. 655, 659.

Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire. *Akin v. Western R. Corp.* (N. Y.) 30 Barb. 306, 310; *Alexandria, Warsaw & Keokuk Ferry Co. v. Wisch*, 73 Mo. 655, 57, 39 Am. Rep. 535; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210, 224; *Einstman v. Black*, 14 Ill. App. 381, 383, 384.

A ferry, in a general sense, is a highway over narrow waters, and is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers, with their teams and vehicles, and such other property as they may carry or have with them. *City of New York v. Starin*, 12 N. E. 631, 632, 106 N. Y. 1.

A ferry, says Dane (volume 2, p. 683), forms a part of a public passage or highway wherever rivers or waters are to be passed in boats. *Montgomery v. Multnomah Ry. Co.*, 3 Pac. 435, 437, 11 Or. 344; *Hackett v. Wilson*, 6 Pac. 652, 653, 12 Or. 25.

In the case of *City of New York v. Starin*, 106 N. Y. 1, 11, 12 N. E. 631, Judge Earl says: "In a general sense, it [a ferry] is a highway over narrow seas; and, further, a ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or travelers, with their teams and vehicles, and such property as they may have within them." *People v. Mago*, 10 N. Y. Cr. R. 453, 454, 23 N. Y. Supp. 938, 69 Hun, 559.

The essential element in a ferry is the transportation over intervening water—a crossing from shore to shore at points conveniently opposite, and forming connection with thoroughfares at each terminus. A fer-

ry is defined by Mr. Webster, in words borrowed from legal authorities, to be "a liberty to have a boat for passage upon a river for the carriage of horses and men for a reasonable toll," adding, "It is usually to cross a large river." It has now a wider application, and has been sometimes used to designate transportation over a wide expanse of water; the essential idea of passing from one shore to an opposite shore being retained. Where persons convey no one for toll, and charge only for freight carried up and down a river between a railroad and numerous landings above, they in no proper sense maintain a ferry, nor is their business of the same nature, and therefore they do not interfere with the operation of a ferry belonging to another. *Broadnax v. Baker*, 94 N. O. 675, 681, 55 Am. Rep. 633.

As a link in the chain of transportation by dry land, a ferry forms a part of a public highway, or a connecting link between places in which the public has rights; and, as such, it is a thing of public interest, in which the public have the right of way or use on paying certain specified tolls, regulated and prescribed by public authorities. *Hackett v. Wilson*, 6 Pac. 652, 653, 12 Or. 25.

A ferry is a franchise granted by the state and regulated by statute. It may be defined as a right to transport persons and property across a water course and land within the jurisdiction granting the franchise, and to receive tolls or pay therefor. *Einstman v. Black*, 14 Ill. App. 381, 383, 384.

Property taken for tollbridges and ferries is for a public use. They are public highways. *Southern Illinois & M. Bridge Co. v. Stone*, 78 S. W. 453, 457, 174 Mo. 1, 63 L. R. A. 301 (citing *Arnold v. Covington & C. Bridge Co.*, 62 Ky. [1 Duv.] 372; *State v. Maine*, 27 Conn. 641, 71 Am. Dec. 89).

A ferry is a quasi public use. *Los Angeles Terminal Land Co. v. Muir*, 68 Pac. 308, 312, 136 Cal. 36.

#### As bridge.

A ferry for the transportation of passengers and goods from one side of the stream to the other cannot be regarded as a bridge. *Parrot v. Lawrence*, 18 Fed. Cas. 1234, 1235.

A ferry is a passage over water by boat. There cannot be a ferry without some kind of boat or vessel in which men or things are carried. The word "ferry" therefore does not include a permanent bridge over a river. *Schuykill Bridge Co. v. Fralley* (Pa.) 13 Serg. & R. 422, 424.

Legally considered, a ferry is nothing more than the continuation of a road; and, as far as regards the authority of a state, it does not differ from a tollbridge. *Gilman v. City of Philadelphia*, 70 U. S. (3 Wall.)

713, 726, 18 L. Ed. 96. With regard to the authority of the state, "a bridge" and "a ferry" are equivalent terms. Express power to establish a ferry necessarily implies power to establish a tollbridge. *Oloff v. City of Shreveport*, 27 South. 688, 696, 52 La. Ann. 1203.

#### Car ferry.

A ferry ordinarily is a substitute for the ordinary bridge. It is a means of transportation of all persons and ordinary vehicles, and is for the accommodation of the public generally. As the term is used in the New York charter of 1730, granting to the mayor and aldermen of the city of New York, and their successors, etc., the full and whole power of establishing, etc., a ferry around Manhattan Island, it means ferries such as were understood at that time—that is, ferries similar to those above described—and would not include a car ferry, which is used exclusively for the transportation of cars. *New York v. New England Transfer Co.*, 18 Fed. Cas. 137, 141.

#### Line of steamboats.

The term "ferry" does not apply to a line of steamboats from Albany to New York, and therefore an exclusive grant to operate such steamboats is not a grant of a ferry. "If the exclusive grant be really a right of ferry, then plaintiffs may occupy with their boats every ferry in the state, and thus destroy the rights of all others. But there is no pretense for denominating their grant of ferry. To speak of a ferry from New York to Albany is as great an abuse of terms as to talk of a ferry from New Orleans to St. Louis or Pittsburgh, and even from New York to Liverpool. Those ferries over which the state exercises its appropriate authority are not connected with the coasting trade. They are not, in a constitutional sense, commercial regulations. But if they were, they belong to that exclusively internal commerce over which Congress has no control." *North River Steamboat Co. v. Livingston* (N. Y.) 3 Cow. 713, 748.

#### Steam yacht.

In Pen. Code, § 416, making it a misdemeanor to maintain a ferry without authority of law, a ferry cannot be construed to include a small steam yacht run on Sundays and holidays from a village on a river to private picnic grounds on an island in the river, carrying for hire to the picnic grounds and back again, all persons who offer themselves as passengers; the route of the boat having no connection with a highway at either terminus, and the boat being incapable of transporting the property of the persons, beyond what they carried on their persons or in their picnic baskets. *People v. Mago*, 23 N. Y. Supp. 938, 69 Hun. 559.

**As wharf and establishment.**

"Ferry," as used in Acts 1799, § 1, providing that chosen freeholders shall fix the rate of fare to be taken at a ferry within their respective counties, should be construed in its popular sense, to designate the wharf and establishment set up at the terminus within the state. *State v. Freeholders of Hudson County*, 23 N. J. Law (3 Zab.) 206, 212.

A ferry franchise without the use of a wharf as a place of departure and landing would be useless and of no value. *Starin v. City of New York*, 1 N. Y. St. Rep. 544, 546.

**Railroad distinguished.**

"A ferry is not a railroad, nor is a railroad a ferry. Both franchises—that is, the right to construct a railroad and to erect a ferry—may be granted to one corporation, where the grant conflicts with no other rights; but, if the right to establish a ferry is conferred on a railroad company, it does not cease to be a ferry and become part and parcel of the railroad itself, nor can any language which the Legislature can use in conferring the right make it such. The two things are in their nature distinct, and cannot be merged. If a ferry may constitute part of a railroad, then a Legislature which has made one exclusive grant of a ferry, and thus parted with the right to establish any other, may nevertheless authorize the construction of a railroad across the river, and under this authority a ferry might be run from side to side of the river without infringing on the ferry previously granted." *Aikin v. Western R. Corp.*, 20 N. Y. 370, 376.

**Transportation of goods included.**

"A ferry, in its ordinary sense, is but a substitute for a bridge where a bridge is impracticable, and its end and use are the same. Like a tollbridge it is a franchise created for the use and convenience of the traveling public, as a link in the highway system of the country, and by no means includes the transportation of goods, wares, and merchandise by themselves, or, in other words, the carrying trade of modern commerce." *People v. San Francisco & A. R. Co.*, 35 Cal. 606, 615.

**FERRY BRIDGE.**

A ferry bridge is generally a floating structure hinged or chained to a wharf. *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 630, 7 Sup. Ct. 336, 337, 30 L. Ed. 501, 502.

**FERRY FRANCHISE.**

Ferries are by common law deemed to be franchises, and in England cannot be set up without the King's license, and in this country without a grant of the Legislature,

as representing the sovereign power; and they do not belong to the riparian proprietors of the soil. A ferry franchise is property and an incorporeal hereditament. *City of New York v. Starin*, 8 N. Y. St. Rep. 655, 659.

"A ferry is publici juris. It is a franchise that no one can erect without a license from the crown." *Evans v. Hughes County*, 54 N. W. 603, 604, 3 S. D. 580 (citing *Blessett v. Hart*, Willes, 508); *Hackett v. Wilson*, 6 Pac. 652, 12 Or. 25.

A ferry, when considered as a franchise, consists in the right, arising from grant or prescription, to have a boat or boats for carrying men and horses across a river for reasonable fare or toll. *Akin v. Western R. Corp.* (N. Y.) 30 Barb. 305, 310; *Chapelle v. Wells* (La.) 4 Mart. (N. S.) 426, 427; *Alexandria, Warsaw & Keokuk Ferry Co. v. Wisch*, 73 Mo. 655, 657, 39 Am. Rep. 535; *Attorney General v. City of Boston*, 123 Mass. 460, 468; *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 471, 9 L. Ed. 773, 938; *Averett v. Brady*, 20 Ga. 523, 529.

A ferry franchise "is neither more nor less than a right conferred to land at a particular point and secure toll for the transportation of passengers and property from that point across the stream." *Mills v. St. Clair County*, 7 Ill. (2 Gilman) 197, 208; *Mississippi River Bridge Co. v. Lonergan*, 91 Ill. 508, 513.

A ferry license is a privilege of highway, and the right to grant such a franchise belongs to the state. It may be granted or withheld, and the right to prohibit undoubtedly carries with it the right to impose conditions. *State v. Sickmann*, 65 Mo. App. 499, 501.

According to all authorities, the grant of a ferry, in its very nature, implies the taking of toll. *Attorney General v. City of Boston*, 123 Mass. 460, 468.

The franchise consists in the right to exact toll, and this right involves the corresponding obligation of maintaining the ferry, and carrying such persons as apply and pay their fare. *Akin v. Western R. Corp.* (N. Y.) 30 Barb. 305, 310.

In 2 Washb. Real Prop. (3d Ed.) 269, it is said: "Ferries—that is, rights of carrying passengers across streams or bodies of water or arms of the sea, from one point to another, for a compensation paid by way of a toll—are by common law deemed to be franchises, and cannot, in England, be set up without the King's license, and in this country without a grant of the Legislature, as representing the sovereign power, and do not belong to the riparian proprietors of the soil." *City of New York v. Starin*, 12 N. Y. St. Rep. 631, 632, 106 N. Y. 1.



A ferry license granted by the county court, under the statute, to a person other than the riparian owner, is a mere personal trust bestowed on the grantee, upon conditions imposed upon him alone. His liability cannot be removed by substitution, and the franchise expires with his death. *Knott v. Frush*, 2 Or. 237, 238.

#### **As exclusive franchise.**

The essential element involved in a ferry franchise is the exclusive right to transport persons and horses, and vehicles with which they travel, as well as such personal goods as accompany them from one shore to the other, over the intervening water, for the toll. *Broadnax v. Baker*, 94 N. C. 675, 681, 55 Am. Rep. 633.

The grant of a ferry franchise necessarily implies a right to exercise exclusive privileges within prescribed limits, and on certain conditions. *Phillips v. Town of Bloomington* (Iowa) 1 G. Greene, 498, 502 (citing *Mills v. St. Clair County*, 7 Ill. [2 Gilman] 225).

The grant of a ferry is a franchise, but it is not such an exclusive grant as necessarily implies that the government will not either directly or indirectly interfere with it so as to destroy or materially impair its value, either by the creation of a rival ferry or otherwise. *Dyer v. Tuskaloosa Bridge Co.* (Ala.) 2 Port. 296, 304, 27 Am. Dec. 655.

The exercise of such a franchise divests no right or privilege which any citizen therefore enjoyed freely and uninterruptedly to navigate the river. *Mills v. St. Clair County*, 7 Ill. (2 Gilman) 197, 208.

The sole and exclusive right of transporting persons over water courses for toll resides in no individual, but belongs to the sovereign; but the right of transporting persons over water courses may belong to an individual, and he may, by contract, express or implied, receive hire for so doing. It is the exclusive right that makes the franchise. Where the sovereign, as owner of the land, possesses the power to transport persons, his grant will communicate the whole franchise. Where the sovereign is not the owner of the land, his grant communicates only the exclusive right, for a sovereign cannot grant what he has not, any more than an individual, and the sovereign can grant the franchise to none but the owner of the adjacent land. If the owner refuses to exercise the franchise, the grant may issue to another, but compensation must be made to the owner of the fee. *Pipkin v. Wynns*, 13 N. C. 402, 404.

#### **As an incorporeal hereditament.**

A ferry franchise is an incorporeal hereditament, and assumes a dual nature. It not only becomes the private property of the

grantee, but is subject to regulation from the power granting the right, and in so far is *publici iuris*. The governing power can exercise the same control over the grant when in the hands of an assignee as it could while enjoyed by the original grantee. *Evans v. Kroutinger* (Idaho) 72 Pac. 882, 884 (citing *Dufour v. Stacey*, 90 Ky. 288, 14 S. W. 48, 29 Am. St. Rep. 374).

The ferry franchise is property—an incorporeal hereditament—and as sacred as other property. *City of New York v. Starin*, 12 N. E. 631, 632, 106 N. Y. 1.

The ferry right is an incorporeal hereditament. It grows out of the soil, and may be granted the same as a grant or an advowson. *Averett v. Brady*, 20 Ga. 523, 529.

#### **As limited to particular place.**

It does not mean a mere naked line, or right to pass from the exact landing on one side of the river to the exact landing place on the other, excluding the right to shift a few feet or rods, the better to accommodate the same line or course of travel; such variation being nothing more than the travel of a few more feet or rods to enter or leave the ferryboat. The identity of the ferry is still preserved. *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210, 224.

A ferry franchise is a privilege to take tolls for transporting men, horses, cattle, and vehicles, with or without their loading, across a lake or stream, or some other body of water; and, except in the mode of transporting, it differs in no essential from a bridge franchise. Such a franchise does not include the right to enjoin citizens from using their own boats on the stream for a mile above and below, and crossing themselves, their families, employes, guests, or occasionally a friend, at their will, or lending their boats to each other. *Hunter v. Moore*, 44 Ark. 184, 188, 51 Am. Rep. 589.

#### **As monopoly.**

See "Monopoly."

#### **As property.**

See "Property."

#### **Right to land included.**

The term "ferry," according to the common law of England, implies an exclusive right of conveyance, and can only be set up by license of the crown. While it may be a right to convey one way only, there must at least be a right to land on the opposite shore, subject to be controlled by general regulations. The right of ferry attaches to every riparian owner, of which he cannot be deprived for the benefit of others, except for some legal purpose and after due compensation. *State v. Freeholders of Hudson County*, 23 N. J. Law (3 Zab.) 206, 212.

A ferry is, in its extent, a diminution of the public right, incumbering public property by the grant of the franchise of exacting toll for passing over a stream in boats. If the landing on the public river or an arm of the sea is owned by the King, the grant of the ferry includes the right of landing on the shore or in the public highway, as well as the franchise of toll. *Charles River Bridge v. Warren Bridge*, 36 U. S. (11 Pet.) 420, 471, 9 L. Ed. 773, 938.

**As distinct from right in water.**

A ferry is in respect of the landing place, and not of the water. The water may be to one, and the ferry to another. *Averett v. Brady*, 20 Ga. 523, 529 (quoting Toml. Law Dict., "Ferry").

The right to a ferry does not depend on the right to or the property in the waters over which it passes, or in the soil under the water, or on the shore at either end of the ferry. *City of New York v. Starin*, 12 N. E. 631, 632, 106 N. Y. 1.

**FERRYBOAT.**

As highway, see "Highway."

As ship, see "Ship."

As vessel, see "Vessel."

A ferryboat is a vessel traversing across any of the waters of the state between two constant points, regularly employed for the transfer of passengers and freight, authorized by law so to do, and also any boat employed as a part of the system of a railroad for the transfer of passengers and freight, plying at regular and stated periods between two points. *Pol. Code Cal.* 1903, § 3643.

A ferryboat is not a vehicle, within the meaning of an act authorizing the collection of specific taxes on carriages and other vehicles. *Duckwall v. City of New Albany*, 25 Ind. 233, 236.

**FERRYMAN.**

As common carrier, see "Common Carrier."

Within the meaning of the exemption at common law and of the militia act of ferry-men from militia duty, a ferryman is one who has the exclusive right of transmitting passengers over rivers or other water courses for hire at an established rate, so that no other person could employ or keep a boat to his prejudice either at the same place, or within a limited district above and below him. Hence the term "ferryman" does not include a person employing a boat between a city and a certain island, where he has no exclusive privilege, and there was nothing which was confined to a single individual in that kind of intercourse. *State v. Clarke*, 38 C. 2 McCord, 47, 48, 13 Am. Dec. 701.

Ferry-men, in the exercise of their franchise as to property received on their boat, are exercising a calling in many respects analogous to that of common carriers, and in some cases are held to similar responsibilities. The act of swimming cattle across a river is no part of the duties required of a ferryman by law, and he could not be held liable for its nonperformance. *Einstman v. Black*, 14 Ill. App. 381, 383, 384.

**FERRYING.**

Ferrying is the carrying of goods or passengers over or across the water by means of boats propelled by steam power, horse power, the action of the current, or similar agencies. The term implies a boat which moves back and forth across a stream from bank to bank. *Parrot v. Lawrence*, 18 Fed. Cas. 1234, 1235.

**FERTILIZER.**

The term "fertilizer," as used in the chapter relating thereto, includes all substances, chemicals, and compounds commonly known as "commercial fertilizers," and all manures, except animal excrement, cotton seed, and unmixed cotton seed products, whether natural or artificial products. *Code Miss.* 1892, § 2065.

Under an indictment for stealing fertilizer, it is competent to prove the larceny of phosphate fertilizer, or fertilizer of phosphate. And for the purpose of all questions propounded to a state witness, it is immaterial which expression is used. *State v. Ella*, 32 South. 476, 477, 108 La. 553.

**FEUDA ANTICUA.**

"Feuda antiqua" was a term used in feudal law to designate an interest in land, to which the possessor succeeds as heir to his ancestor. *Priest v. Cummings* (N. Y.) 20 Wend. 338, 349.

**FEUDA NOVA.**

The term "feuda nova" was used in feudal law to designate an interest in land which was acquired by the possessor in any other way than by succession as heir to his ancestor. *Priest v. Cummings* (N. Y.) 20 Wend. 338, 349.

**FEW.**

The word "few" is a relative term, and of great elasticity of meaning. *Anderson v. Williams* (Pa.) 44 Wkly. Notes Cas. 418, 420.

A permission to place a few stones on plaintiff's lot does not justify covering the lot with heavy boulders to a height of 14 to

18 feet. *Wheelock v. Noonan*, 15 N. E. 67, 68, 108 N. Y. 179, 2 Am. St. Rep. 405.

A contract between a bookseller and the publisher, the publisher reserving the privilege of selling at retail what "few copies" might be demanded through him without commissions to the bookseller, does not include so large a proportion of the edition as to exceed one-third thereof. *Myers v. Gross*, 59 Ill. 436, 438.

#### Indefiniteness.

A notice of an injury from a defect in a highway described the place of the injury as at a point "a few rods" from S.'s starch factory, in a certain town. Held, that the term "a few rods" was an indefinite expression, which might apply to the whole length of the sidewalk, which was only a few rods in length, and hence the notice did not sufficiently show the place where the accident happened. *Butts v. Town of Stowe*, 53 Vt. 600, 603.

An offer to sell a few gross of a certain article was an offer of an indefinite quantity, and gave the party a right to name the quantity, which, if accepted by the other party, they would be bound to deliver, but the offer alone is too indefinite to create a contract. *Allen v. Kirwan*, 28 Atl. 495, 496, 159 Pa. 612.

"Few," as used in proposed evidence that between 3 and 4 o'clock p. m. on Sundays during the summer of 1899 but few people returned to the city by a certain street railroad, is very uncertain, for, in the connection used, it might mean 50 persons or 500. *Indianapolis St. Ry. Co. v. Robinson*, 61 N. E. 936, 937, 157 Ind. 414.

#### FIANZA.

"Fianza" is a Spanish word of generic meaning, sufficiently broad to designate general obligation, as well as restricted liability under a single instrument. *Martinez v. Runkle*, 30 Atl. 593, 597, 57 N. J. Law (28 Vroom) 111.

#### FICTION.

A fiction is defined to be a false averment on the part of the plaintiff, which the defendant is not allowed to traverse; the object being to give the court jurisdiction. *Snyder v. Newell*, 44 S. E. 354, 357, 132 N. C. 614 (citing Maine, Anc. Law, 25).

#### FICTION OF LAW.

A legal proceeding which is founded on an intentment of law cannot be contradicted by the parties. Thus a deed operates by relation from its delivery, though not acknowledged till long after; a patent or charter operates from its date, though not promulgat-

ed until afterwards; in England, judgments operate by relation to the first day of the term when entered, while in this country they operate by relation to the last day of the term. But a fiction of law is an allegation in legal proceedings that does not accord with the actual facts of the case, which may be contradicted for every purpose except to defeat the beneficial end for which the fiction is invented and allowed. Thus, in transitory actions the allegation that the cause of action arose in the county where the suit is brought cannot be contradicted so as to defeat the jurisdiction of the court over the cause; in trover, the allegation as to the loss and finding of the property, though generally a fiction, cannot be contradicted for the purpose of defeating the action; and in England, where in the ordinary practice judgment is not rendered until the fourth day of the subsequent term, and is then entered as of the preceding term to give it an earlier operation, the defendant is never permitted to avoid such operation by evidence of the true time when judgment was agreed upon, for the delay was to enable him to move in arrest of judgment or for a new trial. There is also a principle that a fiction allowed by a court can in no case be contradicted. The contradiction is of only such fictions as are voluntarily inserted by the party himself in his writ or declaration. Therefore, whether the entry of a judgment after judgment nisi as of the preceding term was by relation or by fiction of law, its operation as of such earlier date cannot be contradicted by the defendant, and a writ of review will be barred within one year from such earlier date. *New Hampshire Strafford Bank v. Cornell*, 2: N. H. 324, 326, 327.

A fiction of the law is deemed to be a legal assumption that a thing is true which is either not true, or which is as probably false as true; the rule on this subject being that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work wrong, contrary to the real truth and substance of the thing.—*Hibberd v. Smith*, 67 Cal. 547, 561, 4 Pac. 473, 482, 8 Pac. 46, 56 Am. Rep. 726 (citing *Johnson v. Smith*, 2 Burr. 962).

#### FICTITIOUS.

"Fictitious," as used in Const. art. 12, § 1, providing that no corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void, does not include an increase of the capital stock of a water company, and sale of the same at the actual market value, for the purpose of enlarging the works and capacity for supplying an increased quantity of water. *Stein v. Howard*, 4 Pac. 662, 663, 65 Cal. 616.

**FICTITIOUS NAME.**

We have nowhere found a legal definition of what constitutes a fictitious or assumed name. We apprehend that every change in one or more of a person's Christian names, either in the spelling, arrangement, or even substituting one Christian name for another, makes the new name fictitious or assumed, but that the fact must depend upon the substitution and circumstances of the change, how long the new name has been used, and possibly the purpose of the change, and that, in general, whether the name is real, fictitious, or assumed is a question of fact. *Pollard v. Fidelity Fire Ins. Co.*, 47 N. W. 1060, 1061, 1 S. D. 570.

The term "fictitious name" does not include a firm name showing only the surnames of the partners. *Carlock v. Cagnacchi*, 26 Pac. 597, 88 Cal. 600; *McLean v. Crow*, 26 Pac. 596, 88 Cal. 644.

A firm name, showing the surnames only of the partners, is not a fictitious name, within the meaning of Civ. Code, § 2466, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residence of its members, since the names were true as far as they went, and the act would probably have expressly required firm names to show the full names of the members thereof if it had been so intended, and the mere filing of the partnership name is sufficient to give information from which the full names of the partners may be easily obtained. *Pendleton v. Cline*, 24 Pac. 659, 660, 85 Cal. 142.

**FICTITIOUS SUIT.**

A fictitious suit is a mere colorable dispute to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real or substantial controversy between those who appear as adverse parties to the suits, of which courts will not take cognizance. *Smith v. Junction Ry. Co.*, 29 Ind. 546, 551.

**FIDE COMMISSARY.**

"Fide commissary" is a term which Judge Story deems a euphonious substitute for "cestui que trust," which is "an awkward, barbarous phrase." *Brown v. Brown*, 31 N. Y. Supp. 650, 652, 83 Hun, 160.

**FIDEI COMMISSUM.**

A fidei commissum is understood to be a disposition causa mortis, by which the heir or legatee is required to give or return a certain thing to another person. *Succession of Meunier*, 26 South. 776, 779, 52 La. Ann. 79,

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48 L. R. A. 77; *Ducloslange v. Ross*, 3 La. Ann. 432, 433; *Gortario v. Cantu*, 7 Tex. 35, 44.

Fidei commissa, in their origin, were pure, simple trusts; the trustee taking for the mere purpose to convey to another. They were subsequently applied to other purposes. The trustee or fiduciary heir had a usufruct or a vested estate in the property, the extent and character of his interest being dependent on the terms of the bequest. *Gortario v. Cantu*, 7 Tex. 35, 44.

**FIDELITY.**

The word "fidelity," in an oath of viewers appointed to lay out a public road—to perform their duties with fidelity, and according to the best of their judgment—cannot be used in lieu of the word "impartially," in view of the statute requiring such viewers to take an oath to perform their appointment impartially and according to the best of their knowledge. In re Road of Jackson Township (Pa.) 2 Lack. Leg. N. 328.

**FIDELITY GUARANTY.**

The term "fidelity guaranty" is a name given to a form of insurance which is included in the broader term of "guaranty insurance." *People v. Rose*, 51 N. E. 246, 174 Ill. 310, 44 L. R. A. 124.

**FIDUCIAL OFFICE.**

The words "public or fiducial office, trust or employment," in Ky. St. § 3752, providing that the recovery on a bond required by law for the discharge or performance of any "public or fiducial office, trust, or employment" shall not be limited by the amount of the penalty named, does not include the relation arising between a county and one contracting with it; and therefore that portion of the statute has no application to a bond executed by a road contractor for the faithful performance of his contract, and the obligors in such a bond are liable only according to its terms, and to the actual extent of the amount specified therein. *Moss v. Rowlett*, 65 S. W. 153, 154, 112 Ky. 121.

**FIDUCIARY.**

A fiduciary may be defined as a person holding property in trust or in confidence; a trustee. *Swance v. Jurgens*, 33 N. E. 955, 957, 144 Ill. 507.

"The term 'fiduciary' involves the idea of trust, confidence. It refers to the integrity—the fidelity—of the party trusted, rather than his credit or ability. It contemplates good faith, rather than legal obliga-

tion, as the basis of the transaction." *Stoll v. King* (N. Y.) 8 How. Prac. 298, 299.

The word "fiduciary" expresses trust reposed—relations which involve the receipt and payment of money belonging to another over to him, not the receipt of money on a transaction where the recipient has bound himself to pay the debt, whether it be received by him or not. *Sutton v. De Camp* (N. Y.) 4 Abb. Prac. 483, 484.

The bankrupt act of 1867 enlarged the meaning of the word "fiduciary" so that it was not confined to technical trusts, as under the act of 1841, but embraced such relations as a factor, commission merchant, etc. *Keeler v. Snodgrass* (Ohio) 8 Wkly. Law Bul. 219, 220.

#### FIDUCIARY CAPACITY OR CHARACTER.

The expression "fiduciary capacity," as used in Code, § 179, which allows the arrest of any person for money received of any factor, agent, broker, or other person "in a fiduciary capacity," tends to show what is meant by "factor, agent, broker," viz., one in whom a trust is reposed, such as is usually reposed in these persons in their ordinary or regular business; that is, a trust that they will sell, and immediately account for the balance. *Turner v. Thompson* (N. Y.) 2 Abb. Prac. 444, 445; *Goodrich v. Dunbar*, 17 Barb. 644, 646. That is, where a trust is reposed, and not a credit given—where confidence is reposed in the integrity of a man, rather than in his pecuniary ability. *Scudder v. Shields* (N. Y.) 17 How. Prac. 420, 421.

#### Agency coupled with interest.

"Fiduciary character," as used in Bankr. Act, § 83, cannot be construed to include one incurring an obligation in a transaction in which the bankrupt and the creditor had a mutual interest; the bankrupt acting in such transactions in part for himself and another as well as for the creditor, he being interested in the transactions, being entitled to his share of the money arising therefrom after certain deductions were made. *Barber v. Sterling*, 68 N. Y. 267, 272.

Where one has a personal interest in money received by him, or its use, and a right to control it independently of any appropriation of it according to the instruction of the owner, or where the credit for repayment appears to have been given to the pecuniary responsibility of the recipient, rather than because of confidence in his personal character, the money has not been received by such person in his fiduciary capacity, rendering him liable to arrest under the statute on failure to repay the same. *McBurney v. Martin*, 29 N. Y. Super. Ct. (6 Rob.) 502.

#### Agent or attorney in fact.

Where one acted in no other or different trust or fiduciary relation than such as may be said always to exist in a case of agency, the agent is not a fiduciary, within the meaning of the bankrupt act. In every case of agency there is an element of trust and confidence, so that a breach of duty may be said to be a breach of trust, but the agent is nevertheless not a fiduciary, within the meaning of the bankrupt act. *Palmer v. Hussey*, 87 N. Y. 303, 305; *In re Benedict*, 75 N. Y. Supp. 165, 167, 37 Misc. Rep. 230.

A debt created by a person acting as an attorney in fact is not created while acting in a fiduciary character. *Woodward v. Towne*, 127 Mass. 41, 42, 34 Am. Rep. 337. It does not extend to a case of an agent who has violated his authority. *Austill & Marshall v. Crawford*, 7 Ala. 335, 340.

Rev. St. 1891, c. 3, § 70, which provides that where a decedent received money in a fiduciary capacity, in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for, in preference to ordinary debts of the decedent, does not apply to money received by the decedent as a mere factor or agent. *Svanoe v. Jurgens*, 33 N. E. 955, 957, 144 Ill. 507.

Where a person was intrusted with acceptances to be discounted at a certain bank, the proceeds to be returned to his principal, whatever such agent received on a misapplication of such drafts by him he received for his principal, and as his agent, in a fiduciary capacity, within the statute authorizing arrest for conversion of money so received. *Wolfe v. Brouwer*, 28 N. Y. Super. Ct. (5 Rob.) 601, 603.

The provision of the statute authorizing an arrest in an action for money received by any agent, factor, broker, or other persons in a fiduciary capacity does not apply to an action on a judgment recovered by a principal against his agent for money received by him in such capacity. The law of the state is that a judgment merges the original cause of action. In such a case no action can be sustained for money received by the defendant as agent. It can only be sustained on the judgment. *Goodrich v. Dunbar* (N. Y.) 17 Barb. 644, 646, 647.

An agent receives the money of his principal in a fiduciary capacity when it appears that he had no authority to disburse it on account of his principal, but was bound to pay it over on request. *Republic of Mexico v. De Arangaz*, 13 N. Y. Super. Ct. (12 Duer) 634, 640.

Code, § 179, subd. 2, should be construed to apply to an agent who received trees in trust to deliver to persons who had ordered

them or contracted to purchase them; he to receive the money in payment for them from those persons as collected, and remit the money by draft; he having no discretionary power—no power to make contracts, nor to deliver any of the property to any other than those persons who had entered into contracts. He received the trees in trust and confidence, and the money, when paid to him, in the same character. A special trust and confidence were reposed in him. *Frost v. M'Carger* (N. Y.) 14 How. Prac. 131, 136.

Money collected by an agent under an agreement to account and pay over the proceeds monthly to his principal is not a debt created in a fiduciary character, within the meaning of the bankrupt act. *Grover & Baker Sewing Mach. Co. v. Clinton* (U. S.) 11 Fed. Cas. 79.

Where one receives the money or property of another as agent or bailee, the title to which is to remain in his principal, and which is to be paid over or delivered to him or to be used in a particular way, or for a specific purpose, for his use, the money or property is held or received in a fiduciary capacity. *Matteson v. Kellogg*, 15 Ill. (5 Peck) 547, 548.

The word "fiduciary capacity," in Code, § 154, contemplates a case of express trust; and an agent collecting debts, and neglecting to pay over the amount collected, cannot be arrested under such section, the agent not acting in a fiduciary capacity. *White v. McAllister* (N. Y.) 1 Code Rep. 106.

The liability of the managing agent of an iron factory, who has made sales in the usual course of business, and has failed to account for the proceeds to the principal owner, is not a debt contracted within a fiduciary capacity, within the meaning of the bankrupt act, where the debtor was interested with the owner in the manufacture and in the sales. *Barber v. Sterling*, 68 N. Y. 267, 272.

#### **Assignee for benefit of creditors.**

Where an assignee for benefit of creditors received money which by the terms of the assignment should have been paid to the creditors, and which he refused and neglected to pay, he was subject to arrest under a statute authorizing the arrest of a person converting money received by him in a fiduciary capacity. *Roberts v. Prosser*, 53 N. Y. 260.

#### **Attorney at law.**

"Fiduciary character," as used in bankruptcy acts, includes not only cases of technical trusts, but also relations of great confidence, where the law imposes a high degree of good faith, as, for example, the relation of attorney and client. *Heffren v. Jayne*, 39 Ind. 463, 465, 13 Am. Rep. 281. See, also,

*Flanagan v. Pearson*, 42 Tex. 1, 5, 19 Am. Rep. 40; *White v. Platt* (N. Y.) 5 Denio, 266, 273. But does not include a debt resulting from the neglect of an attorney at law to pay over to his client money which he has collected for him. *Wolcott v. Hodge*, 81 Mass. (15 Gray) 547, 77 Am. Dec. 381.

As held in *Chapman v. Forsyth*, 43 U. S. (2 How.) 202, the words "other fiduciary capacity," as used in the bankrupt act, mean the same class of trusts as executors, administrators, guardians, and trustees, and the relation of attorney and client is nearly enough in that class to be within the spirit of that decision. For some purposes the relation of attorney and client is classed by courts of equity with those of trustee and beneficiary, guardian and ward. *Flanagan v. Pearson*, 42 Tex. 1, 5, 19 Am. Rep. 40.

#### **Auctioneer.**

"Fiduciary character," as used in Bankr. Act Ga. March 2, 1869, providing that certain classes of claims, originating in fraud, embezzlement, defalcation, or while acting in a fiduciary character, shall not be discharged by the discharge of the bankrupt, would include the liability of an auctioneer who received certain property for sale, and failed to pay over the proceeds to the owner. *Jones v. Russell*, 44 Ga. 460, 462.

#### **Broker.**

The expression "fiduciary capacity," as used in Code, § 179, authorizing an arrest for the nonpayment of money received in a fiduciary capacity, belonging to the plaintiff, embraces the receiving of money by a broker as a deposit for security against loss in the buying and selling of gold coin and railway shares for the plaintiff. *Clark v. Pinckney* (N. Y.) 50 Barb. 226.

#### **Collector of money.**

Code, § 179, authorizing the arrest of a factor, agent, broker, or other person when the action is for "money received in a fiduciary capacity," is to be construed as including money collected by an agent or attorney. *Stoll v. King* (N. Y.) 8 How. Prac. 298, 299.

A debt incurred by a bankrupt while acting as his creditor's agent in the collection of rent is not incurred in a fiduciary capacity, within the bankruptcy act. *Mulock v. Byrnes*, 29 N. E. 244, 129 N. Y. 23.

"Fiduciary capacity," as used in Bankr. Act 1841, does not include a factor who receives a note for collection on account of his principal, and collects and retains the amount of the note. *Commercial Bank of Manchester v. Buckner*, 2 La. Ann. 1023, 1025. Contra, see *Fulton v. Hammond* (U. S.) 11 Fed. 291, 293.

**Commission merchant or factor.**

In *Chapman v. Forsyth*, 43 U. S. (2 How.) 202, 11 L. Ed. 236, it was held that a factor who had sold the property of his principal, and had failed to pay over to him the proceeds, did not owe to him a debt created in a fiduciary capacity. *Slayton v. Wells*, 28 Atl. 632, 633, 66 Vt. 62. See, also, *Owsley v. Cobin*, 15 Nat. Bankr. Reg. 489, 491. Contra, as the words are used in the act of 1867, see *Lemcke v. Booth*, 47 Mo. 385, 387, 4 Am. Rep. 326; *Hardenbrook v. Collson* (N. Y.) 24 Hun, 475, 476. And as used in the Georgia bankruptcy act, see *Meador v. Sharpe*, 54 Ga. 125, 126. The term does not include a debt owed by a factor to his principal for a balance of money left in his hands by the principal, for which the factor gave a promissory note. It does, however, include a debt owed by a factor to his principal for money left with him under a written stipulation that the money be invested for the owner's account; the money being invested by the factor in his own business, he paying his principal interest on the same. *De Sobry v. Tete*, 31 La. Ann. 809, 812, 33 Am. Rep. 232.

The bankrupt act, providing that the bankrupt should not be discharged from a debt created while acting in a fiduciary character, cannot be construed to apply to one who agreed to handle certain property, with invoices rendered every 30 days for the amount sold, less a percentage; he to have the entire shipments of such property and influence; the shipper to bear all expenses on consignment; such agent not being required to keep separate the proceeds of each sale, to be delivered to the owner as his money; the agent having the right of sale on any terms he chose, being only required to report and pay over every 30 days at the rate stipulated by the contract—for the proceeds of sales did not become the property of the shipper, so as to make it wrongful in the agent to mingle them with his own money. *Kaufman v. Alexander*, 53 Tex. 562, 566.

The phrase "money received in a fiduciary capacity," as used in laws which provide that a person is liable to arrest for failure to pay over money received in a fiduciary capacity, includes money received by a commission merchant for goods sold on commission. *Schudder v. Shiells* (N. Y.) 17 How. Prac. 420, 421. It includes a factor who receives money to be invested in goods, with a condition that it shall not be employed for any other purpose. *Noble v. Prescott* (N. Y.) 4 E. D. Smith, 139, 140. It includes money received by a consignee under a contract with the consignor that he is to sell lumber on commission at 8 per cent., which is to include a premium for guaranty of sales, and to account for the net proceeds after deducting charges and commissions. *Ostell v. Crough* (N. Y.) 24 How. Prac. 274.

Factors or commission merchants receiving property from the consignors, and making sales and collections, are not acting in a fiduciary capacity, within the meaning of Code, § 179, subd. 2, authorizing the arrest of a defendant in an action for money received by any person acting in a fiduciary capacity. *Duguid v. Edwards* (N. Y.) 32 How. Prac. 254, 257.

Code Civ. Proc. § 549, as amended by Laws 1888, c. 672, provides that a defendant may be arrested where an action is brought to recover for money received, where it is alleged in the complaint that the money was received "by a factor, agent, broker, or any other person in a fiduciary capacity." Held, that the words "in a fiduciary capacity" qualified all the persons described, and hence a factor would not be liable for arrest for not paying money borrowed, but would be for not paying money due and which he had received in a fiduciary capacity. *Decatur v. Goodrich* (N. Y.) 44 Hun, 3, 4.

Where the owner of goods consigned them for sale to one H., who turned them over to a firm of which he was a member, at the same time disclosing the ownership, and the goods were sold by the firm, the transaction established no relation of personal trust or confidence between the owner and the partners of H., so as to subject them to arrest on their failure to pay over the proceeds of the sale, as having received money in a fiduciary capacity. *Fuentes v. Mayorga* (N. Y.) 7 Daly, 103, 104.

One does not act in a fiduciary capacity who is engaged to sell, and is paid a commission to guaranty the payment of the sums to be paid on such sales as might be made; such arrangement authorizing him to mingle the money paid with his own, thereby becoming a general debtor to the other party. *Sutton v. De Camp* (N. Y.) 4 Abb. Prac. 483, 484.

The words "fiduciary capacity," occurring in a statute providing for the arrest of those who become indebted in a fiduciary capacity, embrace all contracts based on trust and not on credit. A. became indebted to B. under a contract providing that all A. could make, above a certain price, on goods supplied to him by B., should belong to A. absolutely, but that he should pay B. for such goods as he sold at the price mentioned, and return such goods as remained unsold. Held, that the indebtedness was incurred in a fiduciary capacity, within the meaning of the statute. *Dunaher v. Meyer* (N. Y.) 1 Code Rep. 87.

Code, § 291, par. 2, provides that a defendant may be arrested in an action for money received or property embezzled or fraudulently misapplied by any factor, agent, broker, or other person in a fiduciary capacity. A. received goods from B. on credit,

under contract to hold any of the goods that might be left unsold, and the proceeds of such as might be sold, in trust for the payment of his debts to B., and also to deliver to B. the notes he might take for such goods, and apply all the proceeds of such notes, as collected, to the payment of the debt to B., whether the same had matured or not. Held that, in receiving money under this contract, A. was acting in a fiduciary capacity, within the meaning of the statute above quoted. *Travers v. Deaton*, 12 S. E. 373, 374, 107 N. C. 500.

#### **Creditor holding collateral.**

Rev. St. U. S. § 5117, withholding the benefits of the bankruptcy act from all debts created by the bankrupt while acting in any fiduciary capacity, refers only to one who is regarded as guilty of a breach of trust if he neglects or refuses to perform an obligation resting upon him, and does not apply to a creditor holding collaterals for his own security, and failing to deliver it up upon payment of the debt; such act being a breach of contract, and not a breach of trust. *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565.

A discharge in bankruptcy does not operate to discharge a creditor's debt of the bankrupt, though such debt is evidenced by a judgment; the debt being created while the debtor acted in a fiduciary character, within the meaning of Bankr. Act, § 33, providing that no debt created by a debtor while acting in a fiduciary character shall be discharged by the debtor's discharge in bankruptcy. *Simpson v. Simpson*, 80 N. C. 332, 333.

#### **Director of corporation.**

Directors of a corporation are fiduciaries, and subject to the rule that persons standing in such relation will not be suffered to retain a personal profit out of transactions respecting the subject-matter of the trust, but will be compelled to account to their cestui que trust therefor. *Forker v. Brown*, 80 N. Y. Supp. 827, 829, 10 Misc. Rep. 161.

#### **Executor or administrator.**

An agreement by an executor guarantying the payment of a demand against the estate, and admitting possession of sufficient assets therefor, does not constitute a debt created by the executor while acting in a fiduciary character, within the meaning of Bankr. Act 1867, § 33, providing that no debt contracted by the bankrupt while acting in a fiduciary character shall be discharged. *Amoskeag Mfg. Co. v. Barnes*, 49 N. H. 312, 313.

Where an administrator, in the settlement with the distributees of the estate, gave his individual note for the balance due them, such note is not a debt created while acting in a fiduciary capacity, within the meaning

of Rev. St. U. S. § 5117, exempting from discharge in bankruptcy any debt incurred by the bankrupt while acting in any fiduciary capacity. *Elliott v. Higgins*, 83 N. C. 459, 462.

#### **As limited to express or technical trusts.**

The words "fiduciary capacity," as used in the various bankruptcy acts (Acts 1811, 1841, 1867, 1878), excepting from discharge any debt created by the fraud, etc., of the bankrupt while acting in a fiduciary capacity, have reference to cases of actual technical or express trusts, and do not include those which the law implies from the contract of the parties. *Lawrence v. Harrington*, 25 N. E. 406, 407, 122 N. Y. 408; *Whitaker v. Chapman* (N. Y.) 3 Lana. 155, 158; *Byrnes v. Byrnes*, 129 N. Y. 23, 29 N. E. 244; *Desobry v. Tete*, 31 La. Ann. 809, 818, 33 Am. Rep. 232; *Commercial Bank of Manchester v. Buckner*, 2 La. Ann. 1023, 1025; *Upshur v. Briscoe*, 37 La. Ann. 138, 150; *Banning v. Bleakley & Co.*, 27 La. Ann. 257, 258; *Goddin v. Neal*, 99 Ind. 834, 336; *Du Pont v. Beck*, 81 Ind. 271, 273, 274; *Maxwell v. Evans*, 90 Ind. 596, 597, 46 Am. Rep. 234; *Williamson v. Dickens*, 27 N. C. 259, 263; *Noble v. Hammond*, 9 Sup. Ct. 235, 237, 129 U. S. 65, 32 L. Ed. 621; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; *Chapman v. Forsyth*, 48 U. S. (2 How.) 202, 208; *Neal v. Clark*, 95 U. S. 704, 708, 24 L. Ed. 586; *Keime v. Graff* (U. S.) 14 Fed. Cas. 218, 323; *Grover & Baker v. Clinton* (U. S.) 11 Fed. Cas. 81; *Austill v. Crawford*, 7 Ala. 335, 340; *Woolsey v. Cade*, 54 Ala. 378, 384, 25 Am. Rep. 711; *Green v. Chilton*, 57 Miss. 598, 599, 34 Am. Rep. 483; *Gibson v. Gorman*, 44 N. J. Law (15 Vroom) 325; *Scott v. Porter Bros.*, 93 Pa. 38, 40, 39 Am. Rep. 719; *Cronan v. Cotting*, 104 Mass. 245, 248, 6 Am. Rep. 232; *Woodward v. Towne*, 127 Mass. 41, 42, 34 Am. Rep. 337; *Hammond v. Noble*, 57 Vt. 193, 203. *Contra*, *Herman v. Lynch*, 26 Kan. 435, 440, 40 Am. Rep. 320; *Fulton v. Hammond* (U. S.) 11 Fed. 291, 293; *Heffren v. Jayne*, 39 Ind. 463, 465, 13 Am. Rep. 281. And it has been said that, while the collocation of language in which the term "fiduciary" is used in former acts is not precisely the same as in the act of 1898, there is no reason to believe a different construction will be given to the word. *Gee v. Gee*, 87 N. W. 1116, 1117, 84 Minn. 384. See, also, *In re Benedict*, 75 N. Y. Supp. 165, 167, 37 Misc. Rep. 230; *Johnson's Adm'r v. Parmenter*, 52 Atl. 73, 74 Vt. 58.

A sum of money to which a wife was entitled on the sale of certain real estate in partition was decreed to be paid to her husband; he to apply the interest to his own use, and give bonds for the payment of the principal sum at his death, or whenever required by the court. Held, in an action to recover such principal sum, that the liability of the husband fell within the phrase "while



acting in a fiduciary capacity," and hence he was not discharged from liability by discharge in bankruptcy. *Mock v. Howell*, 8 S. E. 167, 169, 101 N. C. 443.

Where plaintiff sold wood to defendant under an agreement that the title should remain in plaintiff until the purchase price was paid, and defendant sold the wood and appropriated the proceeds, his liability therefor was not created by his fraud, embezzlement, or misappropriation while acting in a fiduciary capacity, so that Bankr. Act July 1, 1898, c. 541, § 12, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], prevented a discharge in bankruptcy from releasing him therefrom. *Bryant v. Kinyon*, 86 N. W. 531, 127 Mich. 152, 53 L. R. A. 801, 6 Am. Bankr. Rep. 237.

The phrase "fiduciary capacity" implies a fiduciary relation existing previous to, or independent of, the particular transaction from which the debt arises. *Bracken v. Milner* (U. S.) 5 Am. Bankr. R. 23, 104 Fed. 522. Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], provides that a discharge shall release a bankrupt from all provable debts, except as such as were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity. Held, that no fiduciary capacity existed between buyer and seller of merchandise which would prevent a discharge in bankruptcy releasing the purchaser from a judgment for the price of goods, though the sale had been induced by his fraudulent representations. *Goodman v. Herman*, 72 S. W. 546, 550, 172 Mo. 344, 60 L. R. A. 885.

As used in Const. § 161, providing that the chancery court shall have jurisdiction concurrent with the circuit courts of suits on bonds of fiduciaries and public officers for failure to account, etc., the word "fiduciaries" embraces those, and those only, who are bound for the discharge of express trusts—technical trusts—where bond is required to be given by law; and it does not include those who are engaged in the execution of trusts springing from contract. It is not to be gathered from the whole section that the framers of the Constitution designed to make fiduciaries, in the proper legal signification of that word, of every agent, clerk, employé, or servant who has confidence reposed in him; and surely the mere giving of a bond for faithful performance of service under a private contract of employment cannot make one a technical fiduciary who was not so before the Constitution was adopted. *George D. Barnard & Co. v. Sykes*, 18 South. 450, 451, 72 Miss. 297.

#### Partners and surviving partners.

The implied trust relation existing between partners under which their liabilities to each other must be determined does not

bring their affairs within the definition of the term "fiduciary" as used in the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. *Gee v. Gee*, 87 N. W. 1116, 1117, 84 Minn. 384.

Under Rev. St. 1881, §§ 6046-6053, making the duties and liabilities of surviving partners undertaking to settle the partnership affairs similar to those of executors and administrators, a surviving partner is a person acting in a fiduciary capacity, within the meaning of section 1952, which provides that whoever, being an administrator, executor, guardian, or trustee, or other person acting in a fiduciary capacity, without good cause fails or refuses, where legally required, to account for or pay over any money or other property which may have come into his hands by virtue of said office or trust, shall be deemed guilty of embezzlement. *State v. Matthews*, 28 N. E. 703, 129 Ind. 281.

#### Public officers.

The phrase "fiduciary character," as used in Rev. St. U. S. § 5117, providing that no debt created by fraud, etc., of a bankrupt, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy, but the debt may be proved, and the dividend shall be a payment on such debt, includes a township trustee, for he is a public officer, and his relations to his township are, as his name clearly imports, of a fiduciary nature. *Madison Tp. v. Dunkle*, 16 N. E. 593, 595, 114 Ind. 262.

#### Surety.

"Fiduciary character," as used in Bankr. Law 1867, § 33, cannot be construed to include suretyship. The sureties of a guardian are not acting in, nor is their liability of, a fiduciary character. *Jones v. Knox*, 46 Ala. 53, 60, 7 Am. Rep. 583; *Reitz v. People*, 72 Ill. 435, 436.

#### FIDUCIARY DEBT.

A fiduciary debt is one founded or arising from some confidence or trust as distinguished from a debt founded simply on contracts. Thus an executor is one to whom is conveyed by the last will and testament of the deceased the personal estate of the testator, to be held and administered by him in pursuance of the will for the interest of all parties in interest, and a debt due from him as executor is a fiduciary debt, and he a trustee; using the word "trustee" in its broad sense. *Crisfield v. State*, 55 Md. 192, 194.

"Fiduciary," in the provision of the bankrupt laws excluding fiduciary debts from the operation of a discharge, does not include the liability of a guardian whose surety has paid money due from the guardian to the

ward to reimburse the surety. The indebtedness of the guardian to the ward was fiduciary, but his obligation to repay his surety is only a simple-contract indebtedness for money paid. *Cromer v. Cromer's Adm'r* (Va.) 29 Grat. 280.

### FIDUCIARY RELATION.

See, also, "Confidential Relation."

A fiduciary relationship is one in which, if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the cestui que trust. *Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 68, 26 L. Ed. 693 (citing *Ex parte Dale & Co.*, 11 Ch. D. 772).

The phrases "fiduciary relations" and "confidential relations" "seem to be used by the courts and law writers as convertible terms. It is a peculiar relation which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors or administrators and creditors, legatees, or distributees, appointer and appointee under powers to partners and part owners. In this and the like cases the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties." *Robins v. Hope*, 57 Cal. 493, 497 (quoting *Story*, Eq. Jur. 218).

"Fiduciary or confidential relation," as used in the law relative to undue influence, is a very broad term. It has been said that it exists and relief is granted in all cases in which influence has been acquired and abused, in which confidence had been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist wherever one man trusts in and relies on another. *Thomas v. Whitney*, 57 N. E. 808, 810, 186 Ill. 225; *Studybaker v. Cofield*, 61 S. W. 246, 250, 159 Mo. 596.

A person is said to stand in a fiduciary relation to another when he has rights and duties which he is bound to exercise for the benefit of that other person. Hence he is not allowed to derive any profit or advantage from the relation between them, except with the full knowledge and consent of the other person, and such other person must be in possession of all his powers before he can be bound by that knowledge or consent. The relations of attorney and client, principal and agent, guardian and ward, are instances

of fiduciary relations. *Meyer v. Reimer*, 70 Pac. 869, 870, 65 Kan. 822.

There are certain technical relations that are readily comprehended as fiduciary, such as guardian and ward, attorney and client, priest and communicant, etc., but there are other relations, not falling in either of those specified classes, that are in fact fiduciary; and, conversely, it is not every guardian, attorney, or priest, *quia eo nomine*, who is to be adjudged to hold a fiduciary relation with the party in regard to a particular subject. It is in each case a question of fact. Thus where it appears a niece was not the exclusive nurse of decedent, but merely assisted in taking care of him, though no other relative was present, she did not stand in a fiduciary relation. *Studybaker v. Cofield*, 61 S. W. 246, 250, 159 Mo. 596.

Bouvier defines "fiduciary" as follows: "A contract by which we sell a thing to some one on condition that he will sell it back to us. This term is derived from the civil law, and may be defined: In trust; in confidence; fiduciary contract; an agreement by which a person delivers a thing to another on condition that he will return it to him." It includes all moneys received under one of the express trusts known to the law, such as that of an executor, trustee, etc. Money received under an understanding that it is to be invested in a specified manner; money received by an agent for his principal, which he is bound to pay over. Partners occupy towards each other, as to the partnership business, a fiduciary relation. *Smith v. O'Gilvie*, 27 N. E. 807, 808, 127 N. Y. 143, 148.

### FIEF.

The word "fief" was used in the Norman law to designate real estate. *Dowdell v. Hamm* (Pa.) 2 Watts, 61, 65.

### FIELD.

See "Cultivated Fields or Grounds"; "From the Field"; "In the Field."

The term "the field" is used in the method of gambling by selling pools on horse races to designate the number of horses in the race which are not selected by the persons selecting particular horses as winners. *James v. State*, 63 Md. 242, 248.

"A field is cleared land for cultivation or other purposes, whether inclosed or not." *Commonwealth v. Wilson* (Va.) 9 Leigh, 648, 649.

### City lot.

"Field," as used in an indictment for the removal of a fence surrounding a cultivated

field, means a cultivated tract of land, and includes a lot in a city, if inclosed and cultivated, for it is just as much a field as if it lay in the country. "An acre of land lying in the country, fenced and cultivated, would certainly be called a field. The fact of its lying on one or the other side of the corporate boundary of a town would make no difference." *State v. McMinn*, 81 N. C. 585, 586.

"Field," as used in *Bat. Rev. St. c. 32, § 93*, prohibiting the removal of fences, may be defined as a cultivated tract of land, and, as so used, includes a lot or parcel of land lying in cities and towns, as well as a field lying in the country. *State v. McMinn*, 81 N. C. 585, 587.

#### Corral.

A contract to convey a tract of land, to be so surveyed as to include the dwelling house of the party who was to receive the conveyance, and also "fields and fenced lands" in front of and about such house, cannot be construed to include a corral within the survey that was to be made. *Hearst v. Pujol*, 44 Cal. 230, 234.

#### Garden.

"Field," as used in a complaint charging a person with working on the Lord's Day by hoeing in his field, should be construed to include a garden which was within a field. *Commonwealth v. Josselyn*, 97 Mass. 411, 412.

#### Large fenced pasture.

A field is a wide extent of land, suitable for tillage or pasture, and, as used in *Rev. St. 1895, arts. 4523, 4524*, requiring railroads to place cattle guards at points entering a field, applies to a large fenced pasture as well as a small field. *Southern Kansas Ry. Co. v. Isaacs*, 49 S. W. 690, 20 Tex. Civ. App. 466.

#### FIELD LOTS.

See "Common Field Lots."

#### FIERI FACIAS.

A fieri facias is a judicial writ in the nature of an appeal to the equitable jurisdiction of the court for relief, and issues to bring under its review cases in which the regular process of the law is suspended or rendered incompetent to enforce a subsisting judgment. *Mack v. Nichols*, 5 Vt. 200, 201.

The writ of fieri facias is the process to enforce the collection of a claim that has gone to judgment, which has become final and executory. *American Nat. Bank v. Childs*, 22 South. 384, 385, 49 La. Ann. 1359.

#### FIGHT.

See "Prize Fight."

The word "fight" does not necessarily imply that both parties should give and take blows. It is sufficient that both parties voluntarily put their bodies in a position to give and take blows, and with that intent. To illustrate, suppose two men go out to fight, and one is knocked down on the first passing, and that is the end of it. Both are guilty of an affray; that is, of a fight by mutual consent. *State v. Gladden*, 73 N. C. 150, 155.

A fight by consent is a fight had on a mutual agreement to fight together. *Carpenter v. People*, 72 Pac. 1072, 1074, 31 Colo. 284.

An accident policy exempted the insurer from liability for any injuries resulting from "fighting, wrestling, scuffling, altercation, feud, quarrel, or assault," in the absence of any contrary qualification should be construed to mean fighting, etc., for which the insured is in some degree to blame, and in which he is to some extent, at least, a voluntary participant, and not those which are unavoidable and beyond his control, or which have not been occasioned by any improper conduct on his part; and hence, where insured, employed as a bartender, having ordered a noisy individual from the premises, was grappled by him, and injured while resisting the assault, or while pushing the aggressor from the room, he had not, as a matter of law, deprived himself of all claims against the insurer, and it was error to dismiss his complaint in an action on the policy. *Coles v. New York Casualty Co.*, 83 N. Y. Supp. 1063, 1064, 87 App. Div. 41.

#### FIGURES.

Figures and initials to represent a year, as "A. D. 1830," are a part of the English language, within the meaning of statutes requiring judicial proceedings to be in the English language. *State v. Hodgeden*, 8 Vt. 481, 485.

The Arabic numeral figures are for some purposes a part of the English language, but of themselves they signify mere numbers, and words or signs are therefore necessary to predicate the number signified of any particular subject or thing. *Clark v. Stoughton*, 18 Vt. 50, 52, 44 Am. Dec. 361.

A description in a deed of lots of land by printed figures instead of written words is sufficient. *Middlebury College v. Cheney*, 1 Vt. 336, 350.

An indorsement of the figures "1, 2, 8" upon the back of a bill of exchange by

a person who used the figures by way of a substitute for his name, and intended to bind himself as indorser, was construed to be a valid indorsement, although the indorser could write. *Brown v. Butchers' & Drovers' Bank* (N. Y.) 6 Hill, 443, 41 Am. Dec. 755.

As used in a will reading, "All that part of W.  $\frac{1}{2}$ , N. E. 4, section 24," etc., the figure "4" means "quarter," and will be so considered. *Diamond Plate Glass Co. v. Tennell*, 52 N. E. 168, 169, 22 Ind. App. 182.

The numeral "50," in an indorsement on the back of a note of the words and figures, "received on the within, 50," is so uncertain that it will be rejected by the court in computing an amount due on the note, unless it is explained. It may mean 50 pounds, 50 bushels, or 50 anything else, though most probably intended for 50 dollars or 50 cents; but which, if either, cannot be determined from the language itself. *Gilpatrick v. Foster*, 12 Ill. (2 Peck) 355, 357.

The meaning of the figures "33 $\frac{1}{3}$ " in a contract for the sale of brackets at 33 $\frac{1}{3}$ , may be explained by evidence tending to explain the sense in which the parties were in the habit of using such figures, or to show the construction given by them to similar contracts, but a party cannot testify as to his intention in using them. *Jaqua v. Witham & A. Co.*, 7 N. E. 314, 315, 106 Ind. 545.

The printer's mark, "Oct. 3, 4t.," cannot be interpreted by the court without evidence as to its meaning. *Johnson v. Robertson*, 31 Md. 476, 481.

The word "younger" or "2d" is affixed to a man's name to distinguish one individual from another whose names are the same, and the purpose may be supplied by any other description, or wholly dispensed with when no other person of the same name resides in the same town or vicinity. *Isaacs v. Wiley*, 12 Vt. 674, 678.

A judgment of a justice entered in figures will be reversed. *Robinson v. Applegate*, 11 N. J. Law (6 Halst.) 178, 179; *Smith v. Miller*, 8 N. J. Law (3 Halst.) 175.

The entry of a verdict in "figures" is an irregularity in form which is cured by entry of judgment thereon in words at length. *Stout v. Hopping*, 6 N. J. Law (1 Halst.) 125, 128.

#### As indicating dollars.

The meaning of the figures "2.50" in a contract for the sale of brackets at "2.50," may be explained by evidence tending to explain the sense in which the parties were in the habit of using such figures, or to show the construction given by them to similar contracts, but a party cannot testify as to his intention in using them. *Jaqua v.*

*Witham & A. Co.*, 7 N. E. 314, 315, 106 Ind. 545.

The mere omission of the dollar mark will be supplied when the sense requires, and where it will save the contract from being ambiguous and uncertain. Thus, in a contract stating, "All properties to be mortgaged as spoken of, I. e., 25,000, 10,000 and 12,000," the figures will be read as if the dollar mark was prefixed. *Dieter v. Fallon*, 12 N. Y. Supp. 33, 35, 58 Hun, 605.

Dollars are the legal money units of this country, made so by the laws of the United States. 1 Bouv. Law Dict. Where figures are used, intending to represent money, they must be understood to represent dollars, unless a different intention is clearly expressed. *Hunt v. Smith*, 9 Kan. 137, 152.

The laws of the United States establishing one national currency having declared that it shall consist of the dollar, as a unit, and the decimal parts of the dollar, as dimes and cents, it would seem that a contract to pay "25.00" should be in the currency of the country, and to mean a promise to pay \$25. *State v. Schwartz*, 54 Wis. 432, 434, 25 N. W. 417, 418.

The figures "350.00," in a verdict in an action for damages, assigning the same as 350.00, is sufficiently definite on which to render a judgment for \$350. The use of the decimal indicates that the figures were used to express dollars. *Gulf, C. & S. F. Ry. Co. v. Fink*, 23 S. W. 330, 331, 4 Tex. Civ. App. 269.

#### As indicating year.

An indictment charging the commission of a crime, without further designating the time, than that it occurred on the 1st day of September, 1897, is not an insufficient allegation of time because it failed to prefix the words "Anno Domini," or their abbreviation, "A. D.," so as to designate the year; but, under the rule that an indictment is sufficient if it enables a person of common understanding to know at what date it was intended to state that the crime was committed, the indictment is sufficiently certain. *Commonwealth v. Traylor*, 45 S. W. 450, 20 Ky. Law Rep. 97.

The fact that a date in a complaint, "This 14th day of Jan., A. D. 1864," is written in Arabic figures, with the initials "A. D." for the year, does not render it defective, although it would be better for criminal pleaders to adhere to the ancient practice in framing complaints exclusively in the English language. *Commonwealth v. Hagarman*, 92 Mass. (10 Allen) 401, 402.

The owner of a copyright inscribed on the face of the copy of the photograph copyright, "Copyright 93," and it was contended

that there was not a sufficient notice as to the time of the issuance of the copyright. The court said "Concededly, if it had read '1893,' instead of '93,' the notice would have been sufficient. Could any person possibly be misled by the omission of the figures denoting the century? Photographs are a production of the present century, and no one would imagine that the figures '93' meant '1793' or any earlier time. Manifestly they could not denote 1993 or a future time, because they are the statement of an antecedent date; the time when the copyright was recorded in the office of the librarian of Congress." *Bolles v. Outing Co.* (U. S.) 77 Fed. 966, 969, 23 C. C. A. 594.

An entry on an execution dated "Dec. 22, '88," means "Dec. 22, 1888." *Perdue v. Fraley*, 19 S. E. 40, 41, 92 Ga. 780.

A complaint alleged the commission of a tort in the year "88." Held, that "88" meant "1888." *Medsker v. Pogue*, 27 N. E. 432, 433, 1 Ind. App. 197.

"94," as used in a notice of copyright inscribed on a photograph, as representing the year, is a substantial compliance with Rev. St. U. S. § 4962 [U. S. Comp. St. 1901, p. 3411], requiring the giving of the year in a notice of copyright on a photograph. *Snow v. Mast* (U. S.) 65 Fed. 995.

## FILAMENT.

Filament is defined as "a substance like a thread; a long, thread-like process." *Luckemeyer v. Magone* (U. S.) 38 Fed. 30, 34.

## FILE.

See "Among the Files"; "Duly Filed"; "Homestead Filing"; "On File."

"The word 'file' is derived from the Latin word 'flum,' which signifies a thread; and its present application is drawn from the ancient practice of placing papers upon a thread or wire for the more safe keeping and ready turning to the same. The origin of the term indicates very clearly that the filing of a paper can only be effected by the bringing it to the notice of the officer who anciently put it on the string or wire. Accordingly, we find that filing a paper is now understood to consist in placing it in the proper official custody on the part of the party charged with the duty of filing the paper, and the making of the appropriate indorsement by the officer." *Phillips v. Beene's Adm'r*, 38 Ala. 248, 251.

The filing by a party, in our practice, consists simply in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record, of which his office becomes thence-

forward the only repository. Though the ancient mode of filing papers has gone into disuse, the phraseology of the ancient practice is retained in the common expressions "to file," "to put on file," "to take off the files," etc., from "flum," the thread, string, or wire used in ancient practice for connecting the papers together. *Holman v. Chevallier's Adm'r*, 14 Tex. 337, 338.

File means at common law a thread, string, wire, upon which writs and other exhibits of courts and offices were fastened or filed for the more safe keeping and ready turning the same. *Dawson v. Cross*, 88 Mo. App. 292, 299; *Wilkinson v. Elliott*, 43 Kan. 590, 596, 23 Pac. 614, 616, 19 Am. St. Rep. 158.

A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file. *Beebe v. Morrell*, 42 N. W. 1119, 1122, 76 Mich. 114, 15 Am. St. Rep. 288 (citing *Bouv. Law Dict.*); *State v. Hockaday*, 12 S. W. 246, 98 Mo. 590; *Sternberger v. McSween*, 14 S. C. 35, 43; *Archer v. Long*, 24 S. E. 83, 84, 46 S. C. 292; *Townsend v. Sparks*, 27 S. E. 801, 803, 50 S. C. 380; *Fanning v. Fly*, 42 Tenn. (2 Cold.) 486, 488; *Stone v. Crow*, 51 N. W. 335, 2 S. D. 525; *State v. Lewis*, 22 South. 327, 328, 49 La. Ann. 1207; *Powers v. State*, 87 Ind. 144; *State v. Chicago & E. I. R. Co.*, 43 N. E. 226, 228, 145 Ind. 229; *State v. Heth*, 57 Pac. 108, 60 Kan. 560; *City of Dallas v. Beeman*, 45 S. W. 626, 628, 18 Tex. Civ. App. 335; *Gorham v. Sumers*, 25 Minn. 81, 84; *Smith v. Headley*, 33 Minn. 384, 23 N. W. 550; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791; *Hasty v. Bonness*, 86 N. W. 896, 898, 84 Minn. 120; *Noyes v. Guy*, 48 S. W. 1056, 1059, 2 Ind. T. 205; *McClellan v. Tootle*, 58 S. W. 555, 556, 3 Ind. T. 325; *Dawson v. Cross*, 88 Mo. App. 292, 299; *Wilkinson v. Elliott*, 43 Kan. 590, 596, 23 Pac. 614, 616, 19 Am. St. Rep. 158; *Peterson v. Taylor*, 15 Ga. 483, 484, 60 Am. Dec. 705; *Floyd v. Chess-Carley Co.*, 76 Ga. 752; *Reed v. Inhabitants of Acton*, 120 Mass. 130. But a filing may depend on the terms of the statute authorizing it, and will not become operative until its requisites are first complied with, and, if a fee is made a necessary prerequisite thereto, no filing is accomplished or effected without the payment of the fee. *Hilts v. Hilts*, 72 Pac. 697, 698, 43 Or. 162. It is not necessary that the party handing the paper to the officer should see that he makes the proper indorsement or entry. *Manhattan Co. v. Laimbeer* (N. Y.) 21 Abb. N. C. 27, 29; *Id.*, 15 N. E. 712, 713, 108 N. Y. 578. The usual file marks are but evidence of its having been filed. The duty of filing usually includes that of putting on such marks. *Franklin County Com'rs v. State*, 3 South. 471, 474, 24 Fla. 55, 12 Am. St. Rep. 183. The indorsement required to be made

on the paper by the officer receiving it is intended merely as a memorandum, and as evidence of the time of filing, but is not essential thereto. The act of filing consists in presenting the paper to the proper officer and its being received by him and deposited among the records of his office. It is accordingly held that a paper may be filed without being marked or indorsed by the clerk. In re Conant's Estate, 73 Pac. 1018, 1020, 43 Or. 530.

"File" is defined as receiving a paper into custody and giving it a place among other papers. The terms "entered" and "filed" in the statutes are never used as synonymous terms. State v. Lamm, 9 S. D. 418, 420, 69 N. W. 592.

Originally the filing of a paper consisted in having the proper officer put it upon the string—flum—on which the other papers in the proceeding were placed. In modern days it is usually held that a paper is filed on the part of the party who is required to file it when he has presented it at the proper office and left it with the person in charge thereof, and paid the fees for filing, if any are required. City St. Imp. Co. v. Babcock (Cal.) 68 Pac. 594, 595; Hastay v. Bonness, 86 N. W. 896, 898, 84 Minn. 120.

The term "file" is used to denote a paper placed with the officer, and assigned by the law to his official custody. A file is a record of the court, and it is the duty of the officer, when a paper is thus placed in his custody, to indorse upon it the date of its reception, and retain it in his office; and this is what is meant by filing the paper. Jones v. Wells, 3 Willson, Civ. Cas. Ct. App. § 94.

A document may be said to be filed with an officer within the meaning of the statute which requires certain instruments and documents to be filed, etc., when it is placed in his official custody, and is deposited in the place where his official records and papers are usually kept. Reed v. Inhabitants of Acton, 120 Mass. 130, 131; Engleman v. State, 2 Ind. (2 Cart.) 91, 92, 52 Am. Dec. 494; Snider v. Methvin, 60 Tex. 487, 493; State v. Hockaday, 12 S. W. 246, 98 Mo. 590.

To file is to leave a paper with an officer for action or preservation. In modern practice the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle. Meridian Nat. Bank v. Hoyt & Bros. Co., 21 South. 12, 13, 74 Miss. 221, 36 L. R. A. 796, 60 Am. St. Rep. 504 (citing Anderson's Law Dict.).

The term "file" is used to designate papers "put together and tied in bundles." Fanning v. Fly, 42 Tenn. (2 Cold.) 486, 488.

To file means to place on file, or more generally to deposit papers in official custody or

receive them officially for orderly, systematic safekeeping. State v. Lewis, 22 South. 327, 328, 49 La. Ann. 1207 (citing Abbott).

Webster defines the transitive verb "to file" as follows: First. To string, to fasten, as papers on a line or wire for preservation. Declarations and affidavits must be filed. An original writ may be filed after judgment. Second. To arrange or insert in a bundle, as papers, indorsing the title on each paper. This is now the more common mode of filing papers in private and public offices. Third. To present for exhibit officially or for trial; as, to file a bill in chancery. Bishop v. Cook (N. Y.) 13 Barb. 326, 328.

"Filing a paper is considered an exhibition of it to the court, and the clerk's office in which it is filed represents the court for that purpose. It is effected by delivering the paper, indorsed with the title of the cause and the attorney's name, to the clerk of the court in which the action is pending, who marks it 'Filed,' adding the date, and deposits it under the proper head among the papers or files in his office." Lamson v. Falls, 6 Ind. 309, 310.

The word "file" may be used in several senses. If a mortgage of personal property is delivered to the town clerk for record, it would not be an improper use of language to say that it was filed with him, and that it remained on his files as long as it was in his possession. But this would not be a filing such as is intended by the statute of 1862, which authorizes a wife doing business on her separate account to file a certificate thereof with the town clerk, and that during the time such certificate so remained on file her separate property employed in such business should not be liable for the debts of her husband. Chapin v. Kingsbury, 138 Mass. 194, 196.

Where an affidavit was delivered, with other papers in the case, to the clerk of the circuit court on appeal from a justice, as required by Rev. St. 4562, it was a filing for all the purposes of appeal, though it had no file mark on it when it was actually delivered to the justice whose duty it was to file it. State v. Hocker, 68 Mo. App. 415, 419.

#### Adoption implied.

The use of the term "filed" in the minutes of a city council, showing that a certain record was received and filed, only shows that the council received the report by its proper officer to be by him kept on file; but in so doing the council did not approve the report, or make it its own—or, in other words, it did not adopt it. It was held in such case that it was erroneous to allow parol evidence that the words "received and filed" mean "received and adopted." City of Dallas v.

Beeman, 45 S. W. 623, 628, 18 Tex. Civ. App. 333.

#### **As allowance of bill of exceptions.**

It is true that technically the act of filing a bill of exceptions follows the presentation for allowance, and the allowance is signing, and is the act of leaving the same with the clerk to be filed in his office, but as used in an order of court granting time to file a bill of exceptions, the word "file" was not used in that technical sense, and an examination of the authorities will disclose that in practice the permission to file a bill within a stated time is construed and acted upon as a grant of time for its preparation and presentation for allowance. And hence the court had authority to grant another order extending the time for presenting the bill for allowance. *Jones v. Bowman*, 65 Pac. 1002, 1003, 10 Wyo. 47.

#### **Delivery by mail.**

Laws 1870, c. 321, providing that the canal appraisers shall have jurisdiction to hear and determine any claim for damages resulting from the negligence of any state officer in charge of the canals, or from any accident connected therewith, and that such claims shall be "filed in the office" of the appraisers, means that, in order to constitute and establish the jurisdictional fact of the filing, they be delivered in the office itself, and not sent through the mail. *Gates v. State*, 28 N. E. 373, 128 N. Y. 221.

A motion to dismiss, received by a deputy clerk of the court through the post office, and marked "Filed in open court," was properly filed. *McClellan v. Tootle*, 58 S. W. 555, 556, 3 Ind. T. 325.

#### **As delivery to officer personally.**

Under Gen. St. c. 33, § 76, requiring an affidavit to be filed with the magistrate upon issuing a writ of attachment and capias, where an affidavit was slipped under the magistrate's office door, without his having previously signed the writ in blank, and when neither he nor any other person was in the office at the time, the affidavit could not be considered as filed by the magistrate, or put under his control, within the meaning of the statute. To satisfy the statute, the affidavit should be brought to the knowledge of the magistrate before the writ issues, and should be left with him, subject to the inspection of all concerned. *Whitcomb's Adm'r v. Cook*, 39 Vt. 585, 588.

#### **As deposit.**

The word "file," as used in Code, § 3583, making it the duty of a justice of the peace when an appeal is taken to file in the office of the clerk all the original papers relating to the suit, etc., should be construed to mean

deposit. *Harrison v. Clifton*, 38 N. W. 406, 408, 75 Iowa, 736.

The word "filed," as used in Pen. Code, § 94, providing that any person who willfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, map, book, paper, document, or other thing filed or deposited in a public office or with any public officer by authority of law is punishable, etc., is not synonymous with or equivalent to "deposited." "A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file. The derivation and meaning of the word as defined in the dictionaries carry with it the idea of permanent preservation—becoming part of the permanent records of the public office where it is filed. Deposit does not carry with it the same meaning. It may or may not mean a permanent disposition of the thing placed or deposited. It may mean a temporary disposition or placing of the thing. And, the words of the statute being coupled together by the conjunction 'or,' the same meaning is not to be given to each, but that meaning or signification which distinguishes it from the other." *People v. Peck*, 22 N. Y. Supp. 576, 579, 67 Hun, 560.

A clerk of the Circuit Court of the United States is not entitled to any fee for filing the various papers surrendered to his custody by the Circuit Court Commissioners in compliance with Act May 28, 1896, c. 252 (29 Stat. 184), abolishing their office, and requiring them to deposit the official documents in their possession with the clerk of the Circuit Court by which they were appointed, since to construe the word "deposit" as synonymous with "filing" is a strange construction of the term, and no good purpose would have been subserved by the formal filing of the dockets. *United States v. Van Duzee*, 22 Sup. Ct. 648, 650, 185 U. S. 278, 46 L. Ed. 909.

#### **Effect of direction not to record.**

"Filed for record," as used in Gantt's Dig. § 4288, making a mortgage a lien on the property from the time the same is filed for record in the recorder's office, and not before, does not include a filing in the recorder's office with directions not to record it. *Bowen v. Fassett*, 37 Ark. 507, 509, 510.

#### **Docketing distinguished.**

Under Sup. Ct. Rule 52, 27 S. E. xi, providing that a petition for a rehearing shall be filed within 20 days after the commencement of the next succeeding term, and that the justice to whom it is submitted shall order its docketing in cases wherein it is granted; and rule 53, requiring the petition to be sent to the clerk, but providing that it shall not be docketed until the justice orders it—it was contended that the words "filing" and "docketing" were synonymous. It was

held that the petition is filed when it is first received by the clerk, and docketed when the clerk enters it upon the records at the order of the justice who grants the rehearing. *Bird v. Gilliam*, 31 S. E. 267, 268, 123 N. C. 63.

#### **As filed at proper office.**

A paper is said to be on file when delivered to the proper officer to be kept on file. The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same. Thus a petition in bankruptcy is to be deemed filed, within the meaning of the bankruptcy law, when it is delivered personally to the clerk of the bankruptcy court, and received by him for the purpose of being kept on file, though not at his office nor during office hours. In *re Von Bocke* (U. S.) 94 Fed. 352.

A paper whose filing carries notice or affects private rights is filed only when deposited with the proper officer at his office for this special purpose. By this is not meant that there are not many acts which a ministerial officer may do outside the four walls of his office, nor, when a proper filing or offer of filing has been made by the party, that he shall suffer for the remissness of the clerk in the performance of his duty, but the proper offer means more than the mere presentation to the officer. It means a presentation to him at the proper place, and within the proper time. In *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501, it is said filing a paper consists in leaving it at the proper office, and leaving it to deposit with the papers in such office. Hence, where an attorney, after office hours, hunts up a deputy clerk, and gives him papers for filing, but the clerk does not place them on file until the next day, the delivery to the clerk did not constitute a filing. *Hoyt v. Stark*, 66 Pac. 223, 224, 134 Cal. 178, 86 Am. St. Rep. 246.

An instrument is filed of record when it is deposited in the proper office with the person in charge thereof, with directions to record it. Indorsing the fact and time of its deposit is not an essential part of the filing. Delivering an instrument to the proper officer in a place other than the place where it is required to be filed is not sufficient, even though the officer indorses it as properly filed. Thus, where a mortgagee delivered a mortgage to the recorder at his office for record, though after the hour fixed as office hours, and such mortgage was marked "Filed" the following morning, it was filed prior to a homestead declaration which was delivered to the officer on his way the following morning, though both were marked "Filed" at the same time. *Edwards v. Grand*, 53 Pac. 796, 797, 121 Cal. 254.

In order to be filed with the clerk, a paper must be delivered to him in his office,

where the law requires him to keep his books and files and to receive and file papers. This is the rule whether the words of the statute in respect to filing be "in the office of the clerk" or "with the clerk," so that leaving a certificate of nomination with the deputy clerk at his house does not satisfy Election Law, § 58, requiring it to be filed with the clerk. In *re Norton*, 53 N. Y. Supp. 924, 25 Misc. Rep. 48.

#### **As indexing or entry of filing.**

Within Gen. St. c. 39, §§ 1-3, relating to filing of mortgages, filing means only the delivery of the instrument to, and the receipt and keeping of the same by, the proper officer in his office, and does not include indexing. *Gorham v. Summers*, 25 Minn. 81, 84.

The word "file" is derived from the Latin "flum," which signifies a thread, and its present application is drawn from the ancient practice of placing papers on a thread or wire for a more safe keeping and ready turning to the same. The origin of the term indicates very clearly that the filing of a paper can only be effected by bringing it to the notice of the officer who anciently put it upon the string or wire. Accordingly we find that filing a paper is now understood to consist in placing it in the proper official custody. On the part of the party charged with the duty of filing a paper, the officer's duty in filing it, or, strictly speaking, placing it on file, may consist of only one or be composed of several acts, and under our statute it consists of several, viz., the reception, the attaching, and the making of the proper entry; so that where statute provides for the payment of a fee for filing a paper that amount constitutes the full fee for performing every act necessary to do in order to file the same, including the entry or index. *Demers v. Cloud County Com'rs*, 47 Pac. 567, 569, 5 Kan. App. 271.

The word "filed," as used in Wag. St. p. 1043, § 31, requiring a bill of exceptions to be filed "during the term of court at which it is taken, and not afterwards," "has a broader signification than the mere indorsement to that effect, and comprehends more especially, in its proper interpretation, the entry made by the clerk on the record, by which the fact that the bill has been allowed is announced and appropriately evidenced." *Fulkerson v. Houts*, 55 Mo. 301, 302; *Johnson v. Hodges*, 65 Mo. 589, 590; *Pope v. Thomson*, 66 Mo. 661; *Williams v. Williams*, 26 Mo. App. 408, 409.

#### **Indorsement required.**

The word "filing" is generally used to describe the indorsement on a paper of the day when it is left in a public office, not for record, but for safe-keeping. *Lent v. New*



York & M. Ry. Co., 29 N. E. 988, 989, 180 N. Y. 504.

"The filing of a paper does not consist of the marking put on it by the clerk, but in placing it, as a permanent record, in the office or case where it belongs." *Bettison v. Budd*, 21 Ark. 578, 580.

The indorsement of the fact of filing does not constitute a part of the filing, but is only evidence that such filing has been made, and is not absolutely essential to the validity of the filing if the paper has in fact been delivered to the proper officer at the proper place for the purpose of being filed. *Starkweather v. Bell*, 80 N. W. 183, 185, 12 S. D. 146; *Haines' Lessee v. Lindsey*, 4 Ohio, 88, 90, 19 Am. Dec. 586; *Nimmons v. Westfall*, 33 Ohio St. 223; *King v. Penn*, 1 N. E. 84, 86, 43 Ohio, 57; *Bishop v. Cook* (N. Y.) 13 Barb. 326, 329; *In re Dewar's Estate*, 25 Pac. 1026, 1028, 10 Mont. 426; *State v. Heth*, 57 Pac. 108, 60 Kan. 560; *Jacksonville St. R. Co. v. Walton*, 28 South. 59, 66, 42 Fla. 54; *Oats v. State*, 55 N. E. 226, 153 Ind. 436 (citing *Powers v. State*, 87 Ind. 144); *Gorham v. Summers*, 25 Minn. 81.

A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file, whether he indorses the filing on them or not. *Wescott v. Eccles*, 2 Pac. 528, 3 Utah, 258; *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501, 505.

The omission of the officer, after an instrument has been presented to him for filing, to make any indorsement thereof, will not prejudice the rights of the party. It is, however, the duty of the officer to whom the paper is delivered to indorse thereon the date of its reception, and to authenticate the same by his official signature. Thereupon the filing is completed. *City St. Imp. Co. v. Babcock*, 68 Pac. 584, 585; *Holman v. Chevaillier's Adm'r*, 14 Tex. 337, 338.

To file a paper on the part of a party is to place it in the official custody of the clerk; to file on the part of the clerk is to indorse upon the paper the date of its reception, and retain it in his office subject to inspection by whomsoever it may concern. *Burrill. Webster*. Filing consists in placing the paper in the hands of the clerk, to be preserved and kept by him in his official custody as an archive or record of which his office becomes thenceforward the only proper repository; and it is his duty, when the paper is thus placed in his custody or filed with him, to indorse upon it the date of its reception, and retain it in his office, subject to instruction by whomsoever it may concern; and that is what is meant by filing the paper. But when the law requires a party to file it, it simply means that he shall place it in the official custody of the clerk. *Meridian Nat. Bank v. Hoyt & Bros. Co.*, 21 South. 12, 18,

74 Miss. 221, 36 L. R. A. 796, 60 Am. St. Rep. 504.

Delivering a paper to the clerk of a court in which an action is pending, who marks it "Filed," adding the date, and the deposit of it under the proper head among the papers or files in his office, is filing it. It is also defined as follows: To file a paper on the part of a party is to place it in the official custody of the clerk. To file on the part of the clerk is to indorse upon the paper the date of its reception, and retain it in his office, subject to inspection by whomsoever it may concern. At English chancery practice a bill has not been filed until it receives the proper indorsement of the clerk. In *Pinders v. Yager*, 29 Iowa, 468, it is held that filing of a transcript imports more than the mere reception of it into the custody of the clerk; that is, indorsement of it is necessary. Thus a writ of error which has not been indorsed as filed by the clerk is not filed in the trial court so as to give the appellate court jurisdiction. *Mutual Life Ins. Co. v. Phinney* (U. S.) 76 Fed. 617, 620, 22 C. C. A. 425.

To file in law means to leave a paper with an officer for action or preservation; to indorse the paper as received in custody, and giving it its place with other papers. *Anderson's Law Dict.* In modern usage, filing a paper consists in placing it in the custody of the proper official by the party charged with this duty, and the making of the proper indorsement by the officer. *Stone v. Crow*, 2 S. D. 525, 51 N. W. 335; *Medland v. Linton*, 82 N. W. 866, 868, 60 Neb. 249.

The term "filing," within the meaning of the fee bill giving the clerk of the federal courts certain fees for filing and entering every declaration, etc., requires the indorsement of such papers by the clerk. Merely placing such a paper in the court papers without such indorsement does not constitute a filing, and hence the clerk is not entitled to filing fee therefor. *Amy v. Shelby County* (U. S.) 1 Fed. Cas. 817.

Rev. St. § 832, making it the duty of the town clerk to file a mortgage when presented, merely means that he shall receive the same, and make thereon the indorsement required by section 2314, requiring an indorsement of the time of receiving the same. *Marlet v. Hinman*, 45 N. W. 953, 954, 77 Wis. 136, 20 Am. St. Rep. 102.

#### Part of records imported.

The word "filing," when applied to the filing of an instrument in a public office, carries with it the idea of permanent preservation; that the paper filed becomes a part of the permanent records of the public office where it is filed. *Delaware Surety Co. v. Layton* (Del.) 50 Atl. 878.

The term "file" is also used to denote the paper placed with the clerk, and assigned by law to his official keeping. A file is a record of the court. *Holman v. Chevallier's Adm'r*, 14 Tex. 337, 338.

#### **Payment of fees required.**

Where the clerk failed to demand the fees for filing demurrers in an action, the failure to pay such fees did not make the leaving of the demurrers at the proper office for filing any less a filing. *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501, 505.

The filing with the clerk of a notice of appeal, and its service upon the adverse party, are not parts of a continuous act, which, as a whole, constitutes the service of the notice of appeal. Throughout the Code papers are said to be filed with the clerk, served on opposing parties. Filing does not consist merely in placing the papers in the hands of the clerk, and so, where a notice of appeal reached the clerk on the 21st of December, but the parties sending it were in arrears to the clerk, and had been notified by him that he would perform no further official services for them unless his fee was sent in advance, the papers were not filed by being merely received by the clerk. It cannot be claimed that he performed an official act by legal construction which he in fact refused to perform, having the legal right so to do. *Boyd v. Burrel*, 60 Cal. 280, 282.

#### **As presentation to court.**

Within Rev. St. § 5024, requiring petitions for adjudication in bankruptcy to be filed with the clerk of the court, a petition will be deemed to be filed, within the meaning of the statute, from the time it is presented to the clerk for the action of the court. The time of filing does not date from the time the clerk presents it to the judge for his action as to issuing an order to show cause. *In re Bear* (U. S.) 5 Fed. 53, 54.

#### **Putting in proper place among the records.**

The receiving and retaining of an administrator's bond in the surrogate's office is a sufficient filing, though it was not put in the proper place for filed papers. *Cullen v. Miller*, 9 N. Y. Leg. Obs. 62, 64.

#### **As received.**

An indorsement made by the clerk on a chattel mortgage, that the instrument was "filed for record" on a certain day, is a sufficient compliance with Rev. St. App. p. 16, § 2, requiring the clerk, on the receipt of such instrument, to indorse on the back thereof the time of receiving it. *Cook v. Halsell*, 65 Tex. 1, 5.

#### **Recording.**

"Filing" and "entering of record" are not synonymous. They always convey distinct ideas. Filing originally signified placing the papers in order on a thread or wire for safe-keeping. In this country, and at this day, it means, agreeably to our practice, depositing them in due order in the proper office. Entering of record uniformly means writing." *Naylor v. Moody* (Ind.) 2 Blackf. 247, 248.

The word "file," as used in St. 1862, c. 198, requiring a married woman doing business on her separate account to file a certificate in the clerk's office of the city or town where the business is to be carried on, setting forth the name of her husband, the nature of the business, etc., imports that the certificate is to be placed permanently on the files of the clerk, so that any person interested may refer to it. Recording it is not equivalent to filing it, if, after being recorded, the certificate is not kept in the clerk's office. *Chapin v. Kingsbury*, 185 Mass. 580, 581.

The word "filing" and the verb "to file" include the idea that paper is to remain in its proper order on file in the office. A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file, so that the mere recording of the articles of incorporation of a proposed county agricultural society is not a filing within the requirements that a certificate of organization shall be filed in the office of the register of deeds. *Bergeron v. Hobbs*, 71 N. W. 1056, 96 Wis. 641, 65 Am. St. Rep. 85.

St. 1866, c. 81, § 16, requiring the filing of a notice of intention to redeem from a foreclosure sale, means the leaving of a notice of intention to redeem in the office of the register of deeds, and by him recorded and indexed. *Willis v. Jelineck*, 6 N. W. 373, 375, 27 Minn. 18.

#### **Retention by officer required.**

Filing imports that the paper filed shall remain with the clerk as a record, subject to inspection by those who have an interest in it, and to be certified by the clerk as any other paper properly lodged in the office and committed to his custody. *Meridian Nat. Bank v. Hoyt & Bros. Co.*, 21 South. 12, 13, 74 Miss. 221, 36 L. R. A. 796, 60 Am. St. Rep. 504.

A paper is to be deemed to have been filed in court only when it shall have been delivered into the custody of the clerk of the court, to be by him kept among the papers of the cause, subject to the inspection of the parties. If a party causes the clerk to mark on a paper "Filed," but afterwards withdraws it from the custody of the clerk and from the inspection of the opposite party

**FINAL**

The ordinary definition of the word "final" is "last." *Johnson v. City of New York*, 1 N. Y. Supp. 254, 255, 48 Hun, 620.

A judgment is spoken of as a final judgment, and the word "final" does ordinarily mean relating to the end, ultimate, last, latest, etc. *Garrison v. Dougherty*, 18 S. C. 486, 488.

**As conclusive.**

Final is defined in *Burrill's Law Dict.* part 1, p. 490, to be that which terminates or ends a matter or proceeding; not absolutely, however, as the final judgment of an inferior court, which admits of an appeal. That which absolutely ends or concludes a matter, as the final judgment of a court, which admits of no appeal. *Rondeau v. Beaumette*, 4 Minn. 224, 228 (Gil. 163, 164).

Where it is expressly agreed by the parties to an arbitration that the same shall be "final, without exception or appeal," such phrase means that a party is precluded by agreement not to appeal and file exceptions. *Williams v. Danziger*, 91 Pa. 232, 233 (citing *McChan v. Reamey*, 33 Pa. [9 Casey] 535).

Final means final as to the subject-matter, and conclusive of the rights of the parties, and not as to the court involved, as used in *Code Civ. Proc.* § 936, providing that a judgment or order in a civil action, except "when expressly made final" by this Code, may be reviewed as prescribed in the title, and not otherwise. *Sharon v. Hill* (U. S.) 26 Fed. 337, 389.

Final means conclusive, from which there is no appeal. *Blanding v. Sayles*, 49 Atl. 992, 995, 23 R. I. 226.

The words "final" and "conclusive," as used in Act April 16, 1880, authorizing appeals from orders forming reclamation or swamp land districts, and declaring that the judgment of the superior court shall be final and conclusive, are synonymous, and mean that the judgment shall be followed by no other proceedings determinative of the rights of the parties in the same or any other court. *Appeal of Bixler*, 59 Cal. 550, 556.

To declare that the decision of a court shall be final and conclusive is the equivalent of declaring that the court's judgment shall not be subject to review on appeal. The word "final" has a well-understood and accepted meaning. The *Century Dictionary* defines it to be in a legal sense as follows: "Precluding further controversy on the question passed upon; as, a statute declaring that the decision of a specified court shall be final." It is held by most of the states that the word "final" means "conclusive," from which there is no appeal. *Pittsburgh, Ft. W. & C. Ry. Co. v. Gillespie* (1902) 63 N. E.

845, 846, 158 Ind. 454 (citing *In re Mayor v. City of New York*, 49 N. Y. 150; *Selleck v. Common Council of City of Norwalk*, 40 Conn. 361; *People v. Fitz Gerald*, 41 Mich. 2, 2 N. W. 179).

**FINAL ADJUSTMENT.**

In 2 Rev. St. 1876, c. 110, § 186, providing that any creditor of a defendant in attachment on filing affidavit and written undertaking as required of attaching creditors may at any time before the final adjustment of the suit become a party to the action, file his complaint, and prove his claim, the term "final adjustment" means "the judgment and order of sale, which disposes not of one only of the pending actions, but of all." *Lexington & B. S. R. Co. v. Ford Plate Glass Co.*, 84 Ind. 516, 520; *Cooper v. Metzger*, 74 Ind. 544, 551.

**FINAL AND CONCLUSIVE.**

An agreement to submit matters to arbitration, by which the parties agree to waive all objections arising on legal grounds, and let the referees decide all matters justly and equitably, the report of a majority of them to be final and conclusive. Held, that the words "final and conclusive" were there used in the same sense in which they were commonly used in such agreements, and meant that the report should be final and conclusive when properly and legally made on the merits, and hence did not preclude the party against whom the report was entered from taking exceptions thereto and proceeding to a hearing of such exceptions in a court of justice. *Mussina v. Hertzog* (Pa.) 5 Bin. 387, 388.

*Code Civ. Proc.* § 1222, declaring that the judgment and orders of the court or judge made in cases of contempt are final and conclusive, means that no appeal lies thereon. *Tyler v. Connolly*, 2 Pac. 414, 415, 65 Cal. 28.

Under a provision of the Maryland Constitution that there shall be a court of appeals, whose judgment shall be final and conclusive in all cases of appeal from the general court, court of chancery, etc., it is held that by the words "final and conclusive" it was intended only that no suit taken to the court of appeals should, after being adjudicated there, be further prosecuted by appeal in any other tribunal; and not that the decision of the court of appeals should be final and conclusive as to the rights of the parties to the subject-matter in controversy in any other suit. *Hammond v. Ridgely's Lessee* (Md.) 5 Har. & J. 245, 268, 9 Am. Dec. 522.

The phrase "final and conclusive," as used in the street improvement act (St. 1885, § 11), providing that upon an appeal

from the act of a superintendent of streets in approving work on which an assessment is based the city council may revise and correct any act of such superintendent, and require the work to be completed according to its direction, and declaring that all decisions of the council shall be final and conclusive on all persons entitled to appeal as to all errors and irregularities which said city council might have remedied, makes the city council the final tribunal in the determination of all cases that might be appealed to it, so far as such determination is of a question of fact, or depends upon evidence that might be presented in support of the appeal. *Lambert v. Bates*, 70 Pac. 777, 778, 137 Cal. 678.

The phrase "shall be final and conclusive," as used in St. 1871-72, p. 623, § 8, as amended by St. 1875-76, p. 251, § 9 (city charter of Santa Rosa), which authorizes the board of trustees to hear and determine municipal election contests, and declares that their decisions in such contests shall be final and conclusive, confers exclusive jurisdiction on the council in election contests. *Carter v. Superior Court of Sonora County*, 70 Pac. 1067, 1068, 138 Cal. 150.

#### As subject to inquiry.

The words "final and conclusive," as used in Act 1813 (Laws 1813) c. 86, § 178, providing that the report of commissioners of estimate and assessment, when confirmed, shall be final and conclusive, has reference to an appeal therefrom, and not to the remedy by motion to set it aside for irregularity, fraud, or mistake. In *re City of New York*, 49 N. Y. 150, 154.

An act of the Legislature declaring that the proceedings of inferior tribunals created by the statute shall be final and conclusive, means final and conclusive as to the exercise of the powers confided to them, but does not bar an examination as to the exercise of powers which they do not legitimately possess. *Ackerman v. Taylor*, 9 N. J. Law (4 Halst.) 65, 68.

The words "final and conclusive," in Laws 1896, c. 745, § 147, providing that the confirmation of a special sewer assessment after opportunity for objection shall be final and conclusive, does not preclude a review to ascertain whether the inferior tribunal has kept within the power conferred by it. *People v. Common Council of City of Kingston*, 65 N. Y. Supp. 590, 591, 53 App. Div. 58.

A decision of an inferior tribunal may be reviewed on certiorari, though by statute such decision is made "final and conclusive." In such case the court, in the exercise of its supervising power, is confined to the inquiry whether such tribunal had jurisdiction to perform the act complained of, and in its performance has kept within the powers giv-

en it by law. *People v. Canal Board (N. Y.)* 7 Lans. 220, 223.

#### FINAL BALANCE.

The term "final balance" is not strictly accurate when applied to a claim where no deduction by way of offset or otherwise is made. It was used (in this case) to signify the amount finally determined upon as due to the creditor by the estate, so that the report would show the entire debts against the estate, and those due it from persons presenting claims to the commissioners, as settled and adjudicated by the commissioners. *Capehart v. Logan*, 20 Minn. 442, 445 (Gil. 395, 399).

#### FINAL CONSUMMATION.

Within the act repealing the bankrupt law of 1841, the term "final consummation" "does not mean merely the discharge of the bankrupt and the distribution of the estate, but a case is not continued to its final consummation so long as there remains any order, decree, or action for the court in the proper and usual exercise of its jurisdiction in like cases to enter or to take, or any redress or relief to be given to any party or person properly applying to the court therefor." In *re King (U. S.)* 3 Fed. 839, 840.

#### FINAL COSTS.

Final costs are awarded not necessarily nor always properly on the bill, answer, replication, proofs, and former proceedings had on the merits. The final costs may be and should be reserved until the end of the case, which often comes after the hearing, when the matter of costs is finally disposed of by the court. *Goodyear v. Sawyer (U. S.)* 17 Fed. 2, 8.

#### FINAL DECISION.

See, also, "Final Decrees and Judgments."

A final decision is one which finally disposes of all the rights of the parties, and on which final judgment may be offered. *Ashton v. Thompson*, 9 N. W. 876, 877, 28 Minn. 330.

The use of the term "final decisions" in section 1911 of the Revised Statutes, regulating writs of error and appeals to the Supreme Court, does not enlarge the scope of the jurisdiction of the Supreme Court, but is only a substitute for the words "final judgment and decree" in section 702 [U. S. Comp. St. 1901, p. 571], and means the same thing. *Crawford v. Haller*, 4 Sup. Ct. 697, 111 U. S. 796, 28 L. Ed. 602.

The word "final," as used in Rev. St. § 896, providing that the court on appeal from

the decision of the county commissioners shall hear and determine the same, "which decision shall be final," means leaving nothing for the further consideration of the court rendering it, and not as denying the right to review the decision by appeal or on petition in error. *Mannix v. Hamilton County Com'rs*, 1 N. E. 822, 323, 43 Ohio St. 210.

"Final," as used in Act Jan. 7, 1857, authorizing a special levee tax, and providing what the board of levee inspectors shall hear and determine, and that their decision shall be final, should be construed as meaning that the decision should be final only so far as to conclude further investigation by the ministerial officers acting in the assessment and collection of the tax, and does not close the door of the courts against a party whose land had been illegally assessed. The decision of the board is pronounced in a ministerial proceeding, and, so far as regards its conclusiveness, must be understood to have reference to proceedings of that character, and not to judicial proceedings. *McGehee v. Mathis*, 21 Ark. 40, 55.

#### FINAL DECREE OR JUDGMENT.

A judgment or decree, to be final within the meaning of that term as used in the acts of Congress giving the Supreme Court jurisdiction of appeals and writs of error, must terminate the litigation between the parties on the merits of the case; so that, if there should be an affirmance by the Supreme Court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 8, 1 Sup. Ct. 15, 16, 27 L. Ed. 73; *Grant v. Phoenix Mut. Life Ins. Co.*, 1 Sup. Ct. 414, 415, 106 U. S. 429, 27 L. Ed. 237; *Express Co.'s Case*, 2 Sup. Ct. 6, 8, 108 U. S. 24, 27 L. Ed. 638; *Winthrop Iron Co. v. Meeker*, 3 Sup. Ct. 111, 113, 109 U. S. 180, 27 L. Ed. 898; *Benjamin's Heirs v. Dubois*, 6 Sup. Ct. 925, 118 U. S. 46, 30 L. Ed. 52; *Dainese v. Kendall*, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305; *Lodge v. Twell*, 10 Sup. Ct. 745, 747, 135 U. S. 232, 34 L. Ed. 153; *National Bank of Rondout v. Smith*, 15 Sup. Ct. 358, 359, 156 U. S. 330, 39 L. Ed. 441; *Kingman & Co. v. Western Mfg. Co.*, 18 Sup. Ct. 786, 788, 170 U. S. 675, 42 L. Ed. 1192; *Robinson v. Belt* (U. S.) 56 Fed. 328, 329, 5 C. C. A. 521; *Desvergers v. Parsons* (U. S.) 60 Fed. 143, 150, 8 C. C. A. 526; *Merriman v. Chicago & E. I. R. Co.*, 64 Fed. 535, 547, 12 C. C. A. 275; *Postal Tel. Cable Co. v. Southern R. Co.* (U. S.) 90 Fed. 211, 212; *Coltrane v. Templeton* (U. S.) 106 Fed. 370, 378, 45 C. C. A. 328; *National Transit Co. v. United States Pipe Line Co.*, 36 Atl. 724, 725, 180 Pa. 224; *United States v. Church of Jesus Christ of Latter-Day Saints*, 16 Pac. 723, 724, 5 Utah, 394; *Chicago & N. W. Ry. Co. v. City of Chicago*, 148 Ill. 141, 33 N.

E. 881, 886; *Rhodes v. Rhodes*, 50 N. E. 170, 172 Ill. 187; *Gade v. Forest Glen Brick & Tile Co.*, 158 Ill. 39, 42 N. E. 65, 67. And the same rule is applicable to the words as used in a statute giving jurisdiction to the Circuit Court of Appeals of appeals and writs of error. *Sanders v. Bluefield Waterworks & Improvement Co.* (U. S.) 106 Fed. 587, 591, 45 C. C. A. 690.

The words "final judgment or decree," as used in the Federal Judiciary Act, § 25, enacting that a final judgment or decree in any suit in the highest court of law or equity of a state in which a decision could be had, where is drawn in question the validity of a statute, or of an authority exercised under any statute, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, etc., may be examined, etc., in the Supreme Court of the United States, must be understood as applying to all judgments and decrees which determine the particular cause. *Weston v. City of Charleston*, 27 U. S. (2 Pet.) 449, 464, 7 L. Ed. 481.

A decree is final when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained by the pleadings on both sides that the court is enabled from them to collect the respective merits of the parties litigant, and upon full consideration of the case made out and relied upon by each determines between them according to equity and good conscience. *Travis v. Waters* (N. Y.) 12 Johns. 500, 508; *People v. Center*, 5 Pac. 263, 269, 66 Cal. 551; *Shegogg v. Perkins*, 34 Ark. 117, 130; *Kane v. Whittick* (N. Y.) 8 Wend. 219, 224; *Jenkins v. Wild* (N. Y.) 14 Wend. 539, 542; *Jaques v. Trustees of Methodist Episcopal Church* (N. Y.) 17 Johns. 548, 598, 8 Am. Dec. 447; *Maloney v. Jones* (Tenn.) 59 S. W. 700, 705; *Delap v. Hunter*, 33 Tenn. (1 Sneed) 101, 104; *Meek v. Mathis*, 48 Tenn. (1 Heisk.) 534, 536 (quoting from *Delap v. Hunter*, 33 Tenn. [1 Sneed] 101).

"A decree," says Chancellor Walworth, "which finally decides and disposes of the whole merits of the cause, and reserves no further question or directions for the future judgment of the court so that it will be necessary to bring the cause before the court for its further decision, is a final decree." *Mills v. Hoag*, 7 Paige, 18, 19; *People v. Center*, 5 Pac. 263, 269, 66 Cal. 551; *Teaff v. Hewitt*, 1 Ohio St. 511, 520, 59 Am. Dec. 634; *Kelley v. Stanbery*, 13 Ohio, 408, 421; *Trammell v. Ashworth*, 39 S. E. 593, 595, 99 Va. 646; *Delap v. Hunter*, 33 Tenn. (1 Sneed) 101, 104; *Meek v. Mathis*, 48 Tenn. (1 Heisk.) 534, 536.

A judgment is final when it terminates the litigation between the parties on the mer-

its of the case, and leaves nothing to be done but to enforce by execution what has been determined. *Klever v. Seawall*, 65 Fed. 373, 377, 12 C. C. A. 653; *Raymond v. Royal Baking-Powder Co.* (U. S.) 76 Fed. 466, 468, 22 C. C. A. 276; *Express Co.'s Case*, 2 Sup. Ct. 6, 8, 108 U. S. 24, 27 L. Ed. 638; *State v. Woodson*, 31 S. W. 105, 107, 128 Mo. 497; *State v. Booth*, 59 Pac. 553, 554, 21 Utah, 88.

*Mr. Story*, in his *Equity Pleading*, says: "A decree is final which adjudicates on all the merits of the controversy, and leaves nothing further to be done but the execution of it." *Griffin v. Orman*, 9 Fla. 22, 46, 47.

A judgment which is the complete determination of the rights of parties to the suit with respect to its subject-matter, leaving no further question or direction for after-determination except such as may be necessary to carry it into effect, is a final judgment. *Heagney v. Hopkins*, 52 N. Y. Supp. 207, 211, 23 Misc. Rep. 608.

There are three kinds of final decrees: First. A decree from which an appeal will lie, which is defined by Acts 1882, c. 157, § 1, as any decree or order \* \* \* requiring money to be paid, or real estate to be sold, or the possession of title of the property to be changed, or adjudicating the principles of the cause. Second. A decree which not only adjudicates all the matters and merits of the cause, but which disposes of the details, and puts the parties out of court. Third. A decree to which a bill of review will lie. A decree made on the hearing on the merits, which settles and adjudicates all the matters in controversy, between the parties, is such a final decree that a bill of review will lie to it, although much may remain to be done before it can be completely carried into execution. *Core v. Strickler*, 24 W. Va. 689, 693, 694.

"A final decree is one which makes an end of the case, and decides the whole matter in controversy, costs and all, leaving nothing further for the court to do." *Ex parte Crittenden*, 10 Ark. (5 Eng.) 333, 339.

A judgment or decree is final which disposes of the issues presented in the case, determines the case, and leaves nothing for the further consideration of the court. *Perkins v. Sierra Nevada Silver Min. Co.*, 10 Nev. 405, 411; *Lake v. King*, 16 Nev. 215, 217.

A final decree is a judgment or decree which settles the ultimate rights of the parties and finally determines the controversy. *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 100 Ill. 473, 483.

A final judgment is the ultimate determination of the court from the whole matter in controversy in the action. *Pfeiffer v. Crane*, 89 Ind. 485, 487; *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 580, 107 Ind. 9.

Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for. *Holden's Adm'rs v. McMakin* (Pa.) 1 Pars. Sel. Cas. 270, 289 (citing 3 Bl. Comm. 398); *Lockwood v. Jones*, 7 Conn. 431, 446; *Rose v. Dempster Mill Mfg. Co.* (Neb.) 94 N. W. 964.

A decree which disposes of the whole subject, gives all the relief that is contemplated, and leaves nothing to be done by the court, is regarded as final. *Sims v. Sims*, 94 Va. 580, 27 S. E. 436, 64 Am. St. Rep. 772.

No judgment or decree will be regarded as final within the meaning of the statute in reference to appeals unless by it the issues of law or fact necessary to be determined were determined, and the case disposed of so far as the court had power to dispose of it. *Snyder v. Cox* (Ky.) 53 S. W. 263, 264.

A final judgment is a judgment that disposes of the case as to all parties, and finally disposes of the subject-matter of the litigation upon the merits of the case. *North Point Consol. Irr. Co. v. Utah & Salt Lake Canal Co.*, 46 Pac. 824, 826, 14 Utah, 155; *Standard Steam Laundry v. Dole*, 58 Pac. 1109, 1110, 20 Utah, 469; *Central Trust Co. v. Western N. C. R. Co.* (U. S.) 89 Fed. 24, 26; *Nelson v. Brown*, 59 Vt. 601, 10 Atl. 721; *Hovey v. Crane*, 27 Mass. (10 Pick.) 440; *Maxwell's Trustees v. England*, 74 S. W. 1091, 1092, 25 Ky. Law Rep. 143.

A final judgment determines the rights of the parties to the action in which it is rendered, and the party in whose favor it is rendered may proceed to enforce the judgment in accordance with its terms. *Holmes v. Campbell*, 18 Minn. 66, 68 (Gil. 58, 64).

A final judgment is a judgment on the matters put in issue by the pleadings about which there was earnest contention. *Preiss v. Cohen*, 23 S. E. 162, 163, 117 N. C. 54.

A final judgment must mean the award—the judicial consequence—which the law attaches to the facts on determining the subject-matter in controversy between the parties. *Hanks v. Thompson*, 5 Tex. 6, 8. This definition was quoted with approval in *West v. Bagby*, 12 Tex. 34, 62 Am. Dec. 512; *Linn v. Arambould*, 55 Tex. 611, 617 (citing *Freem. Judgm.* § 29).

A final decree is one which dispenses with the cause of action either by sending it out of the court before a hearing is had on the merits, or, after a hearing on the merits, decreeing either in favor of or against the prayer of the bill. *Linn v. Arambould*, 55 Tex. 611, 617 (citing *Freem. Judgm.* § 29).

A final decree is one which disposes of the whole case. A decree is final by which the whole purpose of the suit has been ac-

complished. *Coltrane v. Templeton*, 106 Fed. 370, 378, 45 C. C. A. 328.

A final judgment is one that puts an end to the suit. *Branch v. Branch*, 5 Fla. 447, 450; *Treadway v. Coe*, 21 Conn. 283, 284.

A final judgment, as it has been defined by the courts, is an adjudication which shall completely settle, end, and determine the rights of the parties. In *re Arapahoe Paper Co.*, 50 Pac. 45, 46, 10 Colo. App. 66.

Final judgment means a judgment which concludes the parties as regards the subject-matter. *King v. Platt's Ex'rs* (N. Y.) 34 How. Prac. 26, 27.

A final judgment is one which leaves nothing to be judicially determined between the parties in the trial court. It must finally conclude all the necessary parties on the merits, and finally dispose of the subject-matter of the controversy. *Little v. Atchison, T. & S. F. Ry. Co.*, 53 S. W. 331, 332, 2 Ind. T. 551; *Thomas v. Clark County Nat. Bank*, 45 S. W. 73, 74, 103 Ky. 335.

A judgment which fixes the rights of the parties in the action in which it is rendered, and leaves nothing further to be done before such rights are determined, is final. *Standley v. Hendrie & Bolthoff Mfg. Co.*, 55 Pac. 723, 724, 25 Colo. 376.

"The term 'final decree' means that decree which makes an end of the case in the court below, and is used in contrast to such decrees or orders as are only progressive to that end, or as are merely interlocutory." *Alexander's Heirs v. Coleman* (Va.) 6 Munf. 328, 350.

A final decree or judgment is one which finally determines all of the issues presented by the pleadings, and finally fixes the rights of the parties. *Brush Electric Co. v. Electric Imp. Co.* (U. S.) 51 Fed. 557, 561, 2 C. C. A. 373.

A final decree or judgment is one which puts an end to the controversy between the parties litigant. *Merriman v. Chicago & E. I. R. Co.* (U. S.) 64 Fed. 535; 547, 12 C. C. A. 275; *St. Claire County v. Lovington*, 85 U. S. (18 Wall.) 628, 21 L. Ed. 813.

The term "final judgment" means the ultimate or last judgment, which puts an end to the proceedings. In *re Smith's Estate*, 33 Pac. 744, 745, 98 Cal. 636.

Bouvier says a final decree is that which finally disposes of the whole question, so that nothing further is left to adjudicate on. In *Haynie v. McLemore*, 12 Ark. (7 Eng.) 397, Justice Scott says a final decree is where nothing remains to be done by the court between the parties remaining in court. Mr. Adams, in his *Commentaries on the Law*, says a final decree disposes ultimately of the

suit. A decree requiring a defendant in a chancery suit to pay over to the receiver appointed therein is a final decree, it not being always absolutely required to dispose of the entire merits of a cause and all the parties before the court as a necessity to a final decree. *Tucker v. Yell*, 25 Ark. 420, 429.

Where the headline of a judgment designated it as a final judgment, such designation did not make it a final judgment in fact. Whether a judgment be final or interlocutory depends on its text, and not upon the opinion of attorneys, or even upon the opinion of the court at the time of its entry. *Denison & N. Ry. Co. v. Raney-Alton Mercantile Co.*, 53 S. W. 496, 504, 3 Ind. T. 104.

A judgment is the decision of the court upon the case before it, and the last or final determination of a tribunal is a final judgment, and the proper subject for a writ of error. In *re Negus* (N. Y.) 10 Wend. 34, 44.

A final judgment, as defined by Wag. St. 1051, § 1, is that which finally determines the rights of the parties to the action. *Anderson v. Moberly*, 46 Mo. 191, 192, 193.

The phrase "final judgment" has two meanings. It may indicate the judgment which, if not reversed or modified, will end the litigation in which it is entered; but it may be reversed or modified by a superior tribunal, and which therefore gives to the party aggrieved the right to invoke the action of the higher court. The phrase may also mean that judgment which in fact does end the litigation by an order of the court in which the cause was begun, or of some higher court to which it is carried, entered in the cause itself, and by virtue of the process by which the suit was commenced. *Russell Cement Co. v. Le Page Co.*, 174 Mass. 349, 354, 55 N. E. 70, 73.

The nature of any order as a decree or final order, or as not final, depends entirely on the effect produced by the adjudication upon the rights and interests of parties. The usual distinction between interlocutory and other orders depending on the stage of the case in which they are made is not the test for appellate purposes. *Barry v. Briggs*, 22 Mich. 201, 204.

A decree in equity is final where it decides the main question in dispute, and a final decree has the same force as a judgment at law. *Darden v. Lines*, 2 Fla. 569, 571.

A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final on that question, and the Code provides for an appeal from a final judgment, not from the final judgment in an action. *State v. District Court of Second Judicial Dist.*, 72 Pac. 613, 616, 28 Mont. 227 (citing *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456).

Pub. St. c. 161, §§ 38-129, relating to attachments, after providing that all estates liable to be taken on execution may be attached, further provide for the release of the property attached by the giving of a bond conditioned for the payment in 30 days after final judgment of the sum fixed as the value of the property released, and for the dissolution of the attachment "at any time before final judgment" by the giving of a bond conditioned for the payment to the plaintiff of the amount, if any, that he may recover, within 30 days after final judgment. It further provides (section 55) that "the final judgment intended in these provisions is that which is rendered in the original action, whether upon an appeal or otherwise, and not such as may be rendered upon a writ of error or writ of review." Held, that a final judgment, within the meaning of the statute, is the judgment which in fact ends the litigation by an order of the court in which the cause was begun, or of some higher court to which it is carried, entered in the cause itself, and by virtue of the process by which the suit was commenced. *Russia Cement Co. v. Le Page Co.*, 174 Mass. 349, 354, 55 N. E. 70, 73.

A judgment which recites a former judgment, which it shows to be final, and sets the exact amount of the debt, interest, and costs due, and then gives leave to reinstate the judgment on the records of the court, and orders an execution to issue for the sum thus ascertained and computed, is a final judgment. *Smith v. Dudley*, 2 Ark. (2 Pike) 60, 62-65.

A final order is one which finally disposes of the whole matter of the suit, and may be either the decree itself or an order subsequent to the decree, when something further remains to be done in carrying the decree into effect before the whole subject is finally disposed of, and a further and final order is requested for that purpose. *Wing v. Warner* (Mich.) 2 Doug. 288, 291.

A judgment or order of the district court on appeal from an inferior tribunal, which is a complete adjudication so far as the district court is concerned, so as to leave nothing further to be done, is a "final order" within a statute allowing an appeal from such an order. *Ribble v. Furmin* (Neb.) 94 N. W. 967, 969.

#### **As not appealable.**

The term "final judgment" is susceptible of two significations, one of which, in a strict legal sense, is its true meaning. It is a determination of the rights of the parties after a trial whether such is the subject of review or not, and the other is its colloquial use or signification, which makes it synonymous with "decisive," or a judgment that cannot be appealed from, and which is perfectly con-

clusive upon the matter adjudicated. In a stipulation between plaintiff, who had been sued by a third person for the value of liquor in which defendant had an interest, and defendant, providing that, if plaintiff should be defeated at the first trial of the action on its merits, defendant could elect to pay the judgment or not, and, if he did not do so, and plaintiff should elect to appeal, the liquor should be sold, and the proceeds deposited to await final determination of the action, and that, if final judgment against plaintiff should be less than a certain amount, the defendant should do one thing, or, if more, another thing, the term "final judgment" is used synonymously with "final determination of the action," employed in the preceding clause, and by that term is meant the final settling of the rights of the parties to the action beyond all appeal. *Dean v. Marschall*, 85 N. Y. Supp. 724, 725, 90 Hun, 335.

A final judgment is one which is a final determination, or shutting off, or conclusion of any further proceedings in a cause by appeal or otherwise. *Appeal of Bixler*, 59 Cal. 550, 556; *Blanding v. Sayles*, 49 Atl. 992, 995, 23 R. I. 226.

Final judgments are such as at once put an end to the action. Final is often used in the statutes in this, which is its proper legal sense. And in the statute providing for the assessment of damages for flowing the lands of another, and that, when so assessed, "the verdict being returned, the judgment thereon shall be final," the word "final" was used to confine the adjudication of the case to the common pleas, and means a judgment of that court which cannot be appealed from. *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 41 Mass. (24 Pick.) 296, 300.

"Final judgment," within the meaning of Rev. Laws, § 1797, providing that from the filing of the petition in insolvency until the determination of the question of discharge no creditor can prosecute to final judgment any suit for a claim provable against the estate, does not include a judgment in trespass, rendered in the county court before the petitions in insolvency were filed, as such judgment is subject to review. *Patterson v. Smith*, 30 Atl. 2, 3, 66 Vt. 633.

A final decision is one from which no appeal or writ of error can be taken; "a judgment which cannot be appealed from, which is perfectly conclusive upon the matter adjudicated." Thus a decision from which an appeal is taken is not a final judgment in such sense. *Annis v. Bell*, 64 Pac. 11, 12, 10 Okl. 647.

"Final" as used in Rev. St. 1845, p. 224, § 49, which provides that the decision of the circuit court on an appeal from a decision of the justices in cases of contested elections shall be final, means that it is not subject to



review by either writ of error or appeal. *Moore v. Mayfield*, 47 Ill. 187, 169.

**Authority or reservation of power to modify.**

A final judgment is one which does not on its face reserve jurisdiction to make supplementary decree. Under such definition a judgment in a divorce suit settling the property rights of the parties after the time for appeals therefrom has expired is a final judgment, except so far as the power to modify it is given by statutory provisions. *Howell v. Howell*, 37 Pac. 770, 771, 104 Cal. 45, 43 Am. St. Rep. 70.

A judgment granting a divorce and alimony is a final judgment, though the court has discretion to modify it thereafter as to the alimony. *McKennon v. McKennon*, 63 Pac. 704, 705, 10 Okl. 400; *Trowbridge v. Spinning*, 62 Pac. 125, 130, 23 Wash. 48, 15 L. R. A. 204, 83 Am. St. Rep. 806.

An entry finding the defendant guilty of contempt for violation of injunction, and assessing a fine, reserving the right to omit all or any part thereof on the final disposition of the case, was not a final and appealable judgment. *Home Electric Light & Power Co. v. Globe Tissue Paper Co.*, 44 N. E. 191, 145 Ind. 174.

Code Civ. Proc. § 1252, providing for an appeal from a final judgment, should be construed to include a judgment in condemnation proceedings based in part on the assessment of damages and adjudicating that the use is public and the taking necessary, though such judgment may be set aside by the court, with all the proceedings on which it is based, if the sum of money assessed is not paid, and though ordinarily a judgment is not final when the law contemplates further and subsequent proceedings in the same court to precede the absolute determination of the rights of the parties. The final determination is not the final order of condemnation, but is the judgment which adjudges the sum to be paid within a certain time after such order is entered. *California Southern R. Co. v. Southern Pac. R. Co.*, 7 Pac. 123, 126, 67 Cal. 59.

In an action relating to the ownership and transfer of certain corporate stock the decree directed that the defendant transfer the stock forthwith upon the books of the company. The eighth rule of the court prescribes that, "if the decree be for the performance of any specific act, it shall prescribe the time within which the act shall be done, of which the defendant is bound to take notice," and "on affidavit by the plaintiff of nonperformance within the prescribed time the clerk shall issue a writ of ejectment against the delinquent party, from which he shall not be discharged unless on full compliance, or by special order enlarging the time." In this case the decree directs the per-

formance of a specific act, and requires that it be done forthwith. The effect of the act when done is to invest the transferees with all the rights of ownership. It changes the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. It looks to no future modification or change of the decree. No such change or modification was possible after the term, except on rehearing, or by bill of review in the circuit court, or through appeal in the Supreme Court. So far as the court below was concerned, the decree in the case determined the principal matter in controversy between the parties, and, since the decree could not have been changed, except through a new and distinct proceeding, it determined that matter finally, and was a final decree. *Dean v. Nelson*, 74 U. S. (7 Wall.) 342, 345, 19 L. Ed. 94.

**As conclusive.**

A final decree is one that "forever puts an entire end to the litigation by closing the door of justice on the parties." *Carneals v. Parker's Adm'rs*, 30 Ky. (7 J. J. Marsh.) 455, 471.

"Final," as used in 13 Stat. 536, providing that if a debtor, on the filing of a petition by a sufficient number of his creditors asking that he be adjudged a bankrupt, admit in writing that one-fourth his creditors have so petitioned, the court, if satisfied that the admission is made in good faith, shall so adjudge, which judgment shall be final, means that such admission "shall be the end of all inquiry on the point as to whether the required number and amount of creditors have petitioned." *In re Duncan* (U. S.) 8 Fed. Cas. 1, 3.

The word "final," as used in Act April 16, 1880, providing that appeals may be taken from orders affirming the formation of swamp-land districts, and that the judgment of the Supreme Court shall be final, is synonymous with "final and conclusive," and means that the judgment shall be followed by no other proceedings determinative of the rights of the parties in the same or any other court. *Appeal of Bixler*, 59 Cal. 550, 556.

A condition in a contractor's bond binding parties to the payment of any and all judgments which might be recovered against the property imports that the judgments so rendered must be final, as distinguished from the interlocutory judgment. A judgment which is the complete determination of the rights of parties to the suit with respect to its subject-matter, leaving no further question or direction for after-determination except such as may be necessary to carry it into effect, is a "final judgment." It is true that the words "final judgment" are often used to designate a judgment which is irreversible on appeal, or one from which no appeal will

He; but there is nothing in this bond to justify such an extreme construction. The word "final" is not used, and there is not, therefore, any possible suggestion that it meant a judgment final in the sense which was beyond the reach of reversal. *Heagney v. Hopkins*, 52 N. Y. Supp. 207, 211, 23 Misc. Rep. 608.

**Same—As to court rendering decision.**

The word "final" means conclusive only as to the action of the court rendering the decision under Code Civ. Proc. § 939, providing that an appeal may be taken from the final judgment in an action. *Sharon v. Hill* (U. S.) 26 Fed. 837, 889.

By a final judgment the rights of the parties in respect to the matter litigated are settled and concluded as far as the court which rendered it is concerned. *State ex rel. St. Louis, K. & N. W. Ry. Co. v. Klein*, 41 S. W. 895, 897, 140 Mo. 502.

A final order or judgment either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original position. *Christman v. Chess*, 43 S. W. 426, 102 Ky. 230 (citing *Blackstone*); *Helm v. Short*, 70 Ky. (7 Bush) 623, 626; *Mercer v. Glass' Ex'r*, 12 S. W. 194, 89 Ky. 199; *Harrison v. Lebanon Water-Works Co.*, 15 S. W. 522, 91 Ky. 255, 84 Am. St. Rep. 180.

**Costs—Must be taxed.**

On appeal to the Circuit Court from a decree in the District Court for the payment of money the Circuit Court affirmed the judgment of the District Court, with costs to be taxed, from which judgment the respondent took an appeal. After the appeal another decree was rendered by the Circuit Court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to a sum stated. On motion to dismiss the last appeal on the ground of a former one pending in the same case, the court held that under the circumstances the first decree was not a final decree, and that it was the first appeal, and not the second, that should be dismissed. *Wheeler v. Harris*, 80 U. S. (13 Wall.) 51, 52, 20 L. Ed. 531.

**As decision on matter at issue.**

"Final judgment" means a judgment upon the matters put in issue by the pleadings about which there was earnest contention, and not a judgment in matters not in issue nor disputed. *Preiss v. Cohen*, 23 S. El. 162, 163, 117 N. C. 54.

**As determination of particular action.**

A final judgment must be understood as applying to all judgments and decrees which determine the particular cause. *Weston v. City of Charleston*, 27 U. S. (2 Pet.) 449, 464, 7 L. Ed. 481; *Holmes v. Jennison*, 39 U. S. (14 Pet.) 540, 564, 10 L. Ed. 579. It is not required that such judgment shall finally decide upon the rights which are litigated. *Weston v. City of Charleston*, 27 U. S. (2 Pet.) 449, 464, 7 L. Ed. 481.

A final judgment means not a final determination of the rights of the parties with reference to the subject-matter of the litigation, but merely of their rights with reference to a particular suit. It is not at all necessary that the judgment should be upon the merits if it definitely puts the case out of court. *Mutual Reserve Fund Life Ass'n v. Smith*, 48 N. El. 208, 209, 169 Ill. 264, 61 Am. St. Rep. 172; *Mercer v. Glass' Ex'r*, 12 S. W. 194, 195, 89 Ky. 199; *Thomas v. Clark County Nat. Bank*, 45 S. W. 73, 74, 103 Ky. 835. Thus, where a judgment was rendered in the court of first instance, and the defendant filed a complaint in the district court to annul the judgment on the ground of fraud, etc., to which an answer was put in, and the cause tried in the district court, and judgment given in accordance with the prayer of the complaint, this was a final judgment. *Belt v. Davis*, 1 Cal. 134, 138.

A judgment is final that completely disposes of the action. To make it final it is not necessary that the rights of the parties should be finally determined, but that it be upon the merits. It is final if it disposes of that particular suit in which it is rendered. It is held by the Court of King's Bench in England that by final judgment is understood not a final determination of the rights of the parties, but merely of the particular suit, and an order quashing an indictment and discharging the defendant is a final judgment. *State v. Logan*, 1 Nev. 509, 514.

"A final decree is one which disposes of the cause, either sending it out of the court before a hearing is had upon the merits, or, after a hearing upon the merits, decreeing either in favor of or against the prayer in the bill; either of which puts an end to the cause." *Choteau v. Rice*, 1 Minn. 24, 26 (Gil. 8, 10).

A final judgment is such as at once puts an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedies sued for. *Christman v. Chess*, 43 S. W. 426, 102 Ky. 230 (quoting Bl. Comm.); *Turner v. Browder*, 57 Ky. (18 B. Mon.) 825, 826; *Helm v. Short*, 70 Ky. (7 Bush) 623, 626; *Fuller v. Tuska*, 17 N. Y. Supp. 856, 857; *Annis v. Bell*, 64 Pac. 11, 12, 10 Okl. 647; *Trowbridge v. Spinning*, 62 Pac. 125, 130, 23 Wash. 43,

54 L. R. A. 204, 83 Am. St. Rep. 806; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 320. The distinguishing mark of a final judgment is its termination of the individual action. *Fuller v. Tuska*, 17 N. Y. Supp. 356, 357; *Mutual Reserve Fund Life Ass'n v. Smith*, 169 Ill. 264, 48 N. E. 208, 209, 61 Am. St. Rep. 172.

A final judgment has been defined to be a judgment which determines a particular cause, and terminates all litigation on the same right. 1 Kent's Comm. 316. Another definition is given to be a judgment which cannot be appealed from, but is perfectly conclusive as to the matter adjudicated upon. *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 41 Mass. (24 Pick.) 300. As used in Code Civ. Proc. § 642, providing that an appeal may be taken from a final judgment in any action, it means judgments which finally determine the particular suit, without reference to the question whether or not it determines the final rights of the parties to the subject-matter of litigation. In this country the general rule seems to be that in determining a question whether or not a judgment is final, within the meaning of the various statutes in relation to appeals, matters of form are to be disregarded, and matters of substance alone considered, and that the judgment is final if it disposes of the action or proceeding in which it is made, so far as the court which made it is concerned, without reference to the question whether the claim of the parties may not be litigated in some other action or proceeding. *Lalande v. McDonald*, 13 Pac. 347, 348, 2 Idaho (Habb.) 307.

A final judgment is such as at once puts an end to the action by determining that the plaintiff is or is not entitled to recover, and also determining the amount in debt or damages to be recovered. *Appeal of Mahoning County Bank*, 32 Pa. (8 Casey) 158, 160.

#### **Decree capable of enforcement.**

In *Forgay v. Conrad*, 47 U. S. (6 How.) 204, 12 L. Ed. 404, the court says: "Where a decree decides the right to the property in contest, and directs it to be delivered by the defendant to the complainant, and complainant is entitled to have the decree carried immediately into execution, the decree must be regarded as a final one to that extent, authorizing an appeal." *United States v. Church of Jesus Christ of Latter Day Saints*, 16 Pac. 723, 724, 5 Utah, 394.

A decree which disposes of a cause without reserving anything for further consideration is final. Where a judge rendered a decree in vacation, and did not provide that such decree should not take effect until the next term of court, it is a final decree. *United States v. Gwyn*, 42 Pac. 167, 169, 4 N. M. (Gild.) 635.

By "final judgment," mentioned in St. 1784, c. 10, § 3, within one year from which scire facias must be served upon bail, is intended the first judgment on which plaintiff may sue out an execution, whether the judgment be rendered in the common pleas or Supreme Court, and a judgment on review is not necessarily intended. *Swett v. Sullivan*, 7 Mass. 342, 347.

A decree will be considered as final where the issues raised by the pleading were all submitted for final adjudication, and as entered it shows that the court passed on and adjudicated all the merits of the case, leaving nothing to be disposed of except to carry it into effect, though by inadvertence no time was prescribed within which certain conveyances therein directed were to be executed. *Desvergers v. Parsons* (U. S.) 60 Fed. 143, 150, 8 C. C. A. 526.

Under a statute providing that the justice rendering final judgment may continue the suit for further hearing on the defendant's application to take the debtor's oath not exceeding 12 days, and, if the debtor is not admitted to the oath, is to add the costs to the previous judgment, the action is so open to the justice so holding jurisdiction over it after the day on which judgment was rendered that the principal may be surrendered. The statute does, indeed, treat the judgment as previous, but clearly it keeps it suspended, and the court is still open, and no execution can issue. It seems to be but an enlargement of the court day, and we see no reason, when continued for further hearing, why it should not be treated in the same way as if all was going on the same day. The justice may take the surrender as well on the continued day as the court day. *Chase v. Holton*, 11 Vt. 347-349.

#### **Decree as to part of parties.**

The definition of a final judgment by Rev. St. p. 349, § 158, and Id. p. 360, § 73, as "a final determination of the rights of the parties in the action," involves the necessity of its being a full determination of all the rights of the parties presented by the record. Per *Flandrau, J. Deuel v. Hawke*, 2 Minn. 50, 57 (Gil. 37, 45).

A decree dismissing a bill in equity as to one of several defendants sought to be jointly charged is not a final decree from which an appeal may be taken to the Supreme Court. *Hohorst v. Hamburg-American Packet Co.*, 13 Sup. Ct. 590, 591, 148 U. S. 262, 37 L. Ed. 443.

Where a decree is made as to one of several defendants whose interests are not at all connected with that of the other defendants, with a direction for the payment of the costs as to that defendant, such appeal is final as to him, although the cause may be still pending in the court as to the

rest. *Royall's Adm'r v. Johnson* (Va.) 1 Rand. 421, 427.

Where all the defendants answer except one, who demurs to the bill, a judgment sustaining a demurrer and dismissing the bill as to such demurring thereof is not final for the purpose of appeal by complainant. *National Bank of Roundout v. Smith*, 15 Sup. Ct. 358, 359, 156 U. S. 330, 39 L. Ed. 441.

In *Batts' Ann. Civ. St. art. 1383*, a judgment which does not finally dispose of all the parties to the suit is not a final judgment. *Stewart v. Lenoir*, 72 S. W. 619, 31 Tex. Civ. App. 470.

Where one defendant has no interest in one branch of the proceeding, and the decree is final as to all matters directly affecting her, while it is merely interlocutory as to her codefendant, it is, as to her, a final judgment, from which an appeal will lie. *Rhodes v. Williams*, 12 Nev. 20, 24.

#### Decree as to part of questions.

"A judgment that is conclusive on any question in the case is final as to that question. A final judgment is not necessarily the last one in an action." *Sharon v. Sharon*, 7 Pac. 456, 463, 67 Cal. 185.

The phrase "final judgment," as employed in a statute giving an appeal from a final judgment, includes any judgment in its nature final and separable from any other judgment that may be rendered in the action, although not finally disposing of the action. *Bunnell v. Berlin Iron Bridge Co.*, 33 Atl. 533, 536, 66 Conn. 24; *Guarantee Trust & Safe-Deposit Co. v. Philadelphia R. & N. E. R. Co.*, 38 Atl. 792, 793, 69 Conn. 709, 38 L. R. A. 804.

The finality of a decree is not determined by the stage of the suit at the time it is rendered, but upon whether it concludes a party in imposing on him a liberty or depriving him of a right. A decree which may finally dispose of the special matter then being liquidated, and was binding not only upon the executor, but upon the cross-appellants, was a final decree. *Alexander v. Bates*, 28 South. 415, 419, 127 Ala. 328.

A decree does not become final because it settles one or more of the material questions involved in the case, if any other material question or fact remains undisposed of. *Jenkins v. Wild* (N. Y.) 14 Wend. 539, 542.

A bill against several defendants was dismissed as to all but one of them, and plaintiff denied relief upon all but one item, in determining the amount of which the case was referred to a master. An appeal taken from this decree was dismissed for failure to file the transcript in time. The master filed his report, which was confirmed, and the plaintiff again appealed. It was held that

on this second appeal the matters adjudicated by the first decree could not be considered, for it was a final decree, since it disposed of every matter in contention between the parties except as to the amount of one item. *Hill v. Chicago & E. R. Co.*, 11 Sup. Ct. 690, 691, 140 U. S. 52, 35 L. Ed. 331.

An exact definition of a final decree applicable to all cases possible to arise in practice is not easily given. It is not always necessary to dispose of the entire merits of the cause and all the parties before the court as a necessity to a final decree upon certain particular conceded or established rights. *Tucker v. Tell*, 25 Ark. 420, 432.

It cannot affect the finality of a judgment that the cause of action upon which it was rendered was united in the same petition with other causes of action which have not yet been adjudicated. *Klever v. Seawall* (U. S.) 65 Fed. 873, 377, 12 C. C. A. 653.

The term "final decision," as used in the statute authorizing appeals to the Circuit Court of Appeals from final decisions, does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleading, for, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litigation affecting only the parties to the particular controversy, and finally settles that controversy. Thus an order overruling a motion by the owner of a patent to be dismissed from a suit for infringement brought by a licensee on the ground that the suit had been brought without the patentee's authority was a final decision. *Brush Electric Co. v. Electric Imp. Co.* (U. S.) 51 Fed. 557, 561, 2 C. C. A. 373.

An order authorizing receivers' certificates to issue to cover past and future expenses incurred in operating the property under the receivership, and making them superior to the claims of interveners, is a final order from which an appeal lies. *Standley v. Hendrie & Bolthoff Mfg. Co.*, 55 Pac. 723, 724, 25 Colo. 376.

"A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination, so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for further decision." *Teaff v. Hewitt*, 1 Ohio St. 511, 520, 59 Am. Dec. 634; *Thomas v. Chicago & E. Ry. Co.*, 139 Ind. 462, 39 N. E. 44; *Needham v. Gillaspay*, 49 Ind. 245, 246; *Home Electric Light & Power Co. v. Globe Tissue Paper Co.*, 44 N. E. 191, 145 Ind. 824.

A final decree is such a one as settles and adjudicates the questions in a cause, and a decree may be final as to part of the matters in litigation and interlocutory as to the others. *Cook's Heirs v. Bay*, 5 Miss. (4 How.) 485, 486.

A final order, within Rev. St. 1898, § 3300, authorizing an appeal from final orders in the administration of decedents' estates, is such an order as finally disposes of the subject as to which the order is made, so that the parties can proceed no further as to that branch of the proceeding. In *re Williamson's Estate*, 72 Pac. 2, 8, 26 Utah, 50; *Park v. Furman*, Id.

There can be but one "final judgment" in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy. And a judgment disposing of only one of the defenses to an action is not final. *Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co.*, 33 Pac. 633, 637, 98 Cal. 557.

#### Effect of appeal.

A judgment in a state court against a bankrupt, which has been duly appealed from by him, is not a final judgment, under Bankr. Act 1867, § 21, declaring that no creditor shall be allowed to prosecute to final judgment any suit at law or in equity against the bankrupt until the question of the debtor's discharge shall have been determined. In *re Metcalf* (U. S.) 17 Fed. Cas. 172, 173.

#### Effect of reversal.

"The judgment which was reversed, while it remained unreversed, was undoubtedly what is technically termed a 'final judgment' in the suit in which it was rendered, as contradistinguished from what is called an 'interlocutory judgment' (3 Bl. Comm. 398); and, if it had not been reversed, it would have continued to be a final judgment, because, in the words of Blackstone's definition of final judgment, it would have put an end to the action. \* \* \* The action in which it was rendered would have been completely and absolutely terminated thereby. If, however, in consequence of its being reversed, it did not put an end to the action, it was not, by the very terms of the definition, a final judgment. Now, it is very clear that, when that judgment was reversed, it ceased to be a judgment of any description, because the effect of such reversal was wholly to vacate and annul it." *Allen v. Adams*, 17 Conn. 67, 72.

#### Entry and record.

A final judgment is as final when it is pronounced by the court as when it is entered and recorded by the clerk as required by statute. It is the act of the court which

renders the judgment final, and not that of the clerk. *California State Tel. Co. v. Patterson*, 1 Nev. 150, 155.

Within the meaning of a statute providing "that the defendant may at any time before final decree be allowed to file his answer or plea or demurrer," a decree cannot be said to be 'complete and final until entered in the order book. In this case it seems that the court had received the case when submitted for decision, had examined the papers, and settled the terms of the decree, and a decree had been prepared and considered by the court, and directed to be entered in the order book, but before it had been entered, and on the same day it was directed to be entered, the answer was tendered, and it was held that the answer must be received. *Bean v. Simmons* (Va.) 9 Grat. 389, 392.

Under a statute providing that after final judgment in an action to recover lands and tenements the defendant shall within 48 hours after such judgment file a complaint against the plaintiff for so much money as the lands and tenements are made better by improvements erected by defendant, it is held that the term "final judgment" does not mean the entry of the final judgment in the clerk's office, but was intended to express the idea of a final determination of the rights of the parties to the land, and consequently contemplated the verdict as the final judgment of the rights of the parties to the land, or at least assumed that the final judgment would be promptly entered after rendition of the verdict. Hence it is held, where claim for betterments was made on the day of the entry of the final judgment, but four years after the verdict was rendered, no claim for the betterments could be maintained. *Godfrey v. Fielding*, 21 S. O. 313, 317.

Comp. Laws, § 5024, provides that a judgment is the final determination of the rights of the parties in the action, and section 5095 provides that judgment on an issue in law or fact, or upon confession, or upon failure to answer, may be entered by the clerk upon an order of the court or the judge thereof. Sections 5101, 5102, provide that the clerk shall keep a book called the "judgment book," in which shall be entered the judgment, clearly specifying the relief granted or other determination of the action. Section 5323 provides that every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order; and section 5324 provides that an application for an order is a motion. Held that, under such provision and further provisions in regard to the making of the judgment roll and the judgment docket, a final judgment does not become such, and has no force or effect, until entered by the clerk in the judgment book, and that an or-

der of the district court not so entered, and made upon motion, that an appeal "be and the same is hereby dismissed," did not constitute a final judgment from which an appeal could be taken, but was a mere order. It did not constitute "final determination of the rights of the parties in the action," because it looked forward to further proceedings. In *re Weber*, 59 N. W. 523, 524, 4 N. D. 119.

In civil cases at law, by "final judgment" is meant the adjudication which finally disposes of or determines the case in the court of original jurisdiction having power to examine and determine the case upon its merits in favor of the one side or the other, as the result may be, and, if for the plaintiff, declares the nature and extent of his recovery, and entitles him to his execution for the enforcement and satisfaction of the same, and, if for the defendant declares that the plaintiff shall take nothing by his suit, and that the defendant shall no longer be detained in court, and awards the defendant his costs against the plaintiff. But in criminal cases the entry in such a court of the sentence upon the verdict of guilty is the final judgment. *State v. Newman*, 3 South. 467, 469, 24 Fla. 83.

To constitute a final judgment the record must not only indicate that an adjudication took place, but the entry must have been intended as the entry of a judgment. Thus tested, a final judgment will show in intelligible language a determination of the rights of the parties to the action, what relief has been granted, if any, or that defendant has been dismissed without day. In *re People's Sav. Bank (Colo.)* 71 Pac. 397.

#### Expiration of time for new trial.

A decree which controls and governs is a final decree, and no judgment or decree can, under our system, be said to be final until the time prescribed by law in which a motion for a new trial may be made or a writ of error seeking to set aside such judgment has expired. *People's Bank v. Merchants' & Mechanics' Bank*, 42 S. E. 490, 492, 116 Ga. 279.

#### Formal requisites.

A final judgment, according to the test of Code Practice (article 939 et seq.), includes a judgment deciding all points in controversy between the parties, which has been duly signed by the trial judge. *Cassard v. Tracy*, 27 South. 368, 374, 52 La. Ann. 835, 49 L. R. A. 272.

Where, on an indictment, there was no plea of not guilty, but a special plea that the law under which the defendant was indicted had been repealed since the commission of the offense, and no trial could be had, and there was a trial by the court, but the records show nothing but a finding of guilty,

and no sentence was pronounced, it was held that there was no final judgment to sustain an appeal. *Fleet v. State (Md.)* 21 Atl. 367.

A judgment is as final when pronounced by the court as when entered and recorded by the clerk. When the court announced in handing down an opinion that the judgment of the lower court was reversed, for instance, to all intentional purposes the judgment became final. *Hammer v. Downing*, 63 Pac. 990, 39 Or. 504.

A final decree is that which fully decides and disposes of the whole cause, leaving no further questions for the future consideration and judgment of the court. A decree becomes final when formally drawn, adopted by the court, and placed on file as a judgment of the court. A mere order for a decree before it is extended in due form and in apt and technical language is not a final decree. *Gilpatrick v. Glidden*, 19 Atl. 166, 167, 82 Me. 201.

A final judgment is the declaration of the court entered of record, showing: (1) The title and number of the case; (2) that the case was called for trial, and that the parties appeared; (3) the plea of the defendant; (4) the selection, impaneling, and swearing of the jury; (5) the submission of the evidence; (6) that the jury was charged by the court; (7) the return of the verdict; (8) the verdict; (9) in the case of a conviction, that it is considered by the court that the defendant is adjudged to be guilty of the offense as found by the jury, or, in case of acquittal, that defendant be discharged; (10) that the defendant be punished as has been determined by the jury, in cases where they have the right to determine the amount of the duration and the place of punishment in accordance with the nature and terms of the punishment prescribed in the verdict. Code Cr. Proc. Tex. 1895, art. 831. Under this definition a sentence did not contain a final judgment which recited that, there appearing in open court the district attorney and the defendant, who on a former day of the term (designating such day) had been tried and convicted of arson by a jury, etc., and reciting further that, no legal objection being made by the defendant why sentence should not be pronounced against him, more than two days having passed since the return of the verdict of the jury finding him guilty of the crime of arson preferred against him by a bill of indictment by the grand jury, etc., "it is therefore the order of this court that the defendant, P., be sentenced to five years' imprisonment, etc., in accordance with the verdict of the jury aforesaid and the judgment of the court." *Pennington v. State*, 11 Tex. App. 281, 282.

#### Future confirmation of master's report.

A decree is not final as long as anything remains to be done in the case upon which

the action of the court may be invoked. Hence, where under a bill there was a decree for the amount due, but property remained to be sold which of necessity required a decree of confirmation, and further action by the chancellor, such decree was not a final one. *Taylor v. Badoux* (Tenn.) 58 S. W. 919, 927.

A final judgment denotes the final determination of a substantial right for which the action was brought, and is not necessarily the last judgment rendered in a case. Thus, where a court of equity determines the rights of the parties to the land in question, and orders an account to be taken of rents and profits, such judgment is a final judgment, notwithstanding a supplemental judgment will be required on returning of the account. *McMurray v. Day*, 28 N. W. 476, 477, 70 Iowa, 671. It is not necessarily the last order in the case, as orders sometimes follow for the purpose of executing that which the decree has determined. *Ames v. Ames*, 148 Ill. 321, 36 N. E. 110. And so, where in a partition suit the rights of the parties were finally settled by decree, and at a later term the decree was entered approving the master's report, and directing conveyance and the distribution of the proceeds to the parties entitled to same, the former decree was the final decree. *Rhodes v. Rhodes*, 50 N. E. 170, 172 Ill. 187.

A decree is only considered as final where all the material facts in the cause have been ascertained, so as to enable the court to understand and decide upon the merits. Under this definition a decree was not a final decree which required an account to be stated by the prothonotary of the court, and providing further that, "if either party objects to any item charged or discharged, stated by the prothonotary, it is to be referred to the court, who will decide upon it before the final decree." *McCoy v. Porter* (Pa.) 17 Serg. & R. 59, 60.

In chancery a decree is interlocutory whenever an inquiry as to the matter of law or fact is directed preparatory to a final decision. And when a decree finally decides and disposes of the whole merits of the case, reserves no further questions and direction for the future judgment of the court, so that it will not be necessary to bring the case again before the court for its final decision, it is a final decree. Therefore, where a case was referred to a master to take an account of the rents and profits upon evidence and from an examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his result to the court, this was not a final decree. *Beebe v. Russell*, 60 U. S. (19 How.) 283, 15 L. Ed. 668.

A decree is final which terminates the litigation between the parties on the merits

of the case, fixes their rights and liabilities, and leaves nothing to be done but to execute it, although the case may be referred to a master to state an account or to determine questions incidental to its execution. Thus a decree which orders a judicial sale of specific property under which a title may pass beyond the control of the court is final although it contains a provision referring the case to a master to state an account between the parties preparatory to the application of the proceeds and the adjudication of the costs, and an order which absolutely confirms such sale is equally final. *Chase v. Driver* (U. S.) 92 Fed. 780, 785, 34 C. C. A. 668.

#### Future judicial action.

"A final decree is that which does not reserve the consideration of the points of equity arising on the determination of the legal rights of the parties, or of the further directions consequent on the coming in of the master's report, or the costs of the suit. It is that which decides the whole merits of the case, and reserves no further questions or directions for the future judgment of the court. A decree is final when it settles the whole controversy." *Ex parte Crittenden*, 10 Ark. (5 Eng.) 333, 368.

A judgment, though upon the merits, or determining some substantial right which leaves necessary further judicial action before the rights of the parties are settled, is not final. *State ex rel. St. Louis, K. & N. W. Ry. Co. v. Klein*, 41 S. W. 895, 897, 140 Mo. 502.

A decree is not the less final in its nature because some future order of the court may possibly become necessary to carry such final decree into effect. *Texas, S. F. & N. R. Co. v. Orman*, 9 Pac. 253, 256, 3 N. M. (Gild.) 308 (citing *Mills v. Hoag*, 7 Paige, 19; *Stovall v. Bank*, 77 U. S. [10 Wall.] 583, 19 L. Ed. 1036).

An order made upon the accounting of a guardian, which merely finds that a certain sum is in his hands, and which, as administrator, he is directed to retain in his hands subject to the further order of the court, is not a final judgment or decree from which an appeal may be taken. *Carswell v. Spencer*, 44 Ala. 204, 208.

A decree determining that plaintiffs, as holders of stock in defendant company, are entitled to vote it at stockholders' meetings, and that at the preceding election they were forcibly prevented from voting it, and appointing a master to conduct an adjourned meeting, and requiring the master to report to the court the proceedings of the meeting and the count of the votes as directed to be taken, also the objections to the vote of any stockholders, the facts thereof, and the decision of the master thereon, is not a final decree and appealable. *National Transit Co.*

v. United States Pipe Line Co., 36 Atl. 724, 725, 180 Pa. 224.

Where a decree decides the right to property in contest, and directs it to be delivered up or sold, and the plaintiff is entitled to have it carried into immediate execution, it is a final decree to that extent, although it may be necessary by a further bill to adjust the account between the parties. *Forgay v. Conrad*, 47 U. S. (6 How.) 201, 206, 12 L. Ed. 404; *Thomson v. Dean*, 74 U. S. (7 Wall.) 342, 19 L. Ed. 94. A judgment is only interlocutory when inquiry is directed by it as to a matter of law or fact preparatory to a final adjudication of the rights of the parties. *Beebe v. Russell*, 60 U. S. (19 How.) 283, 15 L. Ed. 668. Under these principles a decree adjudicating a party's proportionate interest of land and directing a reference to a master, who is to report at a subsequent term, when the court will determine what amount shall be charged as a lien on the several interests, and whether there shall be a sale to satisfy the liens, is not a final decree from which an appeal can be taken. *Davie v. Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170.

A decree of foreclosure and order of sale is a final decree, and appealable, though a reference to the master is ordered to ascertain the amount due, as by such decree every issue involving the rights of the parties was conclusively determined, the order to determine the amount being merely an interlocutory order in the matter of account. *Wallace v. Carter*, 11 S. E. 97, 98, 32 S. C. 314.

A decree of foreclosure which overruled the defense of an appellant in a cross-bill, and declares that the appellee is the holder and owner of the debt secured by the deed of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens, and the claims for taxes in arrears, is not a final decree, though the court find the amount due appellee largely exceeds the value of the property as a foundation for an order appointing a receiver. *Grant v. Phoenix Mut. Life Ins. Co.*, 1 Sup. Ct. 414, 415, 106 U. S. 429, 27 L. Ed. 237.

A decree of foreclosure and sale is not final in the sense which allows an appeal from it so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined. *North Carolina R. Co. v. Swasey*, 90 U. S. (23 Wall.) 405, 410, 23 L. Ed. 136.

"A decree never can be said to be final where it is impossible for the party in whose favor the decision is made ever to obtain any benefit therefrom without again setting the cause down for hearing before the court upon the equity reserved upon the coming

in and confirmation of the report of the master to whom it is referred to ascertain certain facts which are absolutely necessary to be ascertained before the case is finally disposed of by the court, or which the chancellor thinks proper to have ascertained before he grants any relief. But if the decree not only settles the rights of the party, but gives all the consequential directions which will be necessary to finally dispose of the cause upon the mere confirmation of the report of the master by a common order in the register's office, it is a final decree. *Johnson v. Everett* (N. Y.) 9 Paige, 636, 638; *Colthe v. Crane* (N. Y.) 1 Barb. Ch. 21, 23.

A final decree is not necessarily the last decree rendered, by which all proceedings in a case are terminated, and nothing is left open for the future judgment of the court; but it is a decree which determines the substantial merits of the controversy, all the equities of the case, though there may remain a reference to be had, or the adjustment of some incidental or dependent matter. *Schneider v. Patton*, 75 S. W. 155, 169, 175 Mo. 684 (citing *Black, Judgm.*; *Walker v. Crawford*, 70 Ala. 567).

Much controversy has arisen in reference to those decrees which, while settling the general equities of the case, leave something for future action or determination; and the true rule seems to be that, if that which remains to be done or decided will require the action or consideration of the court before the rights involved in the decree can be fully and finally disposed of, the decree is interlocutory; but it is none the less final if, after settling the equities, it leaves a necessity for some future action or direction of the court in execution of the decree as it stands. From an examination of the cases it seems to be well settled that a judgment may be final if it ascertains and fixes all the rights of the parties, although a reference may be made to a master for the purpose of ascertaining facts which are essential to carry the judgment into execution. If the acts of the master are ministerial, and not judicial, or if all the consequential directions growing out of the judgment are given in the decree itself, and may be carried out without further judicial action, the decree is final, and not interlocutory. *Denison & N. Ry. Co. v. Raney-Alton Mercantile Co.*, 53 S. W. 496, 504, 3 Ind. T. 104.

A decree which distinctly rejects the theory upon which plaintiff's suit is based, which is put in issue by the pleadings, is final, although it leaves the question of the special rights thereunder to be subsequently determined from time to time, as changed circumstances may render it necessary. *Sanders v. Bluefield Waterworks & Improvement Co.* (U. S.) 106 Fed. 587, 591, 45 C. C. A. 475.



**Future ministerial action.**

A decree is final which disposes of all questions presented for decision in a cause, and gives all the relief to which under the pleadings and proof the parties are entitled. A decree for a want of answer entered against the defendant for the amount due on purchase-money bonds, a commissioner being appointed to make the sale, was not a final decree. *Spilman v. Gilpin*, 25 S. E. 1004, 1007, 93 Va. 698.

A decree is final for the purposes of appeal when it terminates the litigation between the parties, and leaves nothing to be done but to enforce by execution what has been determined. Thus, where a decree settles every dispute between the parties, and leaves nothing to be done but to complete the sale under the foreclosure proceedings in the state court, and hand over to complainant any surplus there may be after satisfying the mortgage debt, it is a "final decree." *Ex parte Norton*, 2 Sup. Ct. 490, 498, 108 U. S. 237, 27 L. Ed. 709; *Ray v. Law*, 7 U. S. (3 Cranch) 179, 2 L. Ed. 404; *Milwaukee & M. Ry. Co. v. Soutter*, 69 U. S. (2 Wall.) 440, 17 L. Ed. 860; *Ex parte Branch & Co.*, 63 Ala. 383, 386. But in other respects it is interlocutory. *Nutt v. Cuming*, 49 N. E. 880, 881, 155 N. Y. 309; *Central Trust Co. v. Western N. C. R. Co.* (U. S.) 89 Fed. 24, 26.

A decree is final which is conclusive as to the subject or object of it, and which determines the rights of the parties as to it. A decree under a bill for the sale of mortgaged property ordering payment of a sum of money to plaintiffs, that a master or trustee sell the premises, and permitting the case to pend in the court awaiting the master's report, is a final decree, which may be appealed from. *Lohman v. Cox*, 56 Pac. 286, 288, 9 N. M. 503; *Baker v. Lehman* (Ohio) *Wright*, 522, 523.

A judgment dissolving a partnership and directing a sale of the partnership property and a division of the proceeds, giving directions for the distribution, is a final judgment within a statute allowing interest upon "final money judgments." It adjudges that a certain sum of money is due to the plaintiff, and determines the whole matter in litigation; leaving nothing to be done except to execute the decree by a sale of the property and distribution of the proceeds in the manner fixed by the decree itself. This is a mere ministerial duty. *Clark v. Dunnam*, 46 Cal. 204, 206, 208.

**Future stating of account or assessment of damages.**

A decree making an injunction perpetual, but leaving some matters of account open for further consideration, upon which the parties go on to take further proof, is not a "final decree." *Brown v. Swann*, 84 U. S.

(9 Pet.) 1, 9 L. Ed. 29; *Keystone Manganese & Iron Co. v. Martin*, 10 Sup. Ct. 32, 33, 132 U. S. 91, 33 L. Ed. 275; *Humiston v. Stainthorp*, 69 U. S. (2 Wall.) 106, 17 L. Ed. 905; *Standard Elevator Co. v. Crane Elevator Co.* (U. S.) 76 Fed. 767, 773, 22 C. C. A. 549; *Raymond v. Royal Baking Powder Co.* (U. S.) 76 Fed. 465, 466, 22 C. C. A. 276.

Where the issues have been submitted to a jury, and they render a verdict, but the court did not proceed to give final judgment, but, deeming an accounting necessary, made an order directing the clerk to make a statement, such order is not a final order. *Blackwell v. McCaine*, 11 S. E. 360, 361, 105 N. C. 460.

Where, in a suit by a stockholder against a corporation and its officers, the judgment provides for the taking of an account, this does not destroy its effect as a "final judgment" where it terminated the entire controversy in the court below upon the merits, and every matter in issue was settled by it. *Neall v. Hill*, 16 Cal. 145, 148, 76 Am. Dec. 508.

In a proceeding on a petition for the condemnation of a right of way a judgment sustaining a demurrer to an answer filed by defendant, which leaves proceedings for appointment of a commission and the assessment of damages still to be taken by the court, is not a "final judgment." *Postal Telegraph Cable Co. v. Southern Railway Co.* (U. S.) 90 Fed. 211, 212.

An order appointing commissioners to fix a just compensation for land proposed to be taken in condemnation proceedings is not a "final order," and a writ of error will not lie thereto. *Ludlow v. City of Norfolk*, 12 S. E. 612, 613, 87 Va. 819.

An order appointing commissioners to appraise damages in proceedings to condemn lands is a final order in a special proceeding. In *re St. Paul & N. P. Ry. Co.*, 25 N. W. 345, 84 Minn. 227.

A decree adjudging that complainant is the owner of patents sued on, that the claims of said patents, or some of them, are valid, and that defendants, having infringed them, and granting a perpetual injunction, is appealable as a final decision upon the merits, and not an interlocutory decree, although the decree further refers the cause to a master for an accounting of profits, and expressly reserves the question of costs. *Standard Elevator Co. v. Crane Elevator Co.* (U. S.) 76 Fed. 767, 773, 22 C. C. A. 549.

**Grant of relief essential.**

A final decree is one which finally adjudicates the questions of right and of law involved in a case, and proceeds to provide with reasonable completeness for the execution of such measures as may be necessary

and proper for placing successful suitors in possession of the rights decreed to them. *Scott v. Hore* (U. S.) 21 Fed. Cas. 834, 836; *Knox v. Columbia Liberty Iron Co.* (U. S.) 42 Fed. 378, 379.

"A judgment, to be final, must not only decide that one of the parties is entitled to relief of a final character, but must give that relief of its own force, or be enforceable for that purpose, without further action by the court, or by process of contempt." *Bondurant v. Apperson*, 61 Ky. (4 Metc.) 80 (quoted in *Chorn v. Chorn's Adm'x*, 33 S. W. 1107, 1109, 98 Ky. 627).

The definition of final judgment in the Revised Statutes as a final determination of the rights of the parties in the action, involves the necessity of its containing such a complete grant of relief that no act remains to be done to entitle the party to his rights in the action but the issuance of the writ of execution to enforce it. *Deuel v. Hawke*, 2 Minn. 50, 57 (Gil. 37, 45).

The test of the finality of a decree to support an appeal is not whether the cause remains in fieri, in some respects, in the court of chancery, awaiting further proceedings necessary to entitle the parties to the full measure of the rights it has been declared they have, but whether the decree which has been rendered ascertains and declares these rights. If these are ascertained and adjudged, the decree is final, and will support an appeal. 1 Brick. Dig. pp. 89, 90, §§ 85-87; *Jones v. Wilson*, 54 Ala. 50; *Malone v. Marriott*, 64 Ala. 486; *Walker v. Crawford*, 70 Ala. 567; *Randle v. Boyd*, 73 Ala. 282; *Cochran v. Miller*, 74 Ala. 50; *Adams v. Sayre*, 76 Ala. 509. Thus a decree that plaintiff was entitled to the relief prayed for, and ordering a relief, such decree was "final," within the meaning of Code, § 8611. *Ex parte Elyton Land Co.*, 15 South. 939, 940, 104 Ala. 88.

A final judgment means the awarding of the judicial consequences which the law attaches to the facts, and determines the subject-matter of controversies between the parties. *West v. Bagby*, 12 Tex. 34, 62 Am. Dec. 512; *Linn v. Arambould*, 55 Tex. 611, 617, and *Fitzgerald v. Adams*, 53 Tex. 461, 462, where it is held that the tests of finality are the judicial ascertainment of the facts, with a recorded declaration of the court pronouncing the legal consequences of the facts. A judgment in an action under *Sayles' Ann. Civ. St. art. 4565*, by a person dissatisfied with the decision of a railroad commission, which only finds that a certain regulation of freight rates by the commission and its refusal to establish a definite rate are unjust and unreasonable, but which does not accord any relief to the plaintiff, is not an appealable final judgment. *Railroad Commission of Texas v. Weld* (Tex.) 66 S. W. 122, 127.

A final judgment is the award of consequences which the law attaches to facts. It is not sufficient, to constitute a final judgment, that the court make a ruling which should logically lead to a final disposition of the cause, but the consequence of the ruling to the parties must also be declared. Therefore, where the court, on sustaining defendant's exceptions to plaintiff's petition, made no entry officially disposing of the case, the court's action was not a final judgment. *Texas Land & Loan Co. v. Winter*, 57 S. W. 39, 40, 98 Tex. 560.

#### Interlocutory decree or judgment distinguished.

The contrasts suggested by the use of the words "interlocutory order or decree" and "final decree," as used in a statute giving a right of appeal, is between a decree which is preliminary to a hearing on the merits, and hence discretionary in the court, and one which follows a hearing on the merits, and is hence final, conclusive, and as of right in the prevailing party; between a decree which is meant to preserve the subject-matter of the litigation, or prevent irreparable injury, till a hearing on the merits can be had, and a decree which follows the hearing on the merits, and ultimately determines the rights of the litigant. *Standard Elevator Co. v. Crane Elevator Co.* (U. S.) 76 Fed. 767, 773, 22 O. C. A. 549.

The distinguishing test between an interlocutory and a final decree is found in the fact that, if no questions of fact or law affecting the merits remain undetermined, and nothing remains unfinished except the ministerial execution of the decree, it is regarded as a final decree. *Bissell Carpet Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25. See, also, *Cook v. Jennings*, 18 S. E. 640, 643, 18 S. C. 204.

Judgments are interlocutory or final. Interlocutory judgments are such as are given in the progress of a cause upon some plea, proceeding, or default which is only intermediate, and does not finally determine or complete the suit, but contemplates further proceedings for that purpose. Final judgments are such as at once finish the proceedings by declaring that the plaintiff has or has not entitled himself to the redress he sought, and by ascertaining what amount he shall recover. Decrees are also either interlocutory or final, and their character is to be ascertained by an application of the same test. *Elliott v. Mayfield*, 3 Ala. 223, 226, 229; *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 41 Mass. (24 Pick.) 296, 300.

The distinction between final judgments and interlocutory judgments consists in the final determination of the rights of the parties in an action, and such a determination of those rights of the parties in an action as are not complete and final, needing some

other adjudication by the court, is an interlocutory judgment. *Cook v. Jennings*, 18 S. E. 640, 643, 40 S. C. 204.

If a judgment so completely fixes the rights of the parties as that the court has nothing further to do, then it is final. If anything remains to be done by the court before the rights of the parties are fixed, it is interlocutory. *Valentine v. Central Nat. Bank* (N. Y.) 10 Abb. N. C. 188, 191 (citing *Freem. Judgm.* § 12).

A final judgment as contrasted with an interlocutory judgment, is one which determines the particular cause. *Allen v. City of Savannah*, 9 Ga. 286, 293.

The distinction between final and interlocutory judgments is familiar to every lawyer. Interlocutory judgments are such as are given in the middle of a cause, and do not finally determine and complete the suit. Final judgments are such as at once put an end to the action. *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 41 Mass. (24 Pick.) 296, 300.

The term "final decree," as used in Act March 29, 1832, § 59 (P. L. 213), declaring that no appeal shall be allowed from a definitive sentence or decree of the orphans' court unless the same be entered and security given within three years after the final decree, means a decree which is a final result in the case. "In one sense, every decision or order of a court during the progress of a case may be called final. That particular step may not be retraced. Yet in law they are intermediate or interlocutory, but not definitive. A writ of error or an appeal will not lie at each stage of the proceeding. However much an intermediate decision or order may effect the result, it is not subject to review until that final result has first been reached." An order awarding an inquest of partition is not a final decree, for it is not necessarily any more than the first step toward a valuation or appraisal, having none of the characteristics of a decree of sale, disturbing no right, settling no title, and authorizing no sale. *Gesell's Appeal*, 84 Pa. 238, 239.

The word "final," as applied to a judgment or judiciary award, has a technical fixed or appropriate meaning. It denotes the essential character, not the mere consequence, of the order. It is used in contradistinction to "interlocutory." It was insisted on the argument that the decision of the court below, in refusing to allow a certiorari, was in the nature of a final judgment, because the party aggrieved was hereby deprived of redress, having no other means of relief. But in this sense many interlocutory orders are final; as an order for bail, fixing the amount of bail, refusing a new trial, refusing to open a judgment obtained by sur-

prise, or to correct an assessment. These, and a multitude of orders of a similar character, made in the progress of a suit, which are merely interlocutory, and from which it is conceded no writ of error will lie, are final in the sense used by counsel. They conclude the party. He has no other means of redress. But they are confessedly not final in the technical and appropriate sense of the term. *State v. Wood*, 23 N. J. Law (3 Zab.) 560, 561.

#### **Stipulation for judgment distinguished.**

The distinction is obvious between a final decree and a stipulation upon which a decree may be entered. The sanction of the court, even though a formal supplement to the agreement of the parties, is necessary to give such agreement the effect of a final decree. *Roemer v. Neumann* (U. S.) 26 Fed. 332, 334.

#### **Judgment or order for alimony.**

A judgment is the final sentence of the law in an original suit. An order in a divorce proceeding directing the payment of alimony is not a final judgment. In *re Kelsey*, 43 Pac. 106, 108, 12 Utah, 393.

A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to the question. Thus, a judgment for alimony pendente lite is a final judgment. *Daniels v. Daniels*, 10 Pac. 657, 661, 9 Colo. 133 (citing *Sharon v. Sharon*, 67 Cal. 185, 7 Pac. 456); In *re Smith's Estate*, 55 Pac. 249, 122 Cal. 462.

#### **Decree or judgment of affirmance.**

A final judgment is a judgment which concludes the parties as regards the subject-matter in controversy in the tribunal pronouncing it. It is called "final" in contradistinction to "interlocutory." An order of the general term affirming an order of the special term denying a motion to set aside a judicial sale made under a judgment is a final one. *King v. Platt* (N. Y.) 3 Abb. Prac. (N. S.) 174, 180.

A defendant in the Circuit Court of the United States gave bond, with a surety, conditioned to keep and perform the final decree in the cause and pay all sums which might therein and thereby be decreed to be paid by him. The Circuit Court rendered a final decree against him for damages and costs, from which he appealed to the Supreme Court of the United States, and gave bond, with a different surety, to pay all such costs as that court should decree to be paid to the plaintiff upon affirmance of the decree of the Circuit Court. The Supreme Court affirmed that decree, with costs and interest; and, pursuant to its mandate, the Circuit Court decreed that its own former decree be affirmed, with costs and interest,

and that execution issue for the sum found due by that decree, with interest from its date, and for the further amount of the costs decreed by the Supreme Court and the costs taxed in the Circuit Court upon the return of the mandate. Held, that this was the final decree in the cause, within the meaning of the first bond. *Jordan v. Agawam Woolen Co.*, 106 Mass. 571, 572.

The term "final judgment," as intended by the Revised Statutes of 1899, relating to writs of error for review of judgments recovered against the United States, is the judgment as it stands after its affirmance by the Supreme Court, and after the court below has rendered such judgment as the mandate of the court requires. *Cochran v. Schell*, 2 Sup. Ct. 827, 830, 107 U. S. 625, 27 L. Ed. 543.

The term "final order" applies to an order of the appellate division affirming an order granting a property owner's application to vacate an assessment for a sewer construction, which order finally determines the special proceedings in which such order is made, and releases the owner from all liability on account of the assessment, and therefore the city may take an appeal therefrom. In *re Munn*, 58 N. E. 881, 884, 165 N. Y. 149.

#### Judgment or order allowing or dismissing appeal.

A judgment dismissing an appeal from an award of commissioners in condemnation proceedings is final within Gen. St. 1878, c. 34, § 29, as amended by Laws 1881, c. 57, requiring a railway corporation to pay an award within 60 days after final judgment. *Minneapolis & N. W. R. Co. v. Woodworth*, 21 N. W. 476, 477, 82 Minn. 452.

An order of the Supreme Court of a territory dismissing a writ of error to a district court because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law, is not a final judgment within the meaning of the statute regulating writs of error and appeals to the Supreme Court of the United States. *Crawford v. Haller*, 4 Sup. Ct. 697, 111 U. S. 796, 28 L. Ed. 602.

A final order from which error will lie for its review is defined by Code Civ. Proc. § 581, as an order affecting a substantial right in an action, and such an effect determines the action and prevents a judgment. An order of the district court which, in effect, determines that an appeal from an inferior court had been in due time allowed by law for such purpose, and places the case upon its docket for adjudication, is not a final order. *Edgar v. Keller*, 61 N. W. 587, 588, 48 Neb. 263.

The dismissal of an appeal by a court on appeal, because of the failure to enter the

appeal within the time prescribed by law is a final judgment, and therefore the surety on a recognizance given to obtain an appeal from the judgment is liable. In *re Mair's Estate* (Pa.) 12 Phila. 2, 8.

#### Order in assignment proceedings.

In *Flint v. Powell*, 10 Colo. App. 69, 50 Pac. 46, it was said: "A 'final judgment,' as it has been defined by the courts, is an adjudication which shall completely settle, end, and determine the rights of the parties, and interlocutory orders made in an assignment proceeding requiring the assignee to recognize certain persons as attorneys for the state have not the form or effect of final judgments." In *re People's Sav. Bank* (Colo.) 71 Pac. 897.

#### Order of commitment.

Rev. St. 1881, § 1119, which forbids an inquiry by habeas corpus into the legality of a final judgment of a court of competent jurisdiction ordering a defendant to be held in custody, does not include an order of a justice of the peace in committing a defendant to jail in default of a peace bond. *Smelzer v. Lockhart*, 97 Ind. 315, 319.

#### Decree or judgment upon condition.

A final judgment is one which finally decides and disposes of all the merits of the case, and reserves no further question or direction for the future or further action of the court. *Brown v. Smelting Co.*, 32 Kan. 528, 4 Pac. 1013. Thus a judgment against a corporation, which ordered it to issue certificates of stock, and place them in the hands of the clerk of the court, and finds the value of the stock to be a certain sum, and directs that in default of the defendant's compliance with the order for the issuance and delivery of the certificates the plaintiff have judgment for the value of the stock, is conditional, and not final. *Consolidated Mining & Prospecting Co. v. Huff*, 63 Pac. 442, 443, 62 Kan. 405.

In an action under a statute providing that one may file a petition averring that he believes that the defendant makes some claim adverse to him, and praying that he be summoned to show cause why he should not bring action to try the alleged title, and that the defendant in such a case shall by answer show cause why he should not be so required to bring an action to try title, and that the court shall make such judgment as it may deem just, a judgment that the defendant bring suit within a certain time, or be forever barred, is a final judgment from which an appeal will lie. *Bredell v. Alexander*, 8 Mo. App. 110, 112.

In an action by an express company against a railway company to require the railway company to do the express com-

pany's business on the payment of lawful charges, a decree requiring the railway company to do so is a final decree. *St. Louis, I. M. & S. R. Co. v. Southern Express Co.*, 2 Sup. Ct. 6, 8, 108 U. S. 24, 27 L. Ed. 638.

A final judgment is one which leaves nothing to be judicially determined between the parties. It must finally include all the necessary parties on the merits, and finally dispose of the subject-matter in controversy; while a judgment is interlocutory which finds the general equities, and which retains the action upon the docket for further adjudication. Thus, where a judgment required that, before appellant should be discharged from liability to appellees, he should pay to them not only a certain balance reported by the commissioner, but also the pro rata upon his debts due from an estate, which was based upon the collectibility of another obligation, said judgment was not a final judgment. *Stephens v. Blackburn's Trustee (Ky.)* 46 S. W. 680, 681.

#### **Order confirming report.**

An order of the district court confirming the report of commissioners appointed under the railroad law to condemn land for railroad purposes is a final judgment within the meaning of the practice act, allowing interest on final judgment. *Phillips v. Pease*, 39 Cal. 582, 584.

An order of the chancellor in a foreclosure suit confirming the master's report of the appraisal, set-off, and conveyance of the mortgaged premises under the appraisal law is a final order from which an appeal lies to the Supreme Court. *Benedict v. Thompson (Mich.)* 2 Doug. 299.

In a case of partition, a decree which absolutely confirms the report of the commissioners by which the land was partitioned and allotted by metes and bounds, with an accompanying plot to the respective parties complainant and defendant, is a final decree. *Bull v. Pyle*, 41 Md. 419, 421.

#### **Judgment for costs.**

A final judgment should show in intelligible language a determination of the rights of the parties to the action that relief has been granted, or that the defendant has been dismissed without day. A mere judgment for costs in favor of defendant is not a final judgment. To be final, a judgment must end the particular suit in which it is entered. *Dusing v. Nelson*, 2 Pac. 922, 923, 7 Colo. 184.

To constitute a final judgment, there must be a disposition of the subject-matter, and not merely of an incident. The form of the judgment is immaterial, but in substance it must show intrinsically that the matters in the record had been determined in favor of one of the litigants, or that rights

of the parties in litigation had been adjudicated. The costs are regulated by statute, and are an incident or appendage of the judgment, and generally are recoverable by the victor in the contest. So that, where a judgment is in favor of defendants against plaintiffs for costs of suit, it does not distinctly show that the rights of the parties have been finally determined so as to constitute a final judgment. *Butte & B. Consol. Min. Co. v. Montana Ore Purchasing Co.*, 69 Pac. 714, 27 Mont. 152.

A final judgment is one which disposes of the matters in litigation between all the parties before the court when the judgment is rendered. A judgment for costs only for or against any one of the parties plaintiff or defendant is not a final judgment. A judgment not disposing of the subject-matter of the controversy as to some of the parties who appeared is not a final judgment. *Bovet v. Holzgraft*, 23 S. W. 1014, 1015, 5 Tex. Civ. App. 141.

A judgment for costs merely, without words showing that the subject-matter of the controversy has been disposed of, is not a "final judgment" from which an appeal may be taken. *Bradshaw v. Davis*, 8 Tex. 344.

A judgment for costs alone, the merits not being adjudicated, though entered for the defendant after the jury have found a verdict in his favor, is not such a final judgment as will support a writ of error. *Hall v. Patterson (Fla.)* 83 South. 982.

A judgment for costs merely in favor of the defendant is not a final judgment, and no appeal lies therefrom. *Riddle v. Yates*, 7 N. W. 289, 10 Neb. 510.

#### **Order in contempt proceedings.**

An order in a proceeding declaring a party guilty of contempt, and requiring him to indemnify the other party to the amount he had been injured thereby, is a "final order" affecting a substantial right made in a special proceeding. In *re Day*, 34 Wis. 638; *State v. Lonsdale*, 48 Wis. 348, 4 N. W. 390. Thus, where a party refuses to answer interrogatories propounded to him in an examination before a commissioner, and such refusal is certified to the county court, and an order is made by the court directing a party to appear before a commissioner on a certain notice therein specified and answer the interrogatories which he has refused to answer, and also to pay certain costs and expenses, such an order is a final order affecting a substantial right made in a special proceeding, and therefore appealable. *Cleveland v. Burnham*, 17 N. W. 126, 127, 60 Wis. 16.

A final order which may be reviewed by the appellate court is defined by the Code

to be an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment is a final order. A final order in a contempt proceeding, where affecting a substantial right, and made in a special proceeding, is therefore reviewable. *Larimie Nat. Bank v. Steinhoff*, 53 Pac. 299, 301, 7 Wyo. 464.

An order which discharges a person having property of a judgment debtor from process for contempt for refusing to answer questions properly put on examination in supplementary proceedings necessarily arrests such proceedings, and is a final order affecting a substantial right, within subdivision 10, § 2, c. 264, Laws 1860, providing that such orders shall be appealable. *Ballston Spa Bank v. Marine Bank of Milwaukee*, 18 Wis. 490, 491.

#### **Judgment or order by default or on plea in abatement.**

A default judgment is a final judgment within the provision of the practice act allowing appeal from a final judgment within one year after its rendition, though in the case of a default judgment the defendant has an alternative remedy to move to set the judgment aside. *Hallock v. Jaudin*, 34 Cal. 167, 172.

A judgment on a plea of abatement is not final in the sense that it may be reviewed before the final determination of the cause. *Fitzpatrick v. Flannagan*, 1 Sup. Ct. 869, 379, 106 U. S. 648, 27 L. Ed. 211.

An order which was based upon the question of jurisdiction, and ended the controversy between the parties litigant, so that neither party could proceed further, and was such a determination of the proceedings as, undisturbed, will operate as a power to any similar application founded upon the existing facts, is a final order. In *re Auerbach's Estate*, 65 Pac. 468, 489, 23 Utah, 529.

#### **Order relating to demurrer.**

An order overruling a demurrer to an interplea is not a final judgment. *Robinson v. Belt* (U. S.) 56 Fed. 328, 329, 5 C. C. A. 521.

A judgment of the General Term of the city of New York merely affirming a judgment of the Special Term sustaining a demurrer to a complaint which does not finally put the case out of court, but leaves the plaintiff to pursue the pleadings necessary to perfect his recovery, is not a final judgment. *Fuller v. Tuska*, 17 N. Y. Supp. 356, 357.

The direction or order of the court overruling the demurrer of defendants and pro-

viding that plaintiff have judgment unless defendants within 20 days, etc., pay costs and serve an answer, is not a final judgment. *Garner v. Harmony Mills*, 45 N. Y. Super. Ct. (13 Jones & S.) 148, 152.

The words "final judgment," as used in Code Civ. Proc. § 939, allowing an appeal from a final judgment, do not include a judgment in an action against a justice of the peace and his sureties for costs in favor of the sureties rendered on sustaining a demurrer interposed by them. *Nolan v. Smith*, 70 Pac. 166, 137 Cal. 360.

#### **Decree or judgment of dismissal or nonsuit.**

A final decree is one where the court directs the cause to be struck from the docket after disposing of the money under its control in the same decree, for it means, in the opinion of the court, that the cause is ended, that no further action of the court therein is necessary. It is, and, in the nature of things, must be, an adjudication that everything has been done in the cause that the court intends to do, and hence there is no longer any necessity of retaining it on the docket. The unconditional order striking from the docket, appended to such a decree, absolutely and unequivocally imports judicial determination and a final disposition of the pending cause. The decree may be erroneous, but the error does not render it less final. *Battaille v. Maryland Hospital for the Insane*, 76 Va. 68, 69.

A judgment of nonsuit is a final judgment within the statute authorizing appeals from final judgments. *Lalande v. McDonald*, 18 Pac. 347, 348, 2 Idaho (Hasb.) 307; *Ross v. Evans*, 14 N. W. 897, 898, 30 Minn. 206.

A judgment of nonsuit is a final disposition of the suit in which it is entered, but does not ordinarily bar a subsequent suit for the same cause of action, and hence is not a final disposition of the subject-matter in litigation, or a final judgment so as to be appealable. The term "final judgment" is sometimes used to signify a final disposition of the particular suit and sometimes a final determination of all litigation on the subject-matter. *Bowne v. Johnson* (Mich.) 1 Doug. 185, 186.

In case of an involuntary nonsuit the judgment is a final judgment so far as to be a basis for a writ of error. Citing *Voorhees v. Woodhull's Ex'rs*, 33 N. J. Law (4 Vroom) 482. Judgment of nonsuit ends only the suit on which it is entered. *Beckett v. Stone*, 36 Atl. 880, 881, 60 N. J. Law, 23.

The words "final judgment," as used in Rev. St. c. 120, § 204, providing for an appeal from the final judgment of a justice of the peace, mean the final determination of the rights of the parties in the action.

Under this definition a judgment of dismissal on the awarding costs to either party is a final judgment from which an appeal may be taken. *Collins v. Wagoner*, 20 Wis. 48, 50.

Voluntary dismissal by plaintiff of a suit in which an injunction is issued is a final determination of that suit. *Brown v. Gale-na Mining & Smelting Co.*, 4 Pac. 1013, 1015, 32 Kan. 528.

A cross-bill, like all other bills, must contain within itself, if true, a distinct cause of equitable relief. The cross-bill and original bill are distinct suits, which proceed side by side, the hearing of one being delayed until the hearing of the other. So a decree dismissing a cross-bill on demurrer is a final decree that disposes of the whole case of such defendant, and puts him out of court, and is such a final decree that an appeal therefrom will lie. *Nichol v. Dunn*, 25 Ark. 129, 131.

An order of the court sustaining a motion for nonsuit is a final decision in an action. *Frost v. O'Neil*, 2 Pac. 315, 316, 4 Mont. 226.

A judgment of dismissal discharging a prisoner in a criminal case and releasing his bail, entered after hearing arguments on a plea to the jurisdiction of a court, is a final judgment. *State v. Booth*, 59 Pac. 553, 554, 21 Utah, 88.

Under rules of the Supreme Court providing that applications for rehearing will be entertained only where the judgment already entered disposes finally of the case, the granting of a motion to dismiss would be a final, and not an interlocutory, judgment, or it would have been the disposing finally of the case; but the denial of such a motion is only an interlocutory judgment. *Gagneaux v. Desonier*, 33 South. 561, 563, 109 La. 460.

A judgment of dismissal not awarding costs is a "final judgment," from which an appeal lies. *Stoppenbach v. Zohrlaut*, 21 Wis. 335, 336.

#### **Decree in habeas corpus proceedings.**

The last or final determination of a tribunal being the proper subject for a writ of error according to *Yates v. People*, 6 Johns. 337, a decree in habeas corpus proceedings for the custody of an infant is reviewable on writ of error. *McKercher v. Green*, 58 Pac. 406, 407, 13 Colo. App. 270.

#### **Decree, judgment, or order in injunction proceedings.**

In cases of injunction a final judgment is a final decision which determines the question whether the injunction ought or ought not to have been granted. *Bemis v. Gannett*, 8 Neb. 236.

A judgment dissolving a temporary injunction, but not otherwise disposing of the subject-matter of litigation, is not a final judgment, incapable of supporting an appeal. *International & G. N. R. Co. v. Smith County*, 58 Tex. 74; *Moses v. City of Mobile*, 82 U. S. (15 Wall.) 387, 390, 21 L. Ed. 176; *Fretwell v. Wayt (Va.)* 1 Rand. 415, 417; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 320.

Act Cong. 1789, § 25, allowing appeals from final decrees of lower courts, does not include a decree of a higher court of equity of a state affirming the decretal order of an inferior court of equity of the same state refusing to dissolve an injunction granted on the filing of the bill. *Gibbons v. Ogden*, 19 U. S. (6 Wheat.) 448, 5 L. Ed. 302.

An order refusing a temporary injunction is not a final decision such as to authorize an appeal. *Mahncke v. City of Tacoma*, 23 Pac. 804, 1 Wash. St. 18.

The decision of the district judge awarding a perpetual injunction against a treasury warrant of duties is a final decree within Act Cong. March 3, 1803, which allows an appeal from all "final judgments" or decrees of the District Court to the Circuit Court. *Porter v. United States (U. S.)* 19 Fed. Cas. 1078, 1077.

#### **Decree, judgment, or order as to intervention.**

A decree is final when it determines the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined. Where intervention under claim of a prior lien is dismissed, the order as to the intervener is final. *Easton v. Houston & T. C. Ry. Co. (U. S.)* 44 Fed. 7, 9.

Final judgment, within the meaning of *Burns' Ann. St. 1894*, § 644, giving an appeal from the final judgment, is defined to be such a judgment or order as makes final disposition of the case. The term is applicable to a judgment refusing to permit a creditor to intervene, in which a receiver has been appointed. *Voorhees v. Indianapolis Car & Mfg. Co.*, 39 N. E. 738, 739, 140 Ind. 220.

The decision of a Circuit Court on a petition of intervention in a foreclosure suit sustaining the intervener's claim is a final decision within the provision of the act giving the Circuit Court of Appeals jurisdiction to review final decisions of the Circuit Courts. *Central Trust Co. v. Marietta & N. G. Ry. Co. (U. S.)* 48 Fed. 850, 860, 1 C. C. A. 116.

An order of the Appellate Division modifying an order of a Special Term in regard to the allowance and payment of a claim

against a receiver in foreclosure filed by the intervenor is not a final order in a special proceeding from which an appeal to the Court of Appeals lies as a matter of right. *Guarantee Trust & Safe Deposit Co. v. Philadelphia R. & N. E. R. Co.*, 54 N. E. 575, 576, 160 N. Y. 1.

#### Order for judgment.

An order for judgment is not a final judgment. *Macnevin v. Macnevin*, 63 Cal. 188.

#### Judgment of particular courts.

The words "final judgment," as used in an act providing that writs of error from or appeals to the Supreme Court shall lie to review every "final judgment" of the Court of Appeals, are used for the purpose of distinction between the ultimate judgment of that court in a given case and a judgment that is merely interlocutory, so that the right to review remains irrespective of whether the judgment on appeal is one of affirmance or reversal. *Colorado Springs Live Stock Co. v. Godding*, 38 Pac. 884, 885, 20 Colo. 71.

Under a statute providing that in actions to recover lands and tenements, the defendant shall, within 48 hours after final judgment, or during the term of the court in which the same shall be rendered, file a complaint against the plaintiff for so much money as the lands and tenements are so made better, etc., it is held that the term "final judgment" means judgment of the circuit court. *Garrison v. Dougherty*, 18 S. C. 486, 488.

A final judgment has a well-defined meaning in the law, and both at equity and law finality is a condition of appeal. Although subject to reviews and annulment or modification, the judgments of a justice of the peace are known as final as contradistinguished from interlocutory adjudication in case no appeal is taken, and not when appealed from. *Kayser v. Farmers' & Mechanics' Bank*, 74 N. W. 181, 115 Mich. 688 (citing *Erickson v. Duluth*, S. S. & A. Ry. Co., 105 Mich. 415, 63 N. W. 420).

#### Order relating to parties.

A final judgment is one that disposes of the case either by dismissing it before a hearing is had upon the merits or after trial by rendering judgment either in favor of the plaintiff or defendant. But no judgment or order which does not determine the rights of the parties in the cause, and preclude further inquiry as to their rights in the premises, is a final judgment. An order substituting a party for the plaintiff in an action is not a final order or judgment, and not conclusive upon the parties as to the matter of the assignment of the cause of action. *Hall v. Vanier*, 7 Neb. 397, 398.

#### Preliminary or special order or decree.

A "final judgment" concludes the action; all others are interlocutory. Where, on a judgment in a lower court, money deposited with the court was ordered turned over to the successful party, and on appeal such judgment was reversed, and an order of restitution made, the order of restitution is not a final judgment, but a mere interlocutory order, having for its object the preservation of the fund, so that at the end of a litigation it may be awarded to the successful party. *Devlin v. Hinman*, 57 N. Y. Supp. 663, 665, 40 App. Div. 101.

The term "final decree" includes an order purporting to be a mere preliminary order, and made in the inception of the case, and upon ex parte affidavits, if in reality it disposes absolutely and finally of every matter which is involved in the suit. Such a decree is invalid, as a final decree can only be made upon final hearing. *Pennsylvania R. Co. v. National Docks & N. J. J. C. Ry. Co.*, 32 Atl. 220, 221, 58 N. J. Eq. (8 Dick.) 178.

Decrees which merely establish the principles which are to control a commissioner in the stating of accounts which were necessary in order to enable the court to pass finally upon the rights of the parties is not final, but interlocutory. *Trammell v. Ashworth*, 39 S. E. 593, 595, 99 Va. 646.

An order directing the production of written instruments for inspection or for use as evidence on a trial is not a final judgment. In *Pfeiffer v. Crane*, 89 Ind. 485, it is said: "A final judgment is the evident determination of the court upon the whole controversy in action. An order of the court made in the progress of a case requiring something to be done or observed, but not determining a controversy, is an interlocutory order, and is sometimes called an interlocutory judgment." *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 580, 107 Ind. 9.

A final order or decree is one that disposes of the merits of the case, that settles the rights of the parties under the issues made by the pleadings. An order granting leave to amend the return of service is not a final order or decree. *Nelson v. Brown*, 10 Atl. 721, 722, 59 Vt. 600.

The order of seizure and sale called "executory process," made in Louisiana, when the mortgagee imports a confession of judgment, is in substance a decree of foreclosure and sale, and therefore a final decree. *Marin v. Lalley*, 84 U. S. (17 Wall.) 14, 18, 21 L. Ed. 596.

An order directing the party to appear before a commissioner and answer such interrogatories which he had previously refused to answer on an examination before a com-



missioner, and also to pay certain costs and expenses, is a "final order effecting a substantial right," made in a special proceeding, within Rev. St. p. 759, § 3069, subd. 2. *Cleveland v. Burnham*, 17 N. W. 126, 127, 60 Wis. 16.

An order granting or refusing a change of venue is not a final order, such as to authorize an appeal. *Allerton v. Eldridge*, 10 N. W. 252, 253, 56 Iowa, 709; *Mercer v. Glass' Ex'r*, 12 S. W. 194, 195, 89 Ky. 199.

An order of a justice of the peace certifying a case to the district court of his county for trial upon the ground that the pleading showed that the title to the land is in dispute, is not a final order, within the meaning of the Code, subject to review upon petition in error, since it simply transfers the action to another court, and the action is still pending between the parties for final trial and judgment upon its merits. *Peyton v. Peyton*, 9 Pac. 479, 481, 34 Kan. 624.

**Decree, judgment, or order in probate proceedings.**

The term "final judgment," as used in the Code, providing that appeals may be taken from all final judgments, applies only to those judgments known at common law as final judgments, and do not include formal judgments and orders in probate proceedings, which must be granted under another subdivision of the Code. In *re Tuohy's Estate*, 58 Pac. 722, 723, 23 Mont. 305.

An appeal does not lie from an order permitting the amendment of a statement used on motion for a new trial from a judgment refusing the probate of a will, as such judgment is not a final judgment within the meaning of Code Civ. Proc. § 963, subd. 2, providing that an appeal will lie from any special order made after final judgment. In *re Smith's Estate*, 33 Pac. 744, 745, 98 Cal. 636.

A decree of distribution by the district court in a probate proceeding pending before it is a final judgment within the meaning of the Code, which provides that an appeal from a final judgment in an action or proceeding commenced in the court may be taken within one year after the rendition of the judgment. In *re McFarland's Estate*, 26 Pac. 185, 189, 10 Mont. 445.

The expression "special order made after final judgment," as used in Code Civ. Proc. § 963, providing for an appeal from any special order made after final judgment, refers to the final judgment mentioned in subdivision 1 of the said section, to wit, "A final judgment in an action or special proceeding commenced in a superior court, or brought in a superior court from another court." An order of the superior court vacating a decree of distribution and settlement of the final ac-

count of the executor is not a special order made after the final judgment. In *re Calahan's Estate*, 60 Cal. 232, 233.

A final determination of the rights of parties to a special proceeding in a surrogate's court is a final order. In *re Prentice*, 55 N. E. 275, 160 N. Y. 568.

An order directing an administrator to institute proceedings for the sale of the land of his intestate to pay debts is not a final order from which an appeal can be taken. *McCollister v. Greene County Nat. Bank*, 49 N. E. 734, 735, 171 Ill. 608.

An order of the probate court admitting a will to record is within the meaning of the act of 1875, providing that appeals may be taken to the circuit court from all final orders and judgments of the probate court. *Hogane v. Hogane*, 22 S. W. 167, 168, 57 Ark. 508.

An order denying an application to open a decree of the final judicial settlement of the accounts of an executor is not an order finally determining such special proceeding so as to be appealable to the Court of Appeals under Code Civ. Proc. § 190, as the decree itself is the final order. In *re Small*, 52 N. E. 723, 724, 158 N. Y. 123.

Where, upon an appeal to the court of common pleas from an order refusing to admit a will to probate, that court makes a like order of proposal, the proponent cannot again propound the alleged will for probate, so that on the question such order is a final order, within Rev. St. § 6707, providing that an order affecting a substantial right made in a special proceeding is a final order. *Missionary Soc. of Methodist Episcopal Church v. Ely*, 47 N. E. 537, 538, 56 Ohio St. 405.

**Order relating to receivers.**

A final judgment from which an appeal will lie under Const. art. 8, § 9, is that adjudication which finally disposes of the subject-matter of the litigation on the merits of the case. An order appointing a receiver pendente lite is an interlocutory, and not a final, judgment. *Popp v. Daisy Gold Min. Co.*, 63 Pac. 185, 22 Utah, 457.

An order removing a receiver is not a final order, decree or judgment. *Farson v. Gorham*, 7 N. E. 104, 105, 117 Ill. 137.

An order directing a receiver to distribute the proceeds of the estate of the insolvent equally among all his creditors, and setting aside the liens of attaching and execution creditors, is a final order affecting a substantial right in a special proceeding, and appealable. In *re Spencer*, 18 N. W. 48, 29 Minn. 269.

A bill was filed by an auditor to wind up a corporation and put it in liquidation.

and a decree was entered, after examining the proofs on hearing, in substance that the corporation was liable, and had subjected itself to such proceeding. A preliminary injunction was declared to be perpetual, and the previous appointment of a receiver was affirmed, and orders made directing steps to be taken to wind up the corporation and adjust its affairs. Held, that such a decree was a final decree, from which a writ of error would lie. The remaining proceedings to be had were simply an enforcement of the decree. *Chicago Life Ins. Co. v. Auditor of Public Accounts*, 100 Ill. 478, 483.

**Report or finding of referee.**

A report or finding of a referee is not a final judgment from which an appeal may be taken, but may more properly be deemed a finding upon the law and facts submitted to him for the information of the court appointing him, upon which the court may properly act as upon the verdict of a jury or an award of arbitrators, and pronounce judgment. *Chambers v. Savage*, 13 Fla. 585, 586, 589.

**Judgment or order of reversal and remand.**

On an appeal from a judgment recovered on a bond given by a vendue master as principal and his sureties, the judgment against the principal was reversed because of his discharge in bankruptcy, while the judgment against his sureties was affirmed. On an appeal from those judgments, it was insisted that the appeal should be dismissed because the judgments were not final. Both of such judgments were final, and may be reviewed on writ of error. *O'Dowd v. Russell*, 81 U. S. (14 Wall.) 402, 404, 20 L. Ed. 857.

A judgment of the Supreme Court of a state which reversed and modified the judgment below, and did not permit further proceedings in the inferior court, if the defendants consented to the modification directed, constituted, when such consent was given, a final judgment within the meaning of the act of Congress as to the jurisdiction of the Supreme Court of the United States over final judgments of state courts. *Atherton v. Fowler*, 91 U. S. 143, 146, 23 L. Ed. 265.

Judiciary Act, § 25, providing that a writ of error may issue to the United States Supreme Court from the highest court of the state on final judgment in certain specified cases, cannot be construed to include a judgment of reversal rendered by the state Supreme Court in a case under such circumstances as that the case must go back to be tried on its merits. *Rankin v. State of Tennessee*, 78 U. S. (11 Wall.) 380, 381, 20 L. Ed. 175.

A judgment of an appellate court reversing the judgment of the trial court and remanding the cause for further proceedings is

not a final judgment, as that term is used in federal appellate procedure. *McLeod v. Graven*, 79 Fed. 84, 24 C. C. A. 449 (citing *Union Mut. Life Ins. Co. v. Kirchoff*, 160 U. S. 374, 16 Sup. Ct. 318, 40 L. Ed. 461; *Werner v. City Council of Charleston*, 151 U. S. 360, 14 Sup. Ct. 356, 38 L. Ed. 192; *Brown v. Baxter*, 146 U. S. 619, 13 Sup. Ct. 260, 36 L. Ed. 1106; *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608, 12 Sup. Ct. 876, 36 L. Ed. 834; *Rice v. Sanger*, 144 U. S. 197, 12 Sup. Ct. 664, 36 L. Ed. 403; *Johnson v. Keith*, 117 U. S. 199, 6 Sup. Ct. 669, 29 L. Ed. 888; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 78; *Houston v. Moore*, 16 U. S. [3 Wheat.] 433, 4 L. Ed. 428); *Callahan v. Ball*, 64 N. E. 295, 297, 197 Ill. 318; *Turner v. Browder*, 57 Ky. (18 B. Mon.) 825, 826. A judgment reversing that of an inferior court and awarding a new trial, is not a final judgment. *Houston v. Moore*, 16 U. S. (3 Wheat.) 433, 4 L. Ed. 428. No judgment is final which does not terminate the litigation between the parties. A judgment reversing the judgment of an inferior court, and remanding the cause, is not a final judgment. *St. Claire County v. Livingston*, 85 U. S. (18 Wall.) 623, 21 L. Ed. 813; *Winn's Heirs v. Jackson*, 25 U. S. (12 Wheat.) 185, 136, 6 L. Ed. 577.

A remanding order is not a final judgment or decree within Act Cong. Feb. 25, 1889, providing that an appeal or writ of error will lie in the Supreme Court in all cases where a final judgment or decree is rendered in a Circuit Court involving a question of the jurisdiction of the court. *Gurnee v. Patrick County*, 11 Sup. Ct. 84, 35, 137 U. S. 141, 34 L. Ed. 601; *Texas Land & Cattle Co. v. Scott*, 11 Sup. Ct. 140, 137 U. S. 436, 34 L. Ed. 730; *Richmond & D. R. Co. v. Thouron*, 10 Sup. Ct. 517, 518, 134 U. S. 45, 33 L. Ed. 871; *Morey v. Lockhart*, 8 Sup. Ct. 65, 66, 123 U. S. 56, 31 L. Ed. 68; *Riser v. Southern Ry. Co.* (U. S.) 116 Fed. 1014.

The words "final decision" cannot be held to include a remand order, first, because it is not a decision, but a refusal to hear and decide; and, second, because it is not final—that is, it is not decisive of the cause. In re *Coe* (U. S.) 49 Fed. 481, 482, 1 C. C. A. 326.

A judgment of the circuit court reversing the judgment of a county court dismissing the application for a new road is a final order or judgment, and an appeal may be prosecuted from it to the Court of Appeals. *Helm v. Short*, 70 Ky. (7 Bush) 623, 626.

Rev. St. § 8707, provides that an order affecting "a substantial right in an action when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is

a final order," etc. Held, that where, on an appeal from the court of common pleas to the district court, the court adjudged that the judgment of the court of common pleas on a demurrer be reversed, with costs, and that the plaintiffs in error be restored to all things which they had lost by reason of the judgment, but did not remand the cause to the court of common pleas except to have its judgments for costs carried into effect, there was no final judgment or order rendered on which an appeal could be taken to the Supreme Court. *Bolles v. Stockman*, 42 Ohio St. 445, 448.

#### Order of revival.

A decision is final in the sense in which an appeal from it is permitted when it decides and disposes of the whole merits of the cause as between the parties to the appeal, reserving no further questions or directions for the future judgment of the court, so that to bring the cause again before the court for decision will not be necessary. An order entered in the original cause reviving the suit in the name of complainant's administrator is not a final appealable decree. *Mackaye v. Mallory* (U. S.) 79 Fed. 1, 2, 24 C. C. A. 420.

#### Order in special proceedings.

Orders entered in a cause at the instance of either party before it is finally determined are interlocutory. But an order which puts an end to a proceeding in the court in which it is pending, and is a judicial determination of the rights of the parties in so far as they are involved in that proceeding, is a final judgment. The term "final judgment," as decided in *Martin v. Simpkins*, 20 Colo. 438, 38 Pac. 1092, includes orders and decisions in special proceedings as well as judgments in ordinary civil and criminal actions, provided such orders or decisions be made by the court in a proceeding instituted and pending before the court. An order denying an application for permission to foreclose a trust deed is final, though it expressly provides that it is without prejudice to the right to make a second application. *Smith v. McCourt*, 45 Pac. 239, 242, 8 Colo. App. 146.

The term "final decree," when applied to a suit by a trustee against a beneficiary for a construction of the trust and a settlement thereof, only applies to a decree of settlement, and not to prior decrees adjudicating only a part of the rights of the parties. The latter decrees are interlocutory, and come up for review on appeal from the final decree. *Marks v. Semple*, 20 South. 791, 793, 111 Ala. 637.

An application to be made a party to an action being regarded as a special proceeding, when the application is denied the

order to that effect is necessarily final, and hence appealable. *Morse v. Stockman*, 26 N. W. 176, 178, 65 Wis. 36.

Where, in attachment, an order is entered adjudging the rights of the parties, but afterwards intervening creditors filed petitions, and defendant moves to quash the attachment, the order entered on the motion to quash is the final order, and not the one first entered. *Offending v. Ford*, 12 S. E. 1, 86 Va. 917.

An order of the circuit court forever disbarring an attorney and prohibiting him from practicing law in the courts of these states is a final order affecting a substantial right made in a special proceeding. In *re Orton*, 11 N. W. 584, 54 Wis. 379.

An order of the district court requiring an attorney to pay money alleged to have been collected by him into court for the use of the plaintiff, and, in default, that execution issue therefor, is a final order, since it directs the payment unconditionally of a definite sum of money within a specified time, on pain of its enforcement by a general execution. It completely fixes the rights of the parties to it, leaving nothing whatever for the court to do further in that regard. *Baldwin v. Foss*, 16 N. W. 480, 14 Neb. 455.

An order awarding a peremptory writ of mandamus is a final judgment in a civil action within the meaning of that term as used in the statute regulating writs of error to the United States Supreme Court. *Davies v. Corbin*, 5 Sup. Ct. 4, 5, 112 U. S. 36, 28 L. Ed. 627.

An order in a bankruptcy proceeding allowing the claim of a creditor is a final decision within the provisions of the act authorizing appeals to the Circuit Court of Appeals. *Duff v. Carrier* (U. S.) 55 Fed. 433, 434, 5 C. C. A. 177.

An order appointing commissioners to locate a county seat permanently is not a final judgment. So far, says the court, from being the last, it is the first, step in the proceeding. The order may remain, and yet the county seat be never removed. The title to the place selected may be defective, or the people may never sanction the location. *Tetherow v. Grundy County Court*, 9 Mo. 118, 120.

#### Supplemental orders.

St. 1871, § 11, giving a right of appeal from the final order affecting a substantial right made in a special proceeding or on a summary application in an action after judgment, does not include an order supplementary to execution, commanding a defendant to appear before the court and answer concerning his property, and an order

made by the judge referring the same matter to take the answers of the defendant. *Roudeau v. Beaumette*, 4 Minn. 224, 228 (Gil. 163, 164).

An order granting leave to issue execution on a judgment after the time has expired within which execution may be issued without such order is a final order within the meaning of the statute providing that appeals may be taken from a final order affecting a substantial right made on a summary application in an action after judgment. It is final because it is all the determination that the application can receive, and it is obvious that it affects a substantial right. *Entrop v. Williams*, 11 Minn. 381, 382 (Gil. 276, 277).

The granting or refusing to grant a certificate of probable cause for the seizure made under the customs law is not a final judgment, so that a writ of error would not lie in the Circuit Court, nor from the latter to the Supreme Court. *United States v. Frerichs*, 1 Sup. Ct. 169, 170, 106 U. S. 160, 27 L. Ed. 128.

The term "final order affecting a substantial right made in a special proceeding," as used in Gen. St. 1878, c. 86, § 8, subd. 6, authorizing an appeal from such an order, includes an order directing the payment of money by a judge to a debtor in disclosure in proceedings supplementary to execution authorized by chapter 66, tit. 24. *Christensen v. Tostevin*, 53 N. W. 461, 462, 51 Minn. 230.

"Final judgment," as used in Code Civ. Proc. § 1253, relating to the "final order of condemnation" in condemnation proceedings, is not a final judgment, but is a special order made after final judgment. *California Southern R. Co. v. Southern Pac. R. Co.*, 7 Pac. 123, 126, 67 Cal. 59.

A decree was made fixing the amount due each of the claimants, and ordering a sale of the land attached to pay the debts. Held, that the decree was final, the complainant having recovered a judgment for his debt and costs, the subsequent decrees to be rendered after the sale of the land being the only means of executing the decree. *Gill v. Creed*, 43 Tenn. (3 Cold.) 295, 297.

#### Order vacating judgment or granting new trial.

An order granting a new trial is not a final judgment from which an appeal will lie, but only in the nature of an interlocutory judgment. *Wallace v. Middlebrook*, 28 Conn. 464, 465; *Magill v. Lyman*, 6 Conn. 59, 61; *Hatchett v. Milner*, 44 Ala. 224, 226; *Williams v. La Valle*, 64 Ill. 110, 111.

The granting of a new trial is in the nature of a final judgment. It is an adjudication of the court that the successful party takes nothing by the verdict which the jury

returns. *Snyder v. Cox* (Ky.) 53 S. W. 263, 264.

An order of the court setting aside a default judgment is not a final judgment from which an appeal lies. Code, § 550. *Masten v. Indiana Car & Foundry Co.*, 49 N. E. 981, 982, 19 Ind. App. 633 (citing *Bransham v. Ft. Wayne & S. R. Co.*, 7 Ind. 524).

The term "final judgment or order," within the meaning of Code Civ. Proc. § 190, authorizing appeals only from a judgment or order finally determining an action or special proceedings, does not include an order denying an application to vacate a judgment entered in condemnation proceedings. *City of Johnstown v. Wade*, 51 N. E. 397, 398, 157 N. Y. 50.

"Final judgment," as used in the Constitution of the state (article 8, § 9), means a judgment that has terminated the litigation between the parties in the court rendering it. When a motion for a new trial has been duly made, the judgment becomes final for the purposes of an appeal when it is overruled. *Watson v. Mayberry*, 49 Pac. 479, 481, 15 Utah, 265.

A final order is one which disposes of the cause either by sending it out of court before a hearing is had on the merits, or, after a hearing on the merits, either grants or refuses the relief demanded by the plaintiff. An order granting a new trial is not a final order. *Fisk v. Henarle*, 13 Pac. 760, 761, 15 Or. 89 (citing *Artman v. West Point Mfg. Co.*, 16 Neb. 572, 20 N. W. 873).

An order granting a new trial is not a final order affecting a substantial right. Orders falling within that class are such as finally dispose of the proceeding, or some question involved in it. The granting of a new trial has not this effect, but only retains the case in court for a rehearing. Therefore an appeal from such an order is unauthorized. *McNamara v. Minnesota Cent. Ry. Co.*, 12 Minn. 388, 394 (Gil. 269, 278).

An order setting aside a final decree at the succeeding term held not a final decision from which an appeal would lie, especially where the appellant obtained leave to amend the bill, and inserted therein additional allegations as to the citizenship of the parties, after the court had vacated its former decree. *Fisher v. Simon* (U. S.) 67 Fed. 387, 14 C. C. A. 443.

An order denying a petition to vacate a judgment allowing a claim against the decedent's estate is not a final judgment which can be refused on appeal. In re *Emanuel's Estate*, 72 Pac. 1079, 31 Colo. 440.

#### Verdict or findings.

St. § 4861, provides that, where non-residents at the time of the final decision

in the circuit court as to the probate of a will resided out of the state, any other interested person could have a retrial of the question of the probate. It was held that the words "final decision," as thus used, mean the final judgment in the proceedings after the party had been heard as provided by law, and not that the verdict was final, though a prior statute provided that the verdict of the jury on the probate of the will should be final. *Ellis v. Ellis*, 46 S. W. 521, 522, 104 Ky. 121.

By Civ. Code, § 543, an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order. The findings of a district court do not constitute such a final order. *Steele v. City of Newton*, 21 Pac. 644, 645, 41 Kan. 512; *Callen v. City of Junction City*, 21 Pac. 647, 648, 41 Kan. 466.

#### FINAL DESTINATION.

A policy of marine insurance, which provided that the policy covered all risks at and from the port of destination to the final destination, does not mean that the risk continued until the goods were delivered into the actual, manual custody and control of the consignee at the port of destination, but a delivery on the dock at the port of destination would be a delivery at the final destination within the meaning of the policy. *Beddall v. British & Foreign Marine Ins. Co.*, 21 N. Y. Supp. 709, 711, 67 Hun, 648.

#### FINAL DETERMINATION.

See, also, "Finally Determine."

In the stipulation providing that proceeds of certain property shall be deposited to await final determination of an action concerning it, the term "final determination" of the action meant the final settling of the rights of the parties to the action beyond all appeal. *Dean v. Marschall*, 85 N. Y. Supp. 724, 726, 90 Hun, 335.

"Final," as used in Act May 19, 1874 (P. L. 208), making the determination of the court of quarter sessions in contested elections final, does not merely mean that such court shall do what is necessary for final determination of the case, and that the final determination is to rest with the Supreme Court, but means that there can be no review on the merits of the decision of the court below. In *re Carpenter's Appeal* (Pa.) 11 Wkly. Notes Cas. 162.

Under Code Proc. defining a judgment from which an appeal may be taken as "the final determination of the rights of the par-

ties in the action," a decree setting aside a satisfaction piece and the entry of satisfaction of a mortgage of record, and directing a foreclosure of the mortgage in the usual form, is not appealable until the amount due on the mortgage has been computed and ascertained by the county judge to whom it was referred, and the report of the referee has been confirmed by the court. *Swarthout v. Curtis*, 4 N. Y. (4 Const.) 415, 416.

#### FINAL DISPOSITION.

The phrase "final disposition of the case," in 19 Stat. 102, allowing an application for discharge in bankruptcy, where there are no assets, "at any time after the expiration of 60 days, and before the final disposition of the cause," means the settlement of the estate and the discharge of the assignee or trustee. In *re Heller* (U. S.) 9 Fed. 373. It means the final disposition of the administration of the estate. In *re Brightman* (U. S.) 4 Fed. Cas. 136, 137.

The final disposition of a matter submitted to arbitration is a determination so that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it without any further ascertainment of rights or duties. It is not absolutely necessary that the award should state in figures the exact amount to be paid. It is sufficient if there is such reference in the award to documents or other matters that nothing remains but mere arithmetical computation to render the award final and conclusive. *Colcord v. Fletcher*, 50 Me. 398, 401.

The expression "final disposition," as used in Act June 25, 1868, § 2, allowing the court of claims at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the final disposition of any such suit or claim, on motion on behalf of the United States to grant a new trial in any such suit or claim, means the final determination of the suit on appeal, if an appeal is taken, or, if none is taken, then its final determination in the court of claims. *Ex parte Russell*, 80 U. S. (13 Wall.) 664, 667, 20 L. Ed. 632.

A dismissal of an appeal is a final disposition of a libel, so as to allow of the entry of a docket fee. *Hayford v. Griffith* (U. S.) 11 Fed. Cas. 909, 910.

#### FINAL DISTRIBUTION.

An agreement by the contestants of a will that, if successful, certain additional amounts should be paid to two of their

number on final distribution, meant the final distribution of the whole estate, and not simply that of the personality, upon which alone administration was had. *Rogers v. Gillett*, 9 N. W. 204, 205, 56 Iowa, 268.

#### FINAL ESTIMATE.

A contract for the furnishing of stone to a contractor for building government batteries provided that final settlement should be made "on final estimates rendered for said work by the engineer in charge." Held, that the quoted phrase meant that the engineer or officer in charge should determine the amount of stone furnished, and that upon his estimate of the same settlement should be made, his estimate being made by what appeared to be a fair and practical method; and that the same should be conclusive. *United States v. Venable Const. Co.* (U. S.) 124 Fed. 267, 272.

#### FINAL HEARING OR TRIAL.

Before final hearing, see "Before."

Final hearing means the trial or hearing of the cause upon its merits. *Smith v. Western Union Telegraph Co.* (U. S.) 81 Fed. 242, 243.

"Final hearing," as used in Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], providing that the docket fee may be taxable on the final hearing, means a hearing on an order of the court, which order is necessary to dispose of the case. *Goodyear v. Sawyer* (U. S.) 17 Fed. 2, 9. Hence, where a demurrer to a bill in equity is overruled, and defendant has leave to answer, plaintiff is not entitled to tax a docket fee. *McLean v. Clark* (U. S.) 23 Fed. 861, 862; *In Doughty v. West, Bradley & Cary Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972, it was said in reference to the allowance of a docket fee under section 1 of the act of 1853: "'Trial' and 'final hearing' have well-known definite meanings in the law, and they are used in this statute in that well-known sense. 'Trial' is used to describe the process of determining the issues in an action at law, and 'final hearing' the submission of the case for a determination thereof upon the pleadings and pleadings and proofs, or otherwise, so that the case may be finally disposed of." *Wooster v. Handy* (U. S.) 23 Fed. 49, 53.

"Final hearing or trial," as used in the act of Congress of 1867 providing for the removal of causes to the federal courts, means the same as if the words had not been transposed from the clause (in the act of 1866) "before trial or final hearing." *Beery v. Irick* (Va.) 22 Grat. 484, 489, 12 Am. Rep. 539; *Bryant v. Rich*, 106 Mass. 180, 192, 8 Am. Rep. 811; *Akerly v. Vilas*, 24 Wis. 165, 171,

1 Am. Rep. 166; *Wooster v. Handy* (U. S.) 23 Fed. 49, 53.

A final hearing, within the meaning of the statute entitling plaintiff's attorney to a docket fee, is a submission of the case for determination on the merits, or the submission of some question, the disposition of which finally ends the case. *Barron v. The Mount Eden* (U. S.) 87 Fed. 483, 484 (approved in *The H. C. Grady* [U. S.] 87 Fed. 483, 484).

"Final hearing or trial," as used in the removal act of Congress, means the examination of the facts in issue. *Vannevar v. Bryant*, 88 U. S. (21 Wall.) 41, 43, 22 L. Ed. 476; *Wooster v. Handy* (U. S.) 23 Fed. 49, 53.

The term "final hearing" in 14 U. S. Stat., authorizing the removal of a suit in the state courts to the federal courts at any time before trial or final hearing, is used in contradistinction to hearings upon interlocutory matters, and means the hearing of the cause upon its merits by a judge sitting in equity. *Galpin v. Critchlow*, 112 Mass. 339, 343, 17 Am. Rep. 176; *Jones v. Foster*, 20 N. W. 785, 786, 61 Wis. 25. See, also, *Chandler v. Coe*, 56 N. H. 184, 186, 22 Am. Rep. 437; *Wooster v. Handy* (U. S.) 23 Fed. 49, 53.

To constitute "a final hearing in equity or admiralty," within the meaning of section 824, Rev. St. [U. S. Comp. St. 1901, p. 632], there must be a hearing of the cause on its merits; that is, a submission of it to the court in such a shape as the parties choose to give it, with a view to a determination whether the plaintiff or libellant has made out the case stated by him in his bill or libel on the ground for the permanent relief which his pleading seeks, on such proof as the parties place before the court, be the case one of pro confesso on bill, or libel and answer, or pleadings alone, or pleadings and proofs. *Wooster v. Handy* (U. S.) 23 Fed. 49, 50; *Mercartney v. Crittenden* (U. S.) 24 Fed. 401; *The H. C. Grady* (U. S.) 87 Fed. 483, 484.

The expression "final hearing or trial," as used in Act Cong. March 2, 1867, authorizing removals of causes on making the proper application "at any time before the final hearing or trial" of the suit, means a trial of an action at law or hearing of a suit in equity on the merits at the Circuit; and the cause is not transferable thereafter, although judgment may have been reversed on the appeal and the cause remitted for a new trial or for further proceedings. The word "hearing" has an established meaning, and is applicable to equity cases. It means the same thing in those cases that the word "trial" does in cases at law, and the words "final hearing" have long been used to designate the trial of an equity case upon the merits, as distinguished from the hearing of any formal questions arising in the cause, and which

are termed "interlocutory." Whenever, in any state, there has been a trial in an action at law or a final hearing in a suit in equity, the result of which was an adjudication, which, upon the principle governing judicial decisions, would be final between the parties as to any portion of the merits of the action, the case has passed beyond the stage where it was within either the letter or the spirit of this law. *Akerly v. Villas*, 24 Wis. 165, 171, 1 Am. Rep. 166.

#### As referring to equitable actions.

"Final hearing," as used in Rev. St. U. S. § 639, relating to the removal of causes from the state court to federal courts, and providing that the same may be removed on petition filed at any time after trial or final hearing of the suit, etc., refers to actions in chancery. *Brayley v. Hedges*, 5 N. W. 748, 749, 53 Iowa, 582. See, also, *Wooster v. Handy* (U. S.) 23 Fed. 49, 53; *Vannevar v. Bryant*, 88 U. S. (21 Wall.) 41, 43, 22 L. Ed. 476; *Galpin v. Critchlow*, 112 Mass. 339, 343, 17 Am. Rep. 176; *Akerly v. Villas*, 24 Wis. 165, 171, 1 Am. Rep. 166; *Jones v. Foster*, 20 N. W. 785, 786, 61 Wis. 25; *Chandler v. Coe*, 56 N. H. 184, 186, 22 Am. Rep. 437; *Beery v. Irick* (Va.) 22 Grat. 484, 489, 12 Am. Rep. 539; *Burson v. National Park Bank of New York*, 40 Ind. 173, 179, 13 Am. Rep. 285.

#### As first trial.

The words "before final hearing or trial," in the removal act of Congress of 1867, would seem to be equivalent in meaning to the same words "trial or final hearing" in the similar act of 1866, and it is doubtful whether a party who has once taken a chance of a decision on the merits by a trial before the jury or a hearing before the court in a suit in equity in the state court can, even if the case stands open for a new trial or further hearing, remove it to another tribunal. *Bryant v. Rich*, 106 Mass. 180, 192, 8 Am. Rep. 311.

The word "final" in the act of Congress 1867, providing that a petition for removal of cause might be filed at any time before the final hearing or trial of the suit, qualifies both "hearing" and "trial," and hence, if a case was pending awaiting a trial, it could be removed, regardless of the number of previous trials or mistrials that had taken place. *Davis v. Chicago & N. W. Ry. Co.* (U. S.) 46 Fed. 307, 308.

14 U. S. Stat. 559, authorizing the removal of cases in state courts on the ground of diverse citizenship before the final hearing or trial, is to be construed as meaning before the first trial of an action, and it does not authorize a removal before the second trial after the first judgment has been reversed on appeal. *Hall v. Bicketts*, 72 Ky. (9 Bush) 366, 371.

Under Act March 2, 1867, authorizing a petition for removal to the federal court to be filed at any time before the final hearing or trial of the suit, it is held that the application for removal filed before retrial after a judgment on appeal of reversal and remand is before the final hearing or trial within the meaning of the act. *Akerly v. Villas* (U. S.) 1 Fed. Cas. 253, 254.

Under a federal statute relative to the removal of causes, and providing that the petition for removal shall be filed before the trial or final hearing, it is held that the trial mentioned means not only "a trial" or "one trial," but a determination of the rights of the parties forever; so that, although there has been a trial, the petition for removal is nevertheless timely if filed before retrial after reversal. The terms "the trial" and "final hearing" have a relative connection and reciprocal meaning; the former applicable to actions at law and the latter to equity cases. *Minnett v. Milwaukee & St. P. Ry. Co.* (U. S.) 17 Fed. Cas. 449, 450.

#### As judgment on appeal.

A bond given in a justice's court for the purpose and having the effect of releasing and discharging all the garnishment proceedings in that court, which provides that the obligors shall pay any judgment which may be rendered against the defendant on final hearing of the case, will bind the obligors to pay any final judgment which may be rendered against the defendant in the district court on an appeal by the plaintiff from the justice's court. *Washer v. Campbell*, 19 Pac. 558, 861, 40 Kan. 398.

By the term "final trial," as used in the constitutional provision that no person shall be compelled to pay costs except after conviction on a final trial, is meant that trial in a criminal case in a court of original jurisdiction upon which such a sentence or judgment of conviction as would constitute a final judgment could be entered, and will not be held to mean the final determination and affirmation of judgment of conviction by the appellate court. *State v. Newman*, 3 South. 467, 470, 24 Fla. 33.

#### Decision in intervention.

A finding in an intervention proceeding in an equity case in favor of the intervener is not a final hearing in equity within the statute entitling a solicitor to a docket fee of \$20. *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.* (U. S.) 32 Fed. 684, 685.

#### Decision on demurrer.

A cause may be removed from a state to federal court under Rev. St. § 639, subd. 3, providing that, when a suit is between a citizen of the state in which it is brought and a citizen of another state, it may be re-

moved from the state court to the federal court on petition filed at any time before the trial or final hearing of the suit, though the petition is filed after a decision or ruling on demurrer to an answer interposed by defendant. *Field v. Williams* (U. S.) 24 Fed. 513, 514, 515.

#### **Dismissal or discontinuance.**

Rev. St. §§ 823, 824 [U. S. Comp. St. 1901, p. 632], provide that solicitors in equity or proctors in admiralty shall be allowed a docket fee of \$20 on a final hearing. Held, that where, without notice to the defendant, an order was obtained by the complainant striking out the bill after the filing of a demurrer thereto, but before any hearing or consideration of the case by the court, there had been no final hearing of the case so as to justify the entry of the docket fee. *Coy v. Perkins* (U. S.) 13 Fed. 111, 112.

A final hearing is one where the cause has been finally determined, and its determination involves a hearing by the court. *Andrews v. Cole* (U. S.) 20 Fed. 410. The mere fact that an order dismissing a cause without prejudice provides that certain depositions filed by defendant may be used by him in any suit brought by complainant on the same cause of action does not make such discontinuance a final hearing within the statute authorizing the taxation of a solicitor's docket fee. *Kaempfer v. Taylor* (U. S.) 78 Fed. 795, 796.

A vessel being in custody of the court under process issued against her, and the case being entered in the admiralty docket, consent was given that the case be discontinued on payment of the amount claimed and libellant's costs. Held, that the granting of a motion for an order discharging the vessel from custody and canceling stipulations was a final hearing under Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], providing that a docket fee of \$20 be allowed in all admiralty cases where there is a final hearing. *The Alert* (U. S.) 15 Fed. 620.

When a bill in equity is, after answer filed, dismissed by the plaintiff on his own motion either generally or without prejudice, the granting of such order is a final hearing within Rev. St. §§ 823, 824 [U. S. Comp. St. 1901, p. 632]. *Goodyear v. Sawyer* (U. S.) 17 Fed. 2.

#### **Final hearing and trial distinguished.**

The words "trial" and "final hearing" have well-known definite meanings in the law, and they are used in that well-known sense in the statute authorizing a docket fee of \$20 in a trial before a jury in civil or criminal cases, or before referees, or on a final hearing in equity or admiralty. "Trial" is used to describe the process of determining the issues in an action at law, and "final hearing" the submission of the case for de-

termination thereof upon the pleadings, or pleadings and proofs, or otherwise, so that the case may be finally disposed of. *Doughty v. West, Bradley & Cary Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972.

#### **Order pro confesso.**

Where the parties stipulate for a decree in favor of an intervener, and a decree was entered accordingly, there was a final hearing. *The H. C. Grady* (U. S.) 87 Fed. 483, 484.

Several cases have decided that the final hearing within the meaning of Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], authorizing a docket fee of \$20 to be taxed in cases of final hearing, is any order or determining which results in the final disposition of the cause. *Hayford v. Griffith* (U. S.) 11 Fed. Cas. 909, 910. Other cases hold that there is a final hearing only when some question of law or fact has been submitted to the court requiring not merely formal action, but consideration. *Coy v. Perkins* (U. S.) 13 Fed. 111, 112; *Yale Lock Mfg. Co. v. Colvin* (U. S.) 14 Fed. 269. Under either of these principles there has been a final hearing within the meaning of Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], where a final decree has been obtained under an order pro confesso, since, even after the order, the matter of the bill is still to be decreed by the court, and then only when it is proper to be decreed. The bill is to be examined to see if the facts alleged entitle the complainant to relief. *Andrews v. Cole* (U. S.) 20 Fed. 410.

#### **Proceedings before commissioner or master.**

The taking of proofs before a master in order to dispose of a motion for an injunction pendente lite is not a final hearing. *Doughty v. West, Bradley & Cary Mfg. Co.* (U. S.) 7 Fed. Cas. 971, 972.

A proceeding before a commissioner on a reference is not a final hearing. *Barron v. The Mount Eden* (U. S.) 87 Fed. 483, 484.

#### **Remand to state court.**

The term "final hearing" means a trial or hearing of the cause upon its merits. An order to remand a cause from the federal to the state court is not a final hearing within the provisions allowing plaintiff's attorney a docket fee. *Smith v. Western Union Telegraph Co.* (U. S.) 81 Fed. 242, 243.

#### **Submission to jury.**

Where, in an equity trial, certain issues of fact were submitted to a jury, but the jury failed to agree, such submission did not constitute a final hearing, within the meaning of the local prejudice act, authorizing a removal of cases to federal court at any time before final hearing, since there was, in effect, no verdict, even though the



hearing by jury was a part of the trial under the Minnesota law. *Osborn v. Osborn* (U. S.) 5 Fed. 389, 390.

### FINAL INJUNCTION.

A final injunction is granted when the rights of the parties are determined. It may be made mandatory commanding acts to be done, and is distinguished from a preliminary injunction, which is confined to the purpose and office of restraining—prevention—simply. *Southern Pac. R. Co. v. City of Oakland* (U. S.) 58 Fed. 50, 54.

### FINAL JUDGE.

The word "final," as used in the statute, amending the charter of South Norwalk, and declaring that the board of councilmen shall be the final judges of the election returns and qualifications of its members, was used for the purpose of divesting the superior court of jurisdiction in such cases, and to make the common council the sole tribunal to determine the legality of the election of its members. *Selleck v. Common Council of City of South Norwalk*, 40 Conn. 359, 362 (cited and approved in *State v. Lewis*, 51 Conn. 113, 126).

Const. pt. 2, art. 34, providing that the Senate shall be final judges of the election, returns, and qualifications of their own members, does not render the determination of the title of one of its members by the Senate more binding than a similar finding by the House in regard to the title of one of its members. The result in either case is a final adjudication of the facts. *Attorney General v. Sands*, 44 Atl. 83, 85, 68 N. H. 54.

### FINAL JURISDICTION.

Between judgment and jurisdiction there is a wide distinction. One is the decision of the law given by the court, as the result of proceedings therein instituted; the other has reference to the power conferred to take cognizance of and authorize cases according to law and carry the same into execution. Accordingly, section 12 of the act of 1885, providing that any person feeling aggrieved by the decision of the county judge in relation to the pre-emption of swamp land may appeal therefrom to the district court, "which shall have final jurisdiction over the matter," does not give the district court merely power to render a final judgment in the controversy, but makes its decision unappealable to the Supreme Court. *Lampson v. Platt*, 1 Iowa, 556, 558.

### FINAL ORDER.

See, also, "Final Decrees and Judgments."

A final order is one that either terminates the action itself, or decides some mat-

ter litigated by the parties, or operates to divest some right in such manner as to put it out of the power of the court making the order, after the expiration of the term, to place the parties in their original condition. *Strull v. Louisville & N. R. Co. (Ky.)* 76 S. W. 181, 183.

An order affecting a substantial right in an action, when such order, in effect, determines and prevents a judgment, and an order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment, is a final order. *Gen. St. Kan.* 1901, § 5027; *Rev. St. Okl.* 1903, § 4735; *Bates' Ann. St. Ohio*, 1904, § 6707; *Rev. St. Wyo.* 1899, § 4247; *McMaster v. People's Bank of Edmond*, 73 Pac. 946, 949, 13 Okl. 326.

A final order from which an appeal is authorized by Laws 1861, p. 133, § 1, subd. 6, is an order which is all the determination which the application can receive, and which affects a substantial right. *Entrop v. Williams*, 11 Minn. 381, 382 (Gil. 276, 277).

A final order which is appealable as such must be an adjudication upon a motion or other application completely disposing of the subject-matter and rights of the parties, and must be such as determines the action and prevents a judgment. In *Hobbs v. Beckwith*, 6 Ohio St. 252, 254, it was said: "An order in the progress of a suit, and before judgment, to be final, and lay the foundation for a petition in error, must be such as determines the action and prevents the judgment." *People v. American Loan & Trust Co.*, 44 N. E. 949, 952, 150 N. Y. 117.

By *Rev. St. § 6707*, an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, is a final order. Under such definition on order of the appellate court striking out and suppressing an answer by a stockholder of a railway company, who, upon his motion, and good cause shown, was made a party defendant, is a final order. *Henry v. Jeans*, 28 N. E. 672, 674, 48 Ohio St. 443.

### FINAL PASSAGE.

The words "final passage" of a bill, as used in the Constitution, providing that no bill shall become a law unless on its final passage it receives the votes of at least two-fifths of the members elected to each house, etc., mean final passage. They do not mean some passage before the final one, but the last one. They do not mean the passage of a part of a bill, or what is first introduced, and which may, by reason of amendment, become the least important. *Norman v. Kentucky Board of Managers World's Columbian Exp.*, 14 Ky. Law Rep. 529, 532, 20 S. W. 901, 902, 93 Ky. 537, 18 L. R. A. 556.

Const. 1875, art. 4, § 21, providing that every bill shall be read on three different days in each house, and no bill shall become a law unless on its final passage it be read at length, etc., means the vote on its passage in every house of the General Assembly after it has received three readings on three different days in that house. *State v. Buckley*, 54 Ala. 599, 613.

"The final passage of a bill, within the meaning of the provisions of Const. 1885, art. 3, § 17, relating to the vote on the final passage of bills being taken by yeas and nays, and entered upon the journal of the Legislature, means the vote in each house which adopts the bill after it has passed its first and second reading, and after it has been read again for the purpose of being put upon its passage; and it is not required that a bill passed in one house and amended and passed in the other shall be read three times in the house originating the bill before it concurs in the amendments proposed by the other, nor is it required that the vote on the adoption of such amendments be taken by yeas and nays and entered on the journal." *State v. Dillon*, 28 South. 781, 42 Fla. 95.

Within the provision of Ky. St. § 3304, requiring that every ordinance and every resolution or measure involving the expenditure of money, and every grant of any license or privilege or franchise, shall within three days after its final passage be engrossed by the clerk, and presented to the mayor, the words "final passage" do not mean the requirement of a second passage by the council. This contention is probably correct so far as it applies to ordinances, but when used in relation to a resolution the words "final passage" mean no more than a single word "passage" would mean, and do not require passing of the resolution at two different meetings. *Roberts & Co. v. City of Paducah* (U. S.) 95 Fed. 62, 67.

The words "final passage," as used in the provision that every law, unless a different time shall be prescribed therein, shall commence and take effect throughout the state on and not before the twentieth day after the day of its final passage, shall be held to mean the enactment into law of a bill which has passed the legislative assembly, either with or without the approval of the Governor. *Civ. Code Mont. 1895*, § 4669; *Code Civ. Proc. Mont. 1895*, § 3467.

#### FINAL PAYMENT.

A "final payment" is a last payment. Where a contract provided that a person might retain out of the money payable to the contractor 25 cents per lineal foot for the work done, which money was to be retained for six months, and was to be paid over at the expiration thereof, provided that the

work should be in good order, such 25 cents per lineal foot is evidently the last or final payment, instead of the payment made within 30 days after the acceptance of the work. *Johnson v. City of New York*, 1 N. Y. Supp. 254, 255, 48 Hun. 620.

#### FINAL PROCESS.

In Act Cong. May 19, 1828, providing that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States and the proceedings thereupon shall be the same, except their style, in each state, respectively, as are now used in the courts of such state, the phrase "final process" means all the writs of execution in use at the time of the act in the various state courts which were properly applicable to the courts of the United States, and the phrase "proceedings thereupon" means the exercise of all the duties of the ministerial officers of the states prescribed by the laws of the state for the purpose of obtaining the fruits of judgment. And among these duties is to be found one, prescribed to the sheriff directing him to restore personal property levied on by him to the defendant, upon his executing a forthcoming bond according to law, and the further duty to return it to the court, forfeited, if the defendant fail to deliver the property, on the day of sale, according to the condition of the bond. These are proceedings upon an execution, and therefore the forthcoming bond is to be regarded as a part of the final process. *Amis v. Smith*, 41 U. S. (16 Pet.) 303, 313, 10 L. Ed. 973.

In *Curlee v. Thomas*, 74 N. C. 51, a motion by a judgment debtor to allow a judgment against the judgment of creditor to be credited against the other judgment was held to be a final process. *Atkinson v. Pittman*, 2 S. W. 114, 116, 47 Ark. 464.

#### FINAL PROOF.

Final proof, which is required to be given under the Oregon donation act, means the evidence provided to satisfy the land office that the right of the grantee is perfect, and entitles him to a patent; and is no part of the consideration which the grantee gives for the land. *Brazee v. Schofield*, 3 Pac. 265, 266, 2 Wash. T. 209.

#### FINAL RECORD.

"The final record of our courts corresponds with the judgment record of the common law; the record in perpetuum rei memoriam." *The Thomas Fletcher* (U. S.) 24 Fed. 481, 482.

A final record is simply a record of summons and proof of service, the pleadings, bill

of exceptions, all orders relating to the change of parties, and journal entries. *Tatum v. Massie*, 44 Pac. 494, 495, 29 Or. 140.

### FINAL RECOVERY.

In Gen. St. c. 156, § 5, denying costs to the plaintiff in personal actions (save actions of replevin) brought originally in the superior court, unless he finally recovers more than \$20 for debt or damages, the words "finally recover" refer to the ultimate judgment of the court. *Fisk v. Gray*, 100 Mass. 191, 193.

St. 1859, c. 196, § 24, and Gen. St. 156, § 5, provide that, when the final recovery does not exceed \$20 for debt or damages in a personal action brought originally in a superior court, the plaintiff shall recover no costs. Gen. St. c. 133, § 8, directs interest to be computed on the verdict from the time when made to the time of making up the judgment. Held, that the words "final recovery" should be construed to mean the amount of the verdict, exclusive of any interest which might afterwards accrue thereon; and hence, where a plaintiff recovered a verdict for \$20, he was not entitled to costs by virtue of interest thereafter accruing on the amount of the verdict. "The question of costs or no costs must properly rest on the verdict itself, and any addition thereto arising from an allowance of interest thereon and subsequently does not effect this question." *Count Joannes v. Pangborn*, 88 Mass. (6 Allen) 243.

### FINAL SAILING.

The expression "final sailing," as used in a charter party stating the period for payment of freight to be "the final sailing of the vessel from the port of loading," means the final departure from the port and being at sea ready to proceed on her voyage, and not merely having the clearances on board and being ready to sail. A vessel wrecked after having her clearances on board and leaving the dock gates and reaching a ship canal between high and low water, where she is subjected to certain regulations under a local act, and where she is liable to be stopped by the harbor master, will not be deemed to have finally sailed within the charter party. *Roelandts v. Harrison*, 9 Exch. 444, 453, 25 E. L. & Eq. 470, 475.

### FINAL SETTLEMENT.

The final report of the outgoing guardian, resigning his trust during the period of guardianship, and the approval of such report, followed by his discharge by the court, does not constitute a final settlement. *State v. Peckham*, 36 N. E. 28, 29, 136 Ind. 198.

There is no final settlement of the business of a firm unless its debts are paid, or

in some way extinguished by the statute of limitation or otherwise, within the provisions of the bankruptcy act. *In re Hirsch* (U. S.) 97 Fed. 571, 574.

### In administration of estates.

Within Code 1881, § 30, subd. 2, providing that an action against an administrator for malfeasance must be brought within one year from the time of final settlement, the term "final settlement" relates not to the final accounting of each successive administrator, but to the final settlement of the estate. *Bartels v. Gove*, 30 Pac. 675, 4 Wash. 632.

The term "final settlement," as applied to the administration of estates, is usually understood to refer to the order of the court approving the account which closes the business of the estate and discharges the executor or administrator; but, as used in Rev. St. 1881, § 2310, providing that claims not filed at least 30 days before the "final settlement" of the estate shall be barred, it means rather the presentation of the account for final settlement at the time fixed by law. *Roberts v. Spencer*, 13 N. E. 129, 112 Ind. 85; *Coleman v. Farrar*, 20 S. W. 441, 445, 112 Mo. 54.

The final settlement of an administrator who gives a bond conditioned to make a just and true account of his administration means the making of a just and true account of such administration according to the condition of the bond. *Dickerson v. Robinson*, 6 N. J. Law (1 Halst.) 195, 205, 10 Am. Dec. 396.

The phrase "final settlement of their accounts," as used in the statutes relating to the accounts of executors, administrators, guardians, etc., providing that the commission of the executors and administrators in certain cases shall be determined by the orphans' court on the final settlement of their accounts, according to the actual services rendered, etc., is not necessarily equivalent to the settlement of final accounts. A decree by the court approving an account rendered by an executor or an administrator showing the amount of receipts and disbursements and the balance on hand for distribution among the legatees and next of kin is the final settlement of the account, within the meaning of the statute referred to, even though it appear that there is still outlying property which has not yet come into the accountant's possession for administration. *Pomeroy v. Mills*, 37 N. J. Eq. (10 Stew.) 578, 581.

Final settlement by an administrator is, as its terms import, a conclusive determination of all the past administration, the unimpeachable evidence of its own verity, if founded on regular proceedings in the absence of fraud. *Sims v. Waters*, 65 Ala. 442, 445.

**FINAL SUBMISSION.**

Where a case is submitted to the court on a demurrer to the answer, the ground of the demurrer being that the answer does not contain a defense, and the demurrer is overruled. The plaintiff cannot, without leave of court, dismiss his action without prejudice, the submission of the cause on the demurrer being a "final submission" of the case within Code, § 372, enacting that a plaintiff may only dismiss his action without prejudice. *Beaumont v. Herrick*, 24 Ohio St. 445, 446.

**FINAL TERMINUS.**

The expression "final terminus," as used in the charter of a street railway company in connection with the term "initial terminus," means that there must be a definite beginning point and a definite ending point. *Citizens' St. Ry. Co. v. Africa*, 42 S. W. 485, 488, 100 Tenn. 23.

**FINALLY DETERMINE.**

In Act Cong. March 3, 1877, appointing commissioners in relation to the Hot Springs in Arkansas, and authorizing them to "finally determine the right of each claimant or occupant to purchase the same [the land] or any portion thereof at the appraised value," such clause means a final determination in the absolute sense, although similar language, if applied to officers of the land department, might be final only so far as departmental action is concerned. In *re Rector* (U. S.) 9 Fed. 16, 17.

The expression "finally determined," as used in an agreement for sale of lands by a railroad containing the stipulation that, in case it be finally determined that patents shall not issue to plaintiff, the money paid by defendant shall be returned, and not used in the sense of finally adjudged so as to require an adjudication as to the specific lands sold; but, where the Supreme Court of the United States has determined the rights of the railroad company to the lands in grant of which such land is a part, such determination is the final determination. *Southern Pac. R. Co. v. Painter*, 45 Pac. 320, 321, 118 Cal. 247.

An order denying an application to open a decree of the final judicial settlement of the accounts of an executor is not an order finally determining such special proceeding so as to be appealable to the Court of Appeals under Code Civ. Proc. § 190, as the decree itself is the final order. In *re Small*, 52 N. E. 723, 724, 158 N. Y. 128.

An order of the Appellate Division reversing an order of the Special Term quashing the writ of certiorari, which also reinstates the writ, and remits the proceedings

to the Special Term for determination on the merits, is not an order finally determining the special proceedings, and hence is not appealable to the Court of Appeals. *People v. Barker*, 49 N. E. 775, 155 N. Y. 308.

The Code provides that appeals may be taken as of right to the Court of Appeals from judgments or orders finally determining actions or special proceedings and from orders granting new trials on exceptions, where the appellants stipulate that on affirmance judgment absolute shall be rendered against them. Held, that the words "finally determining" qualify the nature of both the judgments and orders that may be appealed from, and hence the judgment must be a final judgment, and the order a final order. *Van Arsdale v. King*, 49 N. E. 866, 867, 155 N. Y. 325.

**FINANCIAL MEMBER.**

In the constitution of the grand lodge of the American Star Order, which provides that, upon the death of the wife of a financial member of the order in good standing, he shall be paid the sum of \$500, etc., the phrase "financial member" means a member who is paying his dues and assessments regularly, and does not include one who, having been a member of the lodge, withdrew therefrom by mutual consent, and ceased to pay his dues and assessments, although he has a withdrawal card which certifies that he left his lodge in good standing, and was worthy of acceptance of any other lodge in the order willing to accept him into membership. *Meyer v. American Star Order*, 2 N. Y. Supp. 492.

**FIND—FOUND.**

Agree synonymous, see "Agree."  
Believe synonymous, see "Believe."

"To find," says Webster, coincides in origin with "venio," but in sense with "invenio," and the literal signification of "invenio" is to come upon; to get at. The primary definition of "to find," as given by Webster, is to come to; to meet; and hence to reach; to attain to; to arrive at. *Carter v. Youngs*, 42 N. Y. Super Ct. (10 Jones & S.) 169, 172.

A dead body is found within the county when it is ascertained by any means to be in the county, within the meaning of Rev. St. § 1221, providing for inquests by the coroner when a dead body is found within the county. *State v. Bellows*, 56 N. E. 1028, 1029, 62 Ohio St. 307.

Where one of several boys playing along a railroad track picked up an old stocking, in which something was tied, and, after he had slung it about in play for a time, a

second one of the boys snatched it, or, it having been thrown by the finder, the second boy picked it up and began striking the other boys with it, and in this way it passed from one to another, until finally, while the second boy was swinging it, it broke open, and money was found therein. It was not found, in a legal sense, until the stocking was broken open during the play. Had the stocking been, like a pocketbook, an article generally used for containing money, or had the boy who first picked it up retained it, or tried to retain it, for the purpose of examining its contents, or had it been snatched from him by another boy for the purpose of opening or appropriating the contents himself, and preventing the first boy examining it, the original possession or retention of the stocking by its original finder for such purpose of examination might perhaps be considered as the legal finding of the money inclosed with other articles in the stocking. *Keron v. Cashman* (N. J.) 33 Atl. 1055, 1056.

St. 4 Geo. II, c. 28, § 2, which enacts that if half a year's rent is in arrear, and the landlord has a right to re-enter for non-payment thereof, he may recover the property by ejectment, if it be proved upon the trial that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter, means that the property must be so visibly on the premises that a broker going to distrain on the tenant would, using reasonable diligence, find the property, so as to be able to distrain on it. *Haverson v. Franks*, 61 Eng. Com. Law, 678.

Rev. St. c. 58, § 12 (St. 1812, c. 146, § 2), which authorizes any person to kill any dog "found and being without a collar," means a dog who is without a collar, although he be under the immediate care of his owner. The word "found" will not be held to imply that the dog is out of the care of the owner. *Tower v. Tower*, 35 Mass. (18 Pick.) 262, 263.

The words "find they do the work," in a contract for the purchase of smoke consumers, to be paid for if the purchasers find that they will do the work, are to be construed to mean "if they do the work," and the clause gives the purchasers no option to refuse to accept the consumers if their work is satisfactory. *Garden City Wire & Spring Co. v. Kause*, 67 Ill. App. 108, 110.

In the statement of a prescriptive right to keep and maintain a gate "when it shall be found necessary" for the preservation of grass, the phrase "when it shall be found necessary" is to be construed as equivalent to the phrase "when it shall be necessary." *Speare v. Bicknell*, 5 Mass. 125, 131.

The word "find" is under some circumstances synonymous with "discover," but under other circumstances it is the equivalent of entirely different forms of expression. It may mean to supply and furnish, and, as used in an oil lease, providing that the second lessee shall hold the land for five years, and as much longer as oil is found in paying quantities, it has the same meaning as "obtained." *Smith v. Hickman*, 14 Pa. Super. Ct. 46, 51.

#### As determine.

"Find," in law, is to ascertain by judicial inquiry. The command to find and declare who is legally chosen, in Const. art. 4, § 2, relating to elections, and providing that the Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly, means that the examination shall be sufficiently full and careful to determine the title, so that the person declared to be chosen shall have unimpeachable title to the office. *State v. Bulkeley*, 23 Atl. 186, 190, 61 Conn. 287, 14 L. R. A. 657.

"Found," as used in an indenture conveying a coal mine within and under certain premises, for which the grantee agreed to pay a certain sum for every statute acre of coal which should be found within or under the premises, means "ascertain to lie and be." It is necessary that the quantity should be ascertained some time, in order to fix the ultimate amount of the consideration for it. That quantity might be found and ascertained without working or getting the coal. *Jowett v. Spencer*, 1 Exch. 647, 648.

A written submission to arbitrators, giving authority to find and establish the boundary lines between the adjoining lands of different proprietors, means ascertain and confirm what was before doubtful—the pre-existing line on the respective sides of which the parties have held title. *Weeks v. Trask*, 16 Atl. 413, 414, 81 Me. 127, 2 L. R. A. 532.

#### Finding distinguished.

As the words "find" and "finding" are used in legal proceeding, they do not always imply the same thing. Where a cause is tried by the court, the finding means the facts which the court considers the evidence establishes. The court states such facts, which constitute the finding. The jury finds a verdict or an issue in favor of one party or the other, without stating any facts, except in a special verdict. "Find," as used in Rev. St. § 1559, providing that if, on complaint to the common council that a licensed liquor dealer has violated his license, the council shall find the complaint to be true, the license shall be revoked, means and implies that the board is satisfied from the evidence that the license has been violated

by the licensee, as charged in the complaint, and this conclusion or determination may be informally expressed. A resolution or order revoking the license indicates sufficiently the finding or judgment of the board upon the issue or question involved in the denial of the complaint. *State v. City of Beloit*, 42 N. W. 110, 111, 74 Wis. 267.

#### **As finding by jury.**

The word "found," as used in Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], providing that, when any one shall copy a photograph which has been copyrighted, he shall forfeit \$1 for every sheet of the same found in his possession, means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant. The word cannot be construed as referring to the finding of the jury; and to mean simply that, where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act, such person shall forfeit \$1 for each sheet so ascertained to have been in his possession. *Thornton v. Schreiber*, 8 Sup. Ct. 618, 622, 124 U. S. 612, 31 L. Ed. 577.

#### **As proven.**

Where a defendant, having appealed, requested the judge to incorporate in the findings certain alleged facts which he claimed to be proven by the evidence, embraced in certain numbered paragraphs, upon the margin of which the court wrote "Found" and "Not found," the judge used "found" as meaning "proven," and "not found" as signifying "not proven." *Ketchum v. Packer*, 33 Atl. 499, 500, 65 Conn. 544.

An instruction to the jury that they must find a fact as to which there is conflicting testimony means, by common acceptance, that they must be satisfied of it to that degree of certainty which the case requires—that is, in a criminal case, as to a fact necessary to constitute the crime beyond a reasonable doubt; in a civil case, by such preponderance of evidence as satisfies the mind. *Southern Bell Telephone & Telegraph Co. v. Watts* (U. S.) 86 Fed. 460, 466, 13 C. C. A. 579.

#### **As seen.**

In the metropolitan police act, which enacts that any person found committing an offense, etc., may be taken into custody without a warrant, etc., "found" means that the party must be seen committing the offense. *Simmons v. Millingen*, 52 Eng. Com. Law, 524, 531.

Within laws making it an offense to be found intoxicated, "found intoxicated" means that the person must be seen intoxicated

by some other person. Intoxication alone, without being seen, is not a crime under this section. *State v. Austin*, 19 Atl. 117, 118, 62 Vt. 291. Thus an indictment merely charging that the defendant was intoxicated is insufficient. *State v. Bromley*, 25 Conn. 6, 9.

#### **As affecting service of process.**

The word "found," as used in Act 1853, authorizing substituted service in case the defendant, if a resident of the state, cannot be found after proper and diligent effort to effect service on him, should be construed in its technical sense, as an equivalent of the Latin word "inventus." The two words are synonymous, as well in their general as in their technical sense. Where the deputy charged with the service of summons was quite unable to reach or get at the defendant so as to serve him personally, the defendant could not be found, in the sense of the statute, even though no attempt may have been made by him to avoid or evade such service. *Carter v. Youngs*, 42 N. Y. Super. Ct. (10 Jones & S.) 169, 172.

In Admiralty rule 2, providing that in admiralty suits in personam the mesme process may be by a simple warrant of arrest of the defendant, in the nature of a capias, or "if he cannot be found," to attach his goods, the phrase quoted does not mean found for the purpose of arrest, so as to justify an attachment in a case where defendant is actually within and a resident of the district, but cannot be arrested because of the state law. *Bremena v. Card* (U. S.) 38 Fed. 144.

Code, § 3466, provides that in any civil action, when the summons has been returned, "Not to be found in my county," as to all or any of the defendants resident of the county, the plaintiff may have an alias and pluries summons for the defendant, or, at his election, sue out an attachment against the defendant's estate. Held, that the return, "Not to be found in my county," implies that the defendant is a resident of the county, and the failure of the sheriff to find him implies that he is evading process, and hence, if the defendant is not a resident of the county, it is a false return. *Carlisle v. Cowan*, 2 S. W. 26, 27, 85 Tenn. (1 Pickle) 165 (citing *Slatton v. Jonson*, 5 Tenn. [4 Hayw.] 197; *Welch v. Robinson*, 29 Tenn. [10 Humph.] 264; *James v. Hall*, 31 Tenn. [1 Swan.] 297).

Bankr. Act, § 40, provides that a copy of the petition and order to show cause shall be served on such debtor by delivering the same to him personally, or by leaving the same at his last usual place of abode, or, if he cannot be found, service shall be made by publication. By the words "if such debtor cannot be found" is meant if he

cannot be found within the jurisdiction of the court. In such case, the court said: "We do not understand that the debtor can be served, or that the marshal is compelled to serve him, in another jurisdiction, even when he knows precisely where he may be found. The words 'not found' have a well-settled technical meaning, and mean not found in the jurisdiction of the court." *Alabama & C. R. Co. v. Jones* (U. S.) 1 Fed. Cas. 275, 280.

#### As determining venue.

A statute provides that it shall not be lawful for any plaintiff to sue a defendant out of the county where the latter resides or may be found. Held, that the word "found," as here used, refers only to the defendant being in a county voluntarily. A defendant who was abducted for the purpose of obtaining service of a civil process on him would not be found within the county to which he was taken, within the meaning of the law above referred to. *McNab v. Bennett*, 66 Ill. 157, 160.

The word "found," as used in Judiciary Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], providing that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving process, contemplates a proceeding against a defendant in a district where he is not an inhabitant, and provides for the substituted service of process on him to bring him into the forum of litigation for the purpose of binding the res, unless he is found therein. The section applies solely to actions in rem, and in districts whereof the defendant is not a resident. *Spencer v. Kansas City Stockyards Co.* (U. S.) 56 Fed. 741, 743.

Where there is a statutory provision for service of summons upon a foreign corporation by serving its officers or agents through which it is doing its business in the state where the transitory action is brought, the corporation is found in such state where it is so sued and served, though it resides in another state, within the meaning of the word "found" as used in a statute permitting transitory actions to be brought only where defendants are found, etc. *Rush v. Foos Mfg. Co.*, 51 N. E. 143, 147, 20 Ind. App. 515.

Act Cong. March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 508], provides that an action shall be brought in the district where the defendant is an inhabitant, or in which he may be found. Held that, where foreign corporations establish agencies in a state whose laws provide that they may be summoned by process served on such agents, they are found within the district in which such agent is doing business. *Mohr & M. Distilling Co. v. Insurance Co.* (U. S.) 12 Fed. 474, 475.

A corporation is not to be deemed found within a district unless it is so far constructively present at the place where its agent is served with process that a judgment against it would be respected everywhere, and given full force and efficacy in another jurisdiction. The corporation must be engaged in business within the district, in order to be found there, within the meaning of this statute. A corporation is not found within a district, within the meaning of section above referred to, when its president comes temporarily into such district upon the business of the corporation; such corporation having no office or place of business therein. *Goodhope Co. v. Railway Barb Fencing Co.* (U. S.) 22 Fed. 635, 637. Under such act, "found," as applied to a railroad corporation, should be construed to mean the place where it has an established business office, and an agency for the purpose of soliciting business, having an agent there employed for the purpose of furthering the transportation business of the corporation in the states where its road runs, though it does not run its road to such places, carry passengers, or transport freight within the district. A corporation is found wherever such an office and agency is established. *Block v. Atchison, T. & S. F. R. Co.* (U. S.) 21 Fed. 529, 530.

#### FIND A PURCHASER.

An authority to an agent, authorizing him to find a purchaser for land, meant that the agent was authorized to find a buyer for the land, which he might bring to the owner, who would consider the prospective purchaser's offer, and determine whether she would sell the property. It did not authorize such agent to himself make a binding contract of sale, obligating the vendor to convey. *Flynn v. Van Kleeck*, 58 N. W. 1091, 1092, 91 Iowa, 78.

A lease providing that, in case the party of the first part found a purchaser for the premises, the party of the second part should have the option, during the continuance of the lease, to buy the premises, and, in case he should, on receiving notice that the party of the first part had found a purchaser, refuse to buy the premises, he should, upon notice, give up possession of the premises, should be construed to mean a coming in good faith by the lessor to a disposition of willingness to sell the premises to some other person, who was willing and able to buy, and does not mean actually conveyed the premises to some other person. The purchaser was the person willing and able to purchase. *McCormick v. Stephany*, 48 Atl. 25, 27, 61 N. J. Eq. 208.

Where a broker is to receive a commission for finding a purchaser for real estate, he must bring the parties together, so that

the principal has also found the purchaser. *Baars v. Hyland*, 65 Minn. 150, 152, 67 N. W. 1148.

### FINDER.

In an advertisement offering a reward to the finder for the return of lost property, "finder" means a person finding property which is actually lost by the owner, and does not include one who picks up a pocketbook which the owner thereof leaves on the desk in a banking house. *Kincaid v. Eaton*, 98 Mass. 139, 141, 93 Am. Dec. 142.

### FINDING.

#### See "General Finding."

The term "finding" is universally used by the profession and by the courts as meaning the decision of a trial court upon the facts, and is never used to designate the decision of the Supreme Court upon appeal. *Williams v. Giblin*, 57 N. W. 1111, 1112, 86 Wis. 648.

A finding by the court takes the place of a verdict by the jury. Findings are said to be general and special. In other words, the court finds a general verdict on all the issues for the plaintiff or defendant, or it finds a special verdict. *Rhodes v. United States Nat. Bank (U. S.)* 66 Fed. 512, 514, 13 C. C. A. 612, 34 L. R. A. 742.

#### Decision distinguished.

See "Decision."

#### Find distinguished.

See "Find—Found."

### FINDING OF FACT.

#### See "Special Finding."

A finding of fact is a determination by a court, found on the evidence of a fact averred by one party and denied by the other. *Miles v. McCallan*, 3 Pac. 610, 611, 1 Ariz. 491. The written statement of each issuable fact established by the evidence. *Elder v. Frevert*, 3 Pac. 237, 238, 18 Nev. 278.

A finding of fact is a determination of a fact by the court, which fact is averred by one party and denied by the other, and its determination must be founded on the evidence in the case. There can be no findings of fact where the judgment is upon the pleading. *Miles v. McCallan*, 3 Pac. 610, 611, 1 Ariz. 491.

The phrase "finding of fact" may mean simply a finding expressed in words, or also a finding implied from the nature of the decision. *Trustees of Amherst College v. Ritch*, 151 N. Y. 321, 45 N. E. 876, 37 L. R.

A. 305. Thus Const. 1894, art. 6, § 9, prohibiting the review by the court of a unanimous decision of an Appellate Division that there is evidence to sustain the finding of fact, applies to general as well as to special findings of fact. *People v. Barker*, 46 N. E. 875, 880, 152 N. Y. 417.

Under Code, §§ 2743–2745, providing for a submission to the court, and for findings in writing, either general or special, at the request of a party, the mere setting out of all the evidence in the cause, and rendering judgment thereon, is not a finding of the issues of fact, as required by the statute. *Brock v. Louisville & N. R. Co.*, 21 South. 994, 995, 114 Ala. 431.

Findings should be statements of the ultimate facts in the controversy, and not of probative facts or mere conclusions of law. Findings of probative facts are sometimes held sufficient, but only when the ultimate facts necessarily result from the probative facts. *Murphy v. Bennett*, 9 Pac. 738, 739, 68 Cal. 528.

#### As a proceeding.

See "Proceedings."

#### Special verdict distinguished.

There is a manifest difference between a special verdict and a finding of the facts in answer to interrogatories propounded to the jury. A special verdict is in lieu of a general verdict, and its design is to exhibit all the legitimate facts, and leave the legal conclusions entirely to the court. Findings of fact in answer to interrogatories do not dispense with the general verdict. A special verdict covers all the issues in the case, while an answer to a special interrogation may respond to but a single inquiry, pertaining merely to one issue essential to the general verdict. The one method of ascertaining the facts often serves precisely the same purpose as the other. The advantage of special interrogatories is that the parties are not deprived of the benefit of the general verdict, and that the ultimate facts need not be called for. The design of special interrogatories is to point out the controlling questions in the case, exact for them separate consideration, and thereby guard against misapprehension of what are the vital issues to be determined. When the answers cover all the ultimate facts, these furnish a full explanation of the general verdict, and a safe test of its accuracy. Their use, however, should never be perverted to the purpose of confusing and misleading jurors, nor to that of merely satisfying the curiosity of the parties. *Morbey v. Chicago & N. W. Ry. Co.*, 89 N. W. 106, 107, 116 Iowa, 84.

#### As verdict.

See "Verdict."



**FINE.**

Defendant entered into an agreement not to sell on certain village lots any kind of spirituous liquors in less quantities than a half barrel, and, in case the purchaser did so, he should be liable to pay the plaintiff, his heirs and assigns, in the first case, a fine of \$10, in the second case a fine of \$20, and for every further case the sum of \$50, and providing in a further clause "to pay the said punishment" for nonperformance of his covenant. Held, that the word "fine," as used in the agreement, is synonymous with "penalty," and that the sums mentioned are not liquidated damages, but penalties. *Laubheimer v. Mann*, 19 Wis. 519, 520, 521.

In a contract providing for the payment of a certain sum for each day the use of a boat was delayed by failure to complete the work, the sum was denominated a "fine," but in such connection will be construed to mean liquidated damages, and not a penalty. *Manistee Ironworks Co. v. Shores Lumber Co.*, 65 N. W. 863, 866, 92 Wis. 21.

**Of building and loan associations.**

The term "fine," as used in relation to building and loan associations, which is imposed for every default of payment of dues, is merely an agreed sum as liquidated damages. *Goodman v. Durant Bldg. & Loan Ass'n*, 14 South. 146, 147, 71 Miss. 310.

The fines imposed upon the borrowers from building associations are a species of liquidated damages due the society, under its system of mutuality, for the neglect of a membership duty, and must, of necessity, fall away when the membership is gone, when there is none who can justly claim the damages, and when their exaction would be nothing more or less than the enforcement of penalties not countenanced by law. *Johnston v. Grosvenor*, 59 S. W. 1028, 1031, 105 Tenn. 353.

**FINE (In Conveyancing).**

"The word 'fine' was used by the author of the Touchstone and by Lord Coke to denote a sum of money agreed to be paid on alienation, and not a penalty imposed by any court. In the former sense, it is used not only in the older, but in the modern, books." Citing *Lil. Conv.* 624. "Jacob, in his *Law Dictionary*, says the premiums given on renewal of leases are termed 'fines,' and there are fines for alienation of copyholds paid to the lord. One of the definitions of the same word given by Mr. Burrill is a sum of money or price paid for obtaining a benefit, favor, or privilege, as the ancient fines for obtaining a writ and for alienation." *De Peyster v. Michael*, 6 N. Y. (2 Seld.) 467, 495, 57 Am. Dec. 470.

As a method of conveyance, a fine was an amicable composition of a collusive suit, intended to operate as a conveyance of land by means of a solemn recognition, by matter of record contained in such suit, of the title of the proposed vendee, which he asserts by the suit to be existing in him, and which the grantor, the defendant in the suit, admits in solemn form upon the record to be so. The proceeding is of unknown antiquity, going back to the first rudiments of common law—as it appears, even antedating the Conquest. *Christy v. Burch*, 2 South. 258, 259, 25 Fla. 942 (citing 2 Bl. Comm. 348).

As a method of extinguishing title to land, as defined by Blackstone, a fine is sometimes said to be a feoffment of record, though it might with more accuracy be called an acknowledgment of a feoffment on record, by which it is to be understood, and which has at least the same force and effect with "feoffment" in the conveying and assuring of lands, though it is one of those methods of transferring estates of freehold by the common law in which livery of seisin is not necessary to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But more particularly a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the King or his Justices, whereby the lands in question become, or are acknowledged to be, the right of one of the parties. In its origin it was founded on an actual suit commenced at law for the recovery or possession of land or other hereditaments, and a possession thus gained by such composition was found to be so sure and effectual that negotiations were, and continued to be, every day commenced for the sake of obtaining the same security. *First Nat. Bank v. Roberts*, 23 Pac. 718, 721, 9 Mont. 323.

The conveyance of the estates of married women by deed with separate examination and acknowledgment has taken the place of the alienation of such estates by fine in a court of record under the law of England, though differing in some of its effects. A fine was in the form of a judgment of a court of record, at first in an actual, and afterwards in a fictitious, suit by the conusee against the conusors to recover possession of the land, and derived its very name from its putting an end to that suit, and to all other controversies concerning the same matter. *Hitz v. Jenks*, 8 Sup. Ct. 143, 145, 123 U. S. 297, 31 L. Ed. 156.

A fine, says Lord Coke, is a feoffment (i. e., a deed) upon record—called so because *finem imponit litibus*. It puts a finis or end to litigation. Its object is to quiet titles more speedily than by the ordinary limitation of 20 and 25 years. By means of this

final proceeding, one of two contesting claimants of real estate could compel an asserting or abandonment of the pretensions of his adversary in one-fifth the usual period of delay. The practice of levying fines is as ancient in England, from which country we derived it, as any court of record, and dates back beyond the Conquest. As the law stood in 1828, a fine, properly levied, after the lapse of five years, was an absolute bar to conclude as well privies as strangers. Hence it was that the most ample notice to all the world was required. This notice consisted of three parts: (1) An open, notorious taking of possession under claim of title adverse to all others; (2) public proclamation in open court at four successive terms; (3) an advertisement in the state paper and one other journal for five successive weeks. Also a notice on the courthouse door and a record in the regular office for recording conveyances. *McGregor v. Comstock*, 17 N. Y. 162, 166.

Blackstone says a fine is so called because it puts an end not only to the suit thus commenced, but also to all other suits and controversies containing the same matter. *Murrah v. State*, 51 Miss. 652, 657.

Though a fictitious proceeding, it is a conveyance of record. *Guthrie v. Owen's Heirs*, 18 Tenn. (10 Yerg.) 339, 341.

#### **FINE (In Criminal Law).**

See "Excessive Fine"; "Municipal Fine."

"Fine" means, among other things, a sum of money paid at the end to make an end of a transaction, suit, or prosecution; mulct; penalty." Citing *Webst. Dict.*; *Rich. Dict.* "In ordinary legal language, however, it means a sum of money imposed by a court, according to law, as a punishment for the breach of some penal statute." *Atchison, T. & S. F. R. Co. v. State*, 22 Kan. 1, 15.

A fine is a pecuniary punishment for an offense, inflicted by sentence of court having authority to impose it. *Wilcox v. Knoxville Borough*, 2 Pa. Dist. R. 721, 725.

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. *Southern Exp. Co. v. Commonwealth*, 22 S. E. 809, 810, 92 Va. 59, 41 L. R. A. 436; *State v. Missouri Pac. Ry. Co.*, 90 N. W. 877, 878, 64 Neb. 679; *City of Hudson v. Granger*, 52 N. Y. Supp. 9, 10, 23 Misc. Rep. 401; *People v. Nedrow*, 13 N. E. 533, 535, 122 Ill. 363.

"A fine is a sum of money exacted of a person guilty of a misdemeanor or crime, the amount of which may be fixed by law, or left in the discretion of the court." *Village of Lancaster v. Richardson* (N. Y.) 4 Lans. 136, 140.

"A fine is a pecuniary penalty, and is commonly, perhaps always, to be collected by suit in some form." *Gosselink v. Campbell*, 4 Iowa (4 Clarke) 296, 300.

The word "fine," as used in the act of January 7, 1852 (Gen. Laws 1882, pp. 15, 16, §§ 17, 18), relating to obstructions and interferences with ditches or water, and providing for the recovery, in addition, of all damages that may have accrued to injured parties, must be construed to mean a pecuniary penalty, merely, that may be sued for in a civil action. *Territory v. Baca*, 2 N. M. 183, 180.

In Rev. St. § 3294, providing that a forfeiture may be sued for and recovered in a civil action, and that the word "forfeiture" shall include any penalty in money or goods other than a fine, the word "fine" means a fine imposed by statute, and does not include fines imposed by municipal corporations. *City of Oshkosh v. Schwartz*, 13 N. W. 552, 555, 55 Wis. 453.

A fine is a sum of money which may be exacted from a defendant convicted of an offense or of criminal misconduct, the payment of which is imposed on him as a punishment for the offense. *State v. Belle*, 60 N. W. 525, 526, 92 Iowa, 258.

#### **Costs included.**

The sum which may be exacted from one as a punishment for his criminal misconduct is that definite and certain sum, called a "fine," which the court is empowered to impose upon him. Costs in a criminal proceeding are merely incidental, and form no part of the fine, and consequently may be modified and increased on appeal by the state, though Code 1873, § 4539, provides that a judgment in a criminal case cannot be reversed or modified on appeal, in this state, so as to increase the punishment. *State v. Belle*, 60 N. W. 525, 526, 92 Iowa, 258.

"Fine," as used in Laws 1835-36, relating to the release of persons imprisoned for the nonpayment of any fine or costs of prosecution, on application to the court of common pleas, under certain circumstances, would not include a sentence to pay the costs of a prosecution in a criminal proceeding, as a fine is a penalty imposed on a person who has transgressed the law; a man who is merely sentenced to pay the costs of prosecution being neither a criminal, nor a transgressor of the law. *Appeal of Luzerne County*, 19 Atl. 1063, 135 Pa. 468.

The terms "fine" and "penalty" signify a mulct for an omission to comply with some requirement of law, or for a positive infraction of law, and do not include the costs which accrue from the prosecution. *Lord v. State*, 37 Me. 177, 179.

**Criminal offense or proceeding imported.**

The imposition of a fine is a judgment for a criminal offense; and, as contempt of court may be punished by a fine, it is a criminal offense. In *re Acker* (U. S.) 66 Fed. 290, 292.

The primary definition of a "fine" is a pecuniary punishment inflicted by the sentence of a court exercising criminal jurisdiction. And this is the sense in which the term is used in common speech. *State v. Missouri Pac. Ry. Co.*, 90 N. W. 877, 878, 64 Neb. 679.

A fine is a pecuniary punishment for an offense or contempt committed, imposed by the judgment of the court, so that where, in a bastardy proceeding, a fine is authorized to be imposed, such proceeding is a criminal proceeding. *State v. Burton*, 18 S. E. 657, 660, 113 N. C. 655. "A fine," says Lord Coke, "signifieth a pecuniary punishment for an offense or a contempt committed against the King." "A fine is a pecuniary punishment for an offense or contempt committed, imposed by the judgment of a court." Therefore, under a statute providing that in bastardy proceedings, when the issue of paternity is found against the putative father, he shall be fined, the word "fined" implies that bastardy is a criminal offense. *State v. Ostwalt*, 24 S. E. 660, 661, 118 N. C. 1208, 32 L. R. A. 396.

The definition of "fine" is wholly inapplicable to a judgment in a civil suit. Hence a proceeding for the violation of a city ordinance, where the punishment is a fine or imprisonment, is criminal in character. *City of Hudson v. Granger*, 52 N. Y. Supp. 9, 10, 23 Misc. Rep. 401.

**As a debt.**

See "Debt."

**Forfeitures and penalties included.**

A fine is a pecuniary punishment imposed by a lawful tribunal on a person convicted of crime or misdemeanor. It may include a forfeiture or a penalty recovered in a civil action. The word is often used as synonymous with the word "forfeiture." *People v. Nedrow*, 13 N. E. 533, 535, 122 Ill. 363.

"Penalty" and "fine" are not the same in law. A penalty is always recoverable in a civil action. A fine never is. A penalty, when recovered, goes to the party suing; a fine, to the people. *City of Hudson v. Granger*, 52 N. Y. Supp. 9, 10, 23 Misc. Rep. 401.

When imposed as a punishment for a statutory offense, there is no substantial difference between a fine and a forfeiture. A fine is a pecuniary punishment for an offense, and a pecuniary punishment called a

"forfeiture" is equivalent to the same pecuniary punishment called a "fine." *State v. McConnell*, 46 Atl. 458, 459, 70 N. H. 158.

Const. art. 9, § 3, providing that fines assessed for any breach of the penal laws shall be applied to the county seminaries, means pecuniary punishments for the breaches of the criminal law, and does not include penalties or forfeitures for violation of penal statutes. *Common Council of Town of Indianapolis v. Fairchild*, 1 Ind. (1 Cart.) 315, 316, 318.

A fine is a punishment for the commission of a crime. Crimes, except the greatest, can only be punished by fine or imprisonment, and a penalty is not in any legal sense a fine. *Fuller v. Redding*, 39 N. Y. Supp. 109, 110, 16 Misc. Rep. 634.

"Fines," as used in St. 1854, c. 335, § 13, declaring that the jurisdiction of the police court in Cambridge shall not be limited by reason of any interest on the part of the justices of said court in the payment of fines and costs into the treasury of the city or county, does not mean only those pecuniary punishments for offenses which are inflicted by sentence of a court in the exercise of criminal jurisdiction, but the word "fines" means forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence. The word "fine" has other meanings, being defined not only as a pecuniary punishment, but as a forfeiture, penalty, etc.; and hence the police court in Cambridge has jurisdiction of a civil suit to recover a forfeiture or penalty, one half of which is to the use of the plaintiff, and the other half to the use of the town where he belongs, notwithstanding the interest of the justice, which he had because he is a taxpayer within the town to which a part of the penalty or forfeiture belongs. *Hanscomb v. Russell*, 77 Mass. (11 Gray) 373, 375.

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor. In chapter 31 of the Code the word "fine" includes a pecuniary forfeiture, penalty, and amercement, but that is by special enactment; and as used in Const. art. 8, § 7, providing that all fines collected for offenses committed against the state shall be set apart as a permanent, perpetual, literary fund, it means fines imposed as a punishment for crime. It comprehends only those fines which are fixed as penalties for crimes, and are recoverable upon the conviction of the offender, and does not embrace those pecuniary penalties or forfeitures provided by statute, that a popular or *qui tam* action may be brought to recover, and hence does not include the penalty imposed by Code 1887, § 1220, against express companies, for making excessive charges, etc., and giving one-half of the same to the informer. *Southern Exp. Co. v. Common-*

wealth, 22 S. E. 809, 810, 92 Va. 59, 41 L. R. A. 436.

Acts 1855, p. 151, § 10, declaring that no person shall be prosecuted for any "fine or forfeiture" unless the prosecution for the same shall be instituted within six months from the time of the incurring of such fine or forfeiture, does not apply to a prosecution for a criminal offense. *State v. Jumel*, 13 La. Ann. 399, 400.

A fine, in ordinary legal language, is a sum of money, the payment of which is imposed by a court, according to law, as a punishment for a crime or misdemeanor. The fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor. While the word "penalty" has a broader meaning than the word "fine," still a fine, in the judicial sense, is always a penalty. *United States v. Nash* (U. S.) 111 Fed. 525, 528.

A pecuniary penalty imposed on conviction of an offense is a fine, though called a "penalty" by the statute. *Weideman v. State*, 56 N. W. 688, 689, 55 Minn. 183.

The words "fine" and "penalty" are used interchangeably in a statute relating to a sale of imitation butter (Gen. Laws 1891, c. 11). *Weideman v. Horgan*, 55 Minn. 183, 185, 186, 56 N. W. 688, 689.

Wherever the word "fine" is used in the chapter relating to the recovery of fines, it shall be construed to include a pecuniary forfeiture, penalty, and amercement. Code Va. 1887, § 745.

#### As a judgment.

"A fine is a judgment. In criminal law, it is a pecuniary punishment imposed by the judgment of a court on a person convicted of crime. Such a judgment does not come within the intention of the law allowing interest on judgments. In its nature, principle, and purpose, a fine is a very different thing from the judgments which the Legislature had in view in enacting the law of interest. It is imposed as a punishment, solely, and its payment, as the term imports, is an end of the punishment. In modern practice, where a party is fined, and ordered to stand committed until the fine is paid, the payment has the effect of putting an end to the punishment; and, in any case, where a fine constitutes the sole punishment of a party, its payment puts an end to the offense for which it was imposed, or to the legal liability growing out of such offense." *State v. Steen*, 14 Tex. 396, 398. See, also, *People v. Sutter St. Ry. Co.*, 62 Pac. 104, 105, 129 Cal. 545, 79 Am. St. Rep. 137.

#### Recovery on forfeited bail bond.

Act June 22, 1874 (18 Stat. 186), allowing compensation to informers out of "fines,

penalties, or forfeitures" inflicted, does not include sums recovered on forfeited bail bonds. In *re Brittingham* (U. S.) 5 Fed. 191.

#### As a tax.

See "Tax—Taxation."

#### FINE AND FORFEITURE FUND.

The fine and forfeiture fund of the counties is a fund accruing from pecuniary penalties and punitive impositions incurred by defendants in the enforcement of criminal prosecutions, in the nature of profits arising from our system of criminal procedure. The fund is set apart to meet those occurring and recurring liabilities which will be encountered in the administration of the criminal law. *Burgin v. Hawkins*, 14 South. 771, 772, 101 Ala. 326 (citing *State v. Coleman*, 73 Ala. 550).

#### FINE ARTS.

"Fine arts," as used in Rev. St. § 737, authorizing incorporations of societies for the purpose of promoting "the love and practice of the fine arts," means music, painting, sculpture, etc. *Vredenburg v. Behan*, 33 La. Ann. 627, 637.

"Fine arts," as used in Rev. St. § 4962, providing that a painting, drawing, statue, statuary, and model and designs, intended to be perfected as "works of the fine arts," may be copyrighted, cannot be construed to include printed balloons and hanging baskets, with or without embroidery, designed to be cut up and embroidered. *Rosenbach v. Dreyfuss* (U. S.) 2 Fed. 217, 219.

#### FINE STOCK.

See "Very Fine Stock."

#### FINING.

Time out of mind, glass has been made by melting mixtures of sand and alkali in crucibles. As the ingredients melt, they gradually form a mixture of glass, more or less perfect, sand, etc. By maintaining the requisite temperature, the effect called "fining" is produced. The proportion of glass increases, and, being heavier than the unpurified balance of the mass, sinks, while the latter rises. Thus there is a constant motion of the particles upward and downward, and to some extent laterally; the glass forming the lower strata, with the less pure and the refuse above. The term "fining" signifies that part of the process of melting in which the purified particles sink and find their level. *Benjamin v. Chambers & McKee Glass Co.* (U. S.) 59 Fed. 151, 155, 8 C. C. A. 61.

## FINISH.

The fact that the owner of a house moved into it at a certain time held not to estop him to deny that it was then finished, within the meaning of his acceptance of an order "to be paid when the house is finished." *Robbins v. Blodgett*, 121 Mass. 584.

"Finishing," as used in a statute giving a lien in favor of mechanics for work performed toward the erection, construction, or finishing of buildings, cannot be construed to include flagging the sidewalks, yards, and approaches of buildings which are being erected. *McDermont v. Palmer*, 8 N. Y. (4 Seld.) 383, 386, 2 E. D. Smith, 675.

A railroad 30 miles in length was built in 1885, and had been running with a full equipment for three years, when, in 1888, it was decided to extend it 11 miles. The extension was completed prior to December 31, 1889, when it had 13 locomotives, 24 passenger cars, and 42 freight cars. Held, that in the fall of 1890 it was finished, within the meaning of a will authorizing trustees to invest in real estate, or in bonds of railroad companies whose roads were finished. In *re Bartol's Estate*, 38 Atl. 527, 529, 182 Pa. 407.

### As applied to furniture.

"Finished," as applied to furniture, in the furniture trade, has a particular trade meaning. According to such meaning, if an article has been varnished, stained, oiled, polished, or the like, it is finished. In *re Herrman* (U. S.) 56 Fed. 477, 479, 5 C. C. A. 582.

## FIRE.

See "Accidental Fire"; "Friendly Fire"; "Loss by Fire"; "After the Fire."

"Fire," as used in bills of lading exempting the owner of a vessel from loss of the freight by fire, construed to mean any fire, and not to be limited to fire originating from the furnace of the boat. *Swindler v. Hilliard* (S. C.) 2 Rich. Law, 286, 305, 45 Am. Dec. 732.

A fire policy insuring against loss by fire will be construed to cover a loss of goods stored in a building which is blown up to prevent the spread of a fire, and which are burned in such fire. *City Fire Ins. Co. v. Corlies* (N. Y.) 21 Wend. 367, 34 Am. Dec. 258.

In *Dobson v. Sotheby*, 1 Moody & M. 90, which was an action on a fire policy which requires that no fire should be kept in the insured buildings, a tar barrel was taken into a barn for the purpose of repairing the building by tarring it, though no fire was ordinarily kept or made there, but it was held not a violation of the conditions of the policy. Lord Tenterden says that "the condition

must be understood as forbidding only the habitual use of fire, and not its occasional introduction, as in that case, for a temporary purpose connected with the occupation of the premises. *O'Neil v. Buffalo Fire Ins. Co.*, 3 N. Y. (3 Comst.) 122, 127.

### Fires from collision.

"Fire," as used in a bill of lading exempting a carrier from liability from the dangers of the sea, fire, water, etc., does not include fire resulting from a collision arising from the negligence of the carrier. *The City of Norwich* (U. S.) 5 Fed. Cas. 780, 781.

"Fire," as used in a marine policy covering loss by fire, includes fires caused by collisions. *Howard Fire Ins. Co. v. Norwich & N. Transp. Co.*, 79 U. S. (12 Wall.) 194, 20 L. Ed. 378.

A marine policy was on goods on a vessel against loss by fire. A fire, caused by the collision of such vessel with another vessel, broke out immediately on the collision, and the vessel sank before the goods were touched by the fire. Held, that the phrase "loss by fire" included this case, if the damage to the goods could have been avoided but for the intervention of the fire. *New York & B. Despatch Exp. Co. v. Traders' & Mechanics' Ins. Co.*, 132 Mass. 377, 385, 42 Am. Rep. 440.

### Fires intentionally caused.

A policy of marine insurance against the peril of fire should not be construed to cover a fire directly and immediately caused by the barratry of the master and crew, as the efficient agents, or, in other words, a fire communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. *Waters v. Merchants' Louisville Ins. Co.*, 36 U. S. (11 Pet.) 213, 219, 9 L. Ed. 69.

### Explosion.

A policy of insurance insuring against loss by fire should be construed to include a loss produced by an explosion, the explosion being produced by fire, though such explosion may have contributed in a large degree to the destruction of the property. *Washburn v. Farmers' Ins. Co.* (U. S.) 2 Fed. 304, 307.

The breaking of plate glass in a store by the explosion of gas in a room, generated from gasoline being used to clean clothes, prior to fire in the building, is not caused by fire, within the exception to the policy, though the gas was ignited by a match or light in the room. *Vorse v. Jersey Plate Glass Ins. Co.*, 93 N. W. 569, 570, 119 Iowa, 555, 60 L. R. A. 838, 97 Am. St. Rep. 330.

"Fire," as used in a fire policy providing against loss or damage by fire, and making no exceptions against explosions, includes damage or loss caused by an explosion of

gasoline, either resulting from accidental fire gradually coming in contact with coal oil or gasoline, or from an innocent fire, such as a gas jet, purposely left burning, igniting the inflammable gas mixed with atmosphere, which had escaped and filled the room. *Renshaw v. Missouri State Mut. Fire & Marine Ins. Co.*, 15 S. W. 945, 947, 949, 103 Mo. 595, 23 Am. St. Rep. 904.

A match lighted and held by an employé of plaintiff company in contact with gasoline vapor, and causing an explosion, is not to be considered as fire, within the meaning of a fire insurance policy. *Mitchell v. Potomac Ins. Co.*, 22 Sup. Ct. 22, 25, 183 U. S. 42, 48 L. Ed. 74.

"Fire," as used in a fire policy insuring against loss by fire, included a loss or damage caused by an explosion taking place as an incident or result of the fire. *Transatlantic Fire Ins. Co. v. Dorsey*, 56 Md. 70, 82, 40 Am. Rep. 403.

A policy insured plaintiff's liquor store from loss or damage by fire, and provided that the company was not liable for loss or damage by lightning or tornado, nor for any loss or damage occasioned by or resulting from any explosion whatever. Held, that the term "loss or damage by fire" included all loss and damage occasioned by any fire of which an explosion was the efficient cause, and the clause, properly construed, should read, "nor any loss or damage by fire occasioned by or resulting from any explosion whatever," and hence a fire caused by explosion of whisky vapor, which had come in contact with the flame of a gas jet, from which it ignited, was exempt, within the terms of the policy. *United Life, Fire & Marine Ins. Co. v. Foote*, 22 Ohio St. 340, 344, 10 Am. Rep. 735.

#### Heat.

The word "fire," as employed in a fire policy, does not include damage caused by steam escaping from a break in the pipes of the apparatus by which a building is heated, thereby producing such a degree of heat in a room that the furniture and books therein were charred, since fire and heat are not one, but are cause and effect, and damage by heat was not insured against, and was covered by the policy only when caused by misplaced fire. *Gibbons v. German Ins. & Sav. Inst.*, 30 Ill. App. 263, 265.

#### Lightning.

Where a policy insured a church against loss by fire, the policy did not indemnify against damages sustained by lightning, where the only fire resulting was the charring and insignificant burning of a part of the building in the course taken by the electricity. *Andrews v. Union Mut. Fire Ins. Co.*, 37 Me. 256, 259.

Lightning is defined by Webster as a sudden discharge of electricity from a cloud to the earth, producing a vivid flash of light; but fire is not used in connection with it, and hence a policy covering loss by fire does not cover loss by lightning not followed by fire. *Babcock v. Montgomery County Mut. Ins. Co.*, 4 N. Y. (4 Comst.) 326, 336.

#### As loss.

"Fire," as used in a policy of insurance requiring an action for the recovery of any claim to be brought within 12 months after the fire, means the date of the fire, and not the date when the loss is ascertained or established. *Hart v. Citizens' Ins. Co.*, 56 N. W. 332, 333, 86 Wis. 77, 21 L. R. A. 743, 39 Am. St. Rep. 877.

Under a policy of insurance, one of the conditions of which was that no suit can be maintained, unless brought within "twelve months after the date of the fire," construing it with another provision of the policy, which was that the policy did not become payable until 60 days from the proofs of loss, the action must be brought within 12 months from the expiration of the 60 days. *Steel v. Phoenix Ins. Co.* (U. S.) 51 Fed. 715, 721, 2 C. C. A. 463.

#### Fires negligently caused.

A bill of lading exempting a carrier from liability for losses by fire does not include fire ignited from the engine through the negligence of the carrier in failing to properly construct its locomotive. *Steinweg v. Erie Ry.*, 43 N. Y. 123, 3 Am. Rep. 673.

A bill of lading exonerating a common carrier from loss occasioned by fire did not exonerate the carrier from loss occasioned by fire resulting from its own negligence. *Condict v. Grand Trunk Ry. Co.*, 54 N. Y. 500, 505 (citing *Lamb v. Camden & A. R. & Transp. Co.*, 46 N. Y. 271, 7 Am. Rep. 327).

A fire policy on a steam tug, insuring against "all loss or injury by fire," does not cover damage done to the interior of the boiler by the fire in the furnace on account of the failure to keep a sufficient supply of water in the boiler. *American Towing Co. of Baltimore v. German Fire Ins. Co.*, 21 Atl. 553, 74 Md. 25.

Fire caused by negligence is covered by a marine policy, and has the same effect as it has in a land policy. "Fire" is the risk insured against, and the fire was an approximate cause, though negligence was the remote cause, of the loss. *Waters v. Merchants' Louisville Ins. Co.* (U. S.) 29 Fed. Cas. 415.

An insurance "against all damage which the assured shall suffer by fire on stock and utensils in their regularly built sugarhouse" does not extend to damage done to the sugar

by the heat of the usual fires employed for refining, being accumulated by the mismanagement of the assured, who inadvertently kept the top of their chimney closed. *Austin v. Drewe*, 6 Taunt. 436.

#### Lamp.

A lamp is not fire within the meaning of an insurance policy covering damages by fire or lightning, so that recovery cannot be had for damages caused by the smoke therefrom, when no ignition occurs outside of the lamp. *Fitzgerald v. German-American Ins. Co.*, 62 N. Y. Supp. 824, 30 Misc. Rep. 72.

#### Spontaneous combustion.

"Fire," as used in a marine insurance policy against fire, should be construed to include fire from accident, or brought about by a peril of the sea, but not from spontaneous combustion. *Providence Washington Ins. Co. v. Adler*, 4 Atl. 121, 65 Md. 162, 57 Am. Rep. 814.

#### FIREARMS.

See "Arms."

A firearm is a weapon which acts by the force of gunpowder. *Harris v. Cameron*, 51 N. W. 437, 438, 81 Wis. 239, 29 Am. St. Rep. 891 (quoting *Webst. Dict.*); *Atwood v. State*, 53 Ala. 508, 509.

As the term is used in Rev. Code, § 3555, prohibiting the carrying of concealed firearms, it does not necessarily mean a weapon of present offense or defense; and hence a pistol does not cease to be a firearm for the mere reason that it is so imperfect and battered up that it cannot be discharged by the trigger. *Atwood v. State*, 53 Ala. 508, 509.

The term "firearm," in a statute prohibiting the carrying of concealed weapons or firearms, includes a pistol which is defective, but which may be discharged while holding it in the hand by striking the hammer with a knife or other small instrument. *Redus v. State*, 2 South. 713, 82 Ala. 53.

A corporate authority to manufacture firearms and other implements of war applicable to the use of firearms, and all kinds of machinery adapted to the construction thereof, does not include a power to manufacture and deliver circular railroad locks. *Whitney Arms Co. v. Barlow*, 38 N. Y. Super. Ct. 554, 563.

Within the meaning of St. 1833, c. 367, § 124, forbidding parading by unauthorized bodies of men with firearms, a firearm includes ordinary breach-loading Springfield rifles, which had been rendered useless, so that the rifles could not be used to discharge any missile by means of gunpowder or other explosive, where the rifles are, to an ordi-

nary observer, efficient, and the fact that they were disabled for use was not apparent to an ordinary observer. *Commonwealth v. Murphy*, 44 N. E. 188, 189, 166 Mass. 171, 32 L. R. A. 606.

#### FIREBRICK.

See "Magnetic Fire Brick."

Fire brick, not capable of decoration, over 10 pounds in weight, designed for linings to retort ovens, are dutiable under the similitude clause of section 7 of the tariff act of 1897 [U. S. Comp. St. 1901, p. 1693], as fire brick weighing not more than 10 pounds each, not glazed, enameled, or decorated, under paragraph 87 [U. S. Comp. St. 1901, p. 1632]. *Wing v. United States (U. S.)* 119 Fed. 479.

#### FIRE BY LIGHTNING.

Where a fire policy provided that the insurer should be liable for "fire by lightning," such term should be literally construed, and meant a loss occasioned by the igniting of the building by lightning; and hence, where the insured premises were rent and torn to pieces by lightning, without being burnt, the insurer was not liable. *Babcock v. Montgomery County Mut. Ins. Co. (N. Y.)* 6 Barb. 637, 643, 4 N. Y. (4 Comst.) 326, 328, 331.

A fire policy against loss by fire, which provided in a separate clause that the insurers should be liable for fire by lightning, was held not to include the prostration and destruction of the building by lightning, where no fire resulted therefrom. In reaching such conclusion, the court said: "In the first book of Kings, xviii, 28, 'the fire of the Lord' is mentioned as a destructive agent; and, at an early stage in the afflictions of Job, he received intelligence that 'the fire of God is fallen from heaven, and hath burned up the sheep and the servants, and consumed them.' Job, i, 16. If the fire thus spoken of were atmospheric electricity, which there may be some reason to doubt, still, according to the same book, the voice which answered Job out of the whirlwind designated it as 'the lightning of thunder,' and, as if in derision of all human effort to understand or control its action, inquired, 'Canst thou send lightnings, that they may go and say unto thee, Here we are?' Job, xxxviii, 25, 35. A conjecture as to the identity of fire and lightning appears to have been indulged in by the ancients. Seneca maintained it as probable, and stated that the Stoics believed, that air was converted into fire and water during a thunderstorm. The Epicureans are represented to have taught that lightning consisted of fire alone, which was derived from the sun." *Babcock v. Montgomery County Mut. Ins. Co.*, 4 N. Y. 326, 331, 332.

**FIRE DEPARTMENT.**

Under a statute exempting parcels of land used exclusively for farming purposes from taxation to support the fire department, such land is not exempt from taxes to provide a system of waterworks, though such waterworks are at times used in connection with the fire department. *Baldwin v. City of Hastings*, 47 N. W. 507, 508, 83 Mich. 639.

**FIRE DISTRICTS.**

The term "fire districts," as used in Code 1873, § 482, which provides that cities shall have power to make regulations against dangers from accidents by fire, to establish fire districts in certain cases, to prohibit the erection of any building or addition to any building unless the outer walls be made of brick, etc., is used for the purpose of authorizing the division of the city into districts for the purpose of more efficient services by the fire department in the extinction of fires, and it is not synonymous with the words "fire limits." *City of Des Moines v. Gilchrist*, 25 N. W. 186, 187, 67 Iowa, 210.

**FIRE ENGINE.**

A fire engine is an engine, the primary purpose of which is to extinguish fires. Within the meaning of a statute exempting fire engines from taxation, the term does not include waterworks owned by a private company, and operated to supply the city and its inhabitants with water for all purposes to which it may be applied. *Appeal of Des Moines Water Co.*, 48 Iowa, 324, 329.

**FIRE FORCE.**

The expression "on the force for extinguishing fires," as used in Acts 1880, c. 37, § 7, providing that no person so employed shall be removed without cause, includes an assistant superintendent of telegraphs in the fire department. *People v. Fire Com'rs of City of Brooklyn* (N. Y.) 28 Hun, 495, 496.

The "force for extinguishing fires," within the meaning of the statute prohibiting the discharge of any member of the force employed for extinguishing fires, does not include a person appointed by a fire commissioner as a laborer, though he wears the costume of a fireman and assists at fires. *People v. Wurster*, 35 N. Y. Supp. 90, 89 Hun, 8.

The "force for extinguishing fires," within the meaning of the Brooklyn city charter, providing that the fire commissioner may remove clerks under certain conditions, but that no person on the force for extinguishing fires shall be removed without cause, etc., includes a telegraph operator of the fire department. *People v. Ennis*, 7 N. Y. Supp. 630.

"Fire force," as used in a municipal civil service regulation relative to members of the fire force, includes the chief and assistant chief of the fire department, the engineers, captains, lieutenants, drivers, stokers, tillermen, pipemen, firemen, etc. This includes employees of the fire department wearing the prescribed uniform when on duty, and subject to the orders of the chief or of the captains of their respective companies, but does not include clerical officials of the fire force. *City of New Orleans v. Board of Fire Com'rs*, 23 South. 906, 909, 50 La. Ann. 1000.

**FIRE FROM EXPLOSION.**

A clause in a policy exonerating the insurer from loss by fire which should happen by an explosion includes an explosion of a steam engine insured by the policy. *Hayward v. Liverpool & L. Life & Fire Ins. Co.* (N. Y.) 2 Abb. Dec. 349, 352.

The destruction by fire for which an insurance company is liable under a fire policy providing that the company shall not be liable for loss by explosion unless fire ensues, and then for loss by fire only, includes a fire resulting from an explosion in a building adjoining the insured building, which wrecks the latter, and also starts a fire which destroys the insured building. *Hustace v. Phoenix Ins. Co.*, 75 N. Y. Supp. 568, 71 App. Div. 309.

The term "fire happening from an explosion," in a fire policy, exempting the insured from liability from fire happening from any explosion, etc., includes a fire resulting from an explosion in another building across the street, which blows down the insured's building, and starts a fire which results in an extensive conflagration, destroying the insured's property, though the fire destroying the latter does not go directly from the building where the explosion occurred. *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. (7 Wall.) 44, 19 L. Ed. 65.

**FIRE HAPPENING TO OR ON BOARD SHIP.**

Rev. St. § 4282 [U. S. Comp. St. 1901, p. 2943], providing that no owner of any ship or vessel shall be liable for any loss or damage which may happen to any goods which shall be taken in or put on board any such ship by reason or by means of any fire happening to or on board said ship, unless said fire is caused by the design or neglect of such owner, means a fire that happens to the ship physically, not one that happens merely to interrupt the performance of her duties in respect to the goods upon the dock, and does not include a fire which originated upon the dock, extending to the steamer so far as to do some damage to her helm and rigging before she was towed away, preventing her



from completing the delivery of the goods to the consignees, about which the ship was engaged at the time of the fire. *The Egypt* (U. S.) 25 Fed. 820, 823.

28 G. III, c. 86, § 2, protecting the owners of any ship from making good any loss which may happen to goods on board by means of any fire happening to or on board, would not include a fire on a lighter which the owner used in loading goods. *Morewood v. Pollok*, 1 El. & Bl. 748, 748.

#### FIRE HUNTING.

"Fire hunting," which is prohibited by Act Feb. 11, 1897, is defined by the statute to mean persons camping in the woods, or at or near any house, with guns and dogs, for the purpose of hunting game, etc. *Du Bose v. State*, 74 S. W. 292, 293, 71 Ark. 847.

#### FIRE INSURANCE.

A contract for fire insurance is one of indemnity. *Meigs v. Insurance Co. of North America*, 54 Atl. 1053, 1054, 205 Pa. 378; *Henderson Warehouse Co. v. Brand*, 81 S. E. 551, 553, 105 Ga. 217; *Embler v. Hartford Steam Boiler Inspection & Ins. Co.*, 8 App. Div. 186, 189, 40 N. Y. Supp. 450, 452. It does not pass by assignment. *Cook v. Kentucky Growers' Ins. Co. (Ky.)* 72 S. W. 764.

"Insurance," as the term is used in reference to fire insurance, "is a contract with the owner of property, or some interest therein, to indemnify him against loss or damage by fire." *Durham v. Fire & Marine Ins. Co. (U. S.)* 22 Fed. 468, 470; *Donnell v. Donnell*, 30 Atl. 67, 86 Me. 518.

Policies of insurance against fire are not deemed, in their nature, incident to the property insured, but they are only special agreements with the persons insuring against such loss as they may sustain, and not the loss of any other person having an interest, as grantee or mortgagee or creditor or otherwise may sustain. *Carpenter v. Providence Washington Ins. Co.*, 41 U. S. (16 Pet.) 495, 503, 10 L. Ed. 1044 (cited in *Donnell v. Donnell*, 30 Atl. 67, 86 Me. 518).

Fire insurance is strictly a personal contract of indemnity to the assured, and he, or his heirs in his name, can recover only an indemnity for actual loss to him. If he has no interest in the property insured at the time of the loss, he can recover nothing; and, if he parts with his interest before the loss, he becomes incapacitated to recover upon the policy, and it ceases to insure anything and becomes void. *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24, 27, 52 Am. Rep. 245.

A life policy is a contract to pay a certain sum at an indefinite time, while a fire

policy is a contract to indemnify any cases of loss. *Commonwealth v. American Life Ins. Co.*, 29 Atl. 660, 663, 162 Pa. 586, 42 Am. St. Rep. 844.

#### FIRE INSURANCE COMPANY.

Any company which undertakes and promises, in consideration of a sum paid therefor, to give security or indemnity against loss by fire. The mode and manner in which it conducts its business is immaterial. *Lee Mut. Ins. Co. v. State*, 60 Miss. 395, 399.

#### FIRE UNDERWRITERS.

See "Board of Fire Underwriters."

#### FIREMEN.

As agents, see "Agent."

As employes, see "Employé."

As laborers, see "Laborer."

Within the meaning of Acts March 24 and May 2, 1885, providing that firemen and men employed in the fire department cannot be removed, except for cause, and after a hearing on notice, firemen include members of the city fire department who for convenience are designated as "call members" or "firemen at call." *Lyon v. Fire Com'rs of City of Newark*, 20 Atl. 757, 759, 53 N. J. Law (24 Vroom) 92.

#### FIREPROOF BUILDING.

To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings. *Hickey v. Morrell*, 102 N. Y. 454, 460, 7 N. E. 321, 323, 55 Am. Rep. 824 (cited in *Dietz v. Yetter*, 54 N. Y. Supp. 258, 260, 34 App. Div. 453), where it was held that a representation that a storage building was fireproof was false, when the building was composed of wood and brick.

The words "fireproof" and "incombustible materials" are often used in connection with houses that are not absolutely proof against fires, but are intended as referring to houses built of brick, stone, iron, or other material, on the outside, so as to form barriers that will resist the action of ordinary fires. *Chimine v. Baker (Tex.)* 75 S. W. 330, 331.

#### FIREPROOF SAFE.

"Fireproof" is defined as proof against fire; incombustible; and the sale of fireproof safes means merely that the safes are made of incombustible material, of various sizes, capacities, and styles, and does not

imply a warranty that the safes will protect their contents against any given exposure to fire. *Diebold Safe & Lock Co. v. Huston*, 39 Pac. 1035, 1038, 55 Kan. 104, 28 L. R. A. 53.

The term fireproof, in insurance cases, where used in connection with safes in which books and inventories are to be kept, has been defined as being of materials that will usually resist the action of fires, and not those that will successfully withstand fires under all circumstances. *Chimine v. Baker* (Tex.) 75 S. W. 330, 331.

By a "fireproof safe," within the meaning of an insurance policy, is intended a safe constructed of noncombustible materials, for the purpose of resisting fire, and commonly regarded as sufficient for this purpose. In other words, it is an article of furniture, the distinctive name of which well conveys the idea that the purpose for which it was intended is the preservation of its contents from the effects of fire. *Underwriters' Fire Ass'n v. Palmer & Co.* (Tex.) 74 S. W. 603, 604 (citing *Knoxville Fire Ins. Co. v. Hird*, 23 S. W. 393, 4 Tex. Civ. App. 82). The insured complies with the letter and spirit of the condition when he puts the books in a safe of the kind generally known as "fireproof," and does not by this clause warrant the safe to preserve the books. In *Black's Law Dictionary* the word "fireproof" is defined as follows: "To say of any article that it is fireproof conveys no other idea than that the material out of which it is formed is incombustible. To say of a building that it is fireproof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fireproof buildings. To say of a certain portion of a building that it is fireproof suggests a comparison between that portion and other parts of the building not so characterized, and warrants the conclusion that it is of a different material." *Knoxville Fire Ins. Co. v. Hird*, 23 S. W. 393, 394, 4 Tex. Civ. App. 82.

"Fireproof safe," as used in an insurance policy requiring insured to keep his books and valuable papers in a fireproof safe, should not be construed literally, but means nothing more than a safe composed of incombustible material, and does not require a safe incapable of injury by fire to itself or its contents, or one which by the action of fire could not be rendered useless, or which could never be destroyed or its contents injured by the intensity of heat to which it might be exposed. The words should be construed in view of the situation of the insurer, and, in a policy issued to a country merchant, only mean the usual fireproof safe used in such localities generally, composed of any incombustible materials, and fitted to protect, to the usual extent and in the ordinary way, books and papers deposited there-

in, and not that rare and costly structure which is capable of successfully withstanding the action of fire altogether, and of preserving its contents from harm absolutely. *Sneed v. British-American Assur. Co.*, 18 South. 928, 929, 73 Miss. 279.

### FIREWOOD.

The right to cut firewood from woodland must be exercised in the usual manner, and cannot be extended to the use of the more valuable timber for other purposes, and does not include the right to cut such timber into lumber, and with the proceeds buy fuel, so long, at least, as there is an abundance of fuel timber. *Hogan v. Hogan*, 61 N. W. 73, 74, 102 Mich. 641 (citing *Phillips v. Allen*, 89 Mass. [7 Allen] 115; *Padelford v. Padelford*, 24 Mass. [7 Pick.] 152; 1 Tayl. Landl. & Ten. § 352).

### As cordwood.

"Fire wood," as used in Rev. St. c. 41, § 2, requiring firewood and bark to be measured by a sworn measure before it is sold and delivered, is to be construed as meaning "cord wood of the usual length, and of the dimensions which are described in the preceding sections of the statute." "It never could have been the intention of the Legislature that chips or the trimmings of lumber, which is sold by the load, and not by the cord, should be surveyed." *Duren v. Gage*, 72 Me. 118, 119.

### Fence timber.

Where a grant gave a grantee the right to cut timber for building or firewood, such words should be construed literally, and do not extend to give the grantee a right to cut timber for building fences. *Livingston v. Ten Broeck* (N. Y.) 16 Johns. 14, 16, 8 Am. Dec. 287.

### FIREWORKS.

"Fireworks" as used in a contract of insurance against loss by fire on a stock of fireworks and merchandise, hazardous and extrahazardous, meant such fireworks as were in the prohibition excepted, or might by permission be kept for retailing. As fireworks are of various kinds, and in different degrees dangerous, it is not to be presumed that the agreement to insure against loss was intended to cover an article so specially hazardous that the insured had no right to store it. *Jones v. Fireman's Fund Ins. Co.*, 51 N. Y. 318, 321.

### FIRING.

In an indictment charging that "defendant did then and there unlawfully kill and murder E., by then and there and thereby

firing a large-sized Colt's revolving pistol, loaded with gunpowder and leaden balls, which he, the said defendant, then and there had and held in his hands," the word "firing" is not sufficient to show that defendant shot the deceased, or that the latter was wounded from balls from the pistol, as the indictment does not show that the pistol was shot at deceased. *Shepherd v. State*, 54 Ind. 25, 28.

## FIRM.

House synonymous, see "House."

"Firm" is defined by Webster as the name, title, or style under which a company transacts business; a partnership of two or more persons; a commercial house; and the same author defines "partnership" as an alliance or association of persons for the prosecution of an undertaking or a business on a joint account; a company; a firm; a house. So it will be perceived that "firm" and "partnership" are synonymous with "company." *People v. Strauss*, 97 Ill. App. 47, 55.

A firm is an invisible, artificial person, necessarily represented by the persons who compose it. What they do, therefore, within the scope of the business in which the firm is engaged, and on its behalf, or in its name, they do as agents. *Boyd v. Thompson*, 153 Pr. 78, 82, 25 Atl. 769, 770.

The word "firm" is equivalent to partnership, and signifies the name under which any house of trade is established or conducts business; but a firm is not a being or entity distinct from the individuals who compose it. Knowledge or ignorance of a firm must consequently be the knowledge or the ignorance of the persons who constitute the firm. *McCosker v. Banks*, 35 Atl. 935, 936, 84 Md. 292 (citing *Stewart v. Katz*, 30 Md. 334).

Where, in a contract between certain parties, all of the provisions of which speak as between private individuals, except that in one instance the word "firm" is used, the use of such term is not sufficient to show that the contract was not that of the person individually, but of some undisclosed firm in which he was a partner. *Wood v. Martin*, 41 S. E. 490, 492, 115 Ga. 147.

The term "persons or firms," in the Richmond City charter, authorizing the city to impose taxes on persons or firms doing business in the city, is to be considered as including corporations, when construed in view of another section of the charter expressly authorizing the taxation of telegraph companies. *Western Union Telegraph Co. v. City of Richmond (Va.)* 26 Gratt. 1, 20.

## FIRM NAME.

The firm name of a partnership is such as the copartners choose to adopt. It may

disclose the names of all the partners, or of none of them, or the name of but one of them may be used as the firm name. *Daugherty v. Heckard*, 59 N. E. 569, 571, 189 Ill. 230; *Phillips v. Paxton (La.)* 3 Mart. (N. S.) 39, 45.

The firm name is a firm asset, and part of the good will, and the estate of a deceased partner has an equal right and interest therein with the surviving partner. *Slater v. Slater*, 67 N. E. 224, 175 N. Y. 143, 61 L. R. A. 796, 96 Am. St. Rep. 605.

## FIRMLY BELIEVES.

There are different degrees of belief in the human mind, and, where the law requires a party appealing from an arbitration to make an affidavit that he firmly believes that injustice has been done, an affidavit omitting the word "firmly" is insufficient. *Bradley v. Eccles (Pa.)* 1 Browne, 258.

"Firmly believes," as used in Act March 20, 1810, § 11, relating to appeals, and providing that the appellant shall swear or affirm that it is not for the purpose of delay such appeal is entered, but because he firmly believes injustice has been done, is not equivalent to "believes," but means more than mere belief, for all belief is not equal. For instance, one may have a firm belief that the moon revolves around the earth, and may believe, too, that there are mountains and valleys in the moon, but this belief is not so strong, because the evidence is weaker. "Verily believes" is equivalent to "firmly believes," for "verily" is as strong a word as "firmly." If the belief be a firm or strong one, it is within the meaning of the statute, but it is not sufficient for the appellant to say that he believes injustice has been done. *Thompson v. White (Pa.)* 4 Serg. & R. 135, 137.

## FIRMLY BOUND.

See "Held and Firmly Bound."

## FIRST.

See "By the First Boat."

The phrase "first trial of the case," in a clause in a municipal charter giving the aldermen, on an appeal from the mayor's court, the power to reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case, imports a second trial by the council, and not a mere appeal; for the hearing of an appeal in the usual form is not, properly speaking, a trial of the case, and therefore the charter authorizes a trial de novo. *City Council of Anderson v. O'Donnell*, 7 S. E. 523, 527, 29 S. C. 355, 1 L. R. A. 632, 13 Am. St. Rep. 728.

The use of the word "first" in a will, after the introductory clause in the common form, stating distinctly the motive of the testator in making the will, first, if by casualty or otherwise he should lose his life during his certain voyage, he gave certain property to his wife, has a tendency to show that the testator was expressing a particular qualification, and not a general purpose, so that the property should only go to his wife if he lost his life during the voyage. *Damon v. Damon*, 90 Mass. (8 Allen) 192, 195.

Sayles' Civ. St. art. 695, providing that no county seat "first established" in a new county shall be located more than five miles from its geographical center, means the first county seat established or located according to law in the county. *State v. Alcorn*, 14 S. W. 663, 664, 78 Tex. 396.

Act April 7, 1770 (7 Stat. 93), empowering the vestry and church wardens of a certain parish to let out certain lands on written leases, with reserved rent, for any term not exceeding 31 years, and from time to time, after the expiration of such leases, to renew the same, provided such renewed leases do reserve the same rent or a greater rent, not exceeding as much again as "the first rent reserved by the former lease," should be construed as though it read, "reserving a rent not exceeding as much again as the rent reserved in the first of the former leases," and does not mean the rent reserved in the former lease last expired. *Horlbeck v. Protestant Episcopal Church (S. C.)* 13 Rich. Eq. 123, 134.

A bequest in trust of a certain sum of money, "first to be taken out of the proceeds of the realty," makes a general legacy; that is, one to be raised out of the proceeds of the realty first, or, if that fund be not enough, then the balance of the estate, except specific legacies, must supply the balance of such bequest. *Hutchinson v. Fuller*, 75 Ga. 88, 92.

#### **Precedence indicated.**

"First," as used in constitutional provisions declaring that private property shall not be taken or damaged for public use without just compensation having been first made, means that the compensation shall precede the appropriation. *Redman v. Philadelphia, M. & M. R. Co.*, 33 N. J. Eq. (6 Stew.) 165 (cited and approved in *Martin v. Tyler*, 60 N. W. 392, 398, 4 N. D. 278, 25 L. R. A. 838; *Thompson v. Grand Gulf R. & Banking Co.*, 4 Miss. (3 How.) 440, 447, 34 Am. Dec. 81.

The constitutional guaranty that private property shall not be taken for public use "without just compensation first made therefor," means that "the compensation or offer of it must precede or be concurrent with the seizure and entry on private property under the authority of the state." *Thompson v.*

*Grand Gulf R. & Banking Co.*, 4 Miss. (2 How.) 440, 447, 34 Am. Dec. 81.

A will which provides that, in the first place, testator gives a legacy to A., and, in the second place he gives a certain sum of money to B., cannot be construed as showing a preference of the legacy in favor of A. over that given to B. or any other legatee. *Everett v. Carr*, 59 Me. 325, 330.

A grant of a gristmill on a stream, "to have the first privilege of water necessary for running the same as a good gristmill," should be construed to mean the right to take so much water as is necessary, subject to no vested prior claim. *Hapgood v. Brown*, 102 Mass. 451, 452.

A clause in a lease giving the lessee the first privilege of a renewal gives the prior right to a lease for the same term as the first lease, and upon terms the same, providing the property is relet at the expiration of the first lease. *Holloway v. Schmidt*, 67 N. Y. Supp. 169, 33 Misc. Rep. 747.

#### **FIRST-CLASS.**

A stipulation in a contract to purchase real estate that the title should be first-class means that it should be marketable. *Vought v. Williams*, 24 N. E. 195, 196, 120 N. Y. 253, 8 L. R. A. 591, 17 Am. St. Rep. 634.

#### **FIRST-CLASS FRAUD OF THE FIRST WATER.**

A publication concerning a person, stating that he is a "first-class fraud of the first water," necessarily tends to degrade his business character in the estimate of his neighbors, and is libelous per se. *Meas v. Johnson*, 39 Atl. 562, 563, 185 Pa. 12.

#### **FIRST-CLASS FUNERAL.**

Where an undertaker is ordered to give a "first-class funeral," the term ordinarily has reference to the previous social status and pecuniary condition of the person to be interred, for what might be considered extravagant in one case would be moderate in another; but where the child of destitute parents was killed on a street railway, and the railway company voluntarily employed an undertaker, and directed him to give a first-class funeral at such company's expense, an expense of \$250 was not unreasonable. *Macovsky v. Manhattan Ry. Co.*, 11 N. Y. St. Rep. 649, 650.

#### **FIRST-CLASS INTEREST PAYING SECURITIES.**

As used in a will in which testator directed his executors to invest certain funds in "first-class interest paying securities," and to pay the interest derived therefrom semi-

annually to certain designated beneficiaries for life, etc. (the testator having left his funds invested in second mortgage railroad bonds, railroad stocks, and bank stocks), means first mortgages, and not stocks or second mortgages. Under such a direction as to investments, only such securities as the court of chancery allows for trust funds would be allowable. *Woodruff v. Ward*, 35 N. J. Eq. (8 Stew.) 467, 471.

#### FIRST-CLASS INVESTMENTS.

By "first-class investments" is meant those which require little or no personal care or supervision in order to avoid loss. It is common knowledge that money cannot be invested permanently at 5 per cent. without some risk, and without constant care and supervision to prevent loss. *Sparks Mfg. Co. v. Town of Newton*, 41 Atl. 385, 402, 57 N. J. Eq. 367.

#### FIRST-CLASS TITLE.

A first-class title is a clean record, or at least one not depending on presumptions that may be overcome or facts that are uncertain. *Vought v. Williams* (N. Y.) 46 Hun, 638, 642.

#### FIRST COST.

Where the owner of goods, on consigning them to an agent to sell, wrote that they were not to be sold for less than first cost and charges, and inclosed an invoice of the goods, pricing the articles, and stating the amount of the charges, the price stated in the invoice is the first cost referred to, and the minimum by which the agent is to be guided. *Lorraine v. Cartwright* (U. S.) 15 Fed. Cas. 870, 871.

#### FIRST COUSIN.

In a bequest to the testator's "first cousins," or cousins-german, the term "first cousin" means the relation first in degree to whom that appellation is given; that is, the child of an uncle or aunt; and to no other does the appellation belong; for though the child of such first cousin is called a first cousin once removed, it is not known by the appellation of first cousin; and in fact it is a cousin in the second degree, though not called a second cousin, as being the second class of persons to whom the appellation of cousin is given. The term "first cousin" is synonymous with the term "cousin-german," and in the dictionaries both are explained as meaning children of a brother or sister. *Sander-son v. Bayley*, 4 Mylne & Craig, 56, 59.

#### FIRST DEVISEE.

By the term "first devisee" is understood the person to whom the estate is first given

by the will, while the term "next devisee" refers to the person to whom the remainder is given in tail. *Young v. Robinson*, 5 N. J. Law (2 Southard) 689, 709, 710.

"First devisee," as used in Gen. St. c. 171, § 2, providing that no person seised in fee simple shall have a right to devise any estate in fee tail for a longer time than to the children of the first devisee, means the first devisee in tail. *Wilcox v. Heywood*, 12 R. I. 196, 198.

#### FIRST DRAW.

Where a pensioner agreed to allow an agent, for obtaining a pension for him, the "first draw," such phrase meant the first annuity, not including the arrearages due by retrospective operation of the act. *Trimble v. Ford*, 35 Ky. (5 Dana) 517, 518.

#### FIRST FLOOR.

A lease of the first floor of a building is equivalent to a lease of the first story of the building, and naturally includes the walls. The apparent intention is to separate a section of the building, as a distinct tenement. The words "first floor" define the upper and lower boundaries of this, but there is nothing to fix the lateral boundaries, except the boundaries of the building. In this respect the words differ somewhat from the word "room." "Floor" means a section of the building between horizontal planes, and includes the front wall of that part of the building, as parcel of the leased premises, giving the lessee not merely a privilege or easement appurtenant to the building to use the wall for certain purposes, such as putting out signs, but the right to the exclusive use thereof. *Lowell v. Strahan*, 12 N. E. 401, 404, 145 Mass. 1, 1 Am. St. Rep. 422.

#### FIRST HALF OF MONTH.

A contract to deliver salt at the seller's option during the "first half of August next," means for the portion of the month terminating at noon on the 16th day thereof. *Grosvenor v. Magill*, 37 Ill. 239, 241.

#### FIRST INSTANCE.

See "In the First Instance."

#### FIRST MALE HEIR.

Testator, after giving his T. estate to certain persons for life, devised it "to J. or his male heir, if any, free land, not to be mortgaged or sold; and if no male heir lawfully begotten by the said J., then the above lands to fall to the first male heir of the branch of my uncle C.'s family, yielding and paying unto such of the daughters of the aforesaid C.

which shall be then living the sum of 100 pounds each at the time of the taking possession of the aforesaid estate." At the time when the will was made, C. was dead, having left five daughters, all married; the eldest had several daughters, but no son; each of the others had sons; and all these persons were known to the testator. J. died without issue, and the fourth daughter of C. died before any of her sisters, and during the continuance of the life estates given by the will, leaving a son. Held, that her son was entitled to the T. estate, as being the first male heir of the branch of C.'s family. *Winter v. Perratt*, 5 Barn. & C. 48, 59.

### FIRST MORTGAGE.

"First mortgage" means "first lien." When railroad bonds are sold in the open market as first mortgage bonds, all persons understand them to be first liens. When we speak of lending money on first mortgage, no thought of anything but a first lien is entertained. This meaning of "first mortgage" is so thoroughly grounded as to lead to the sequence that a second mortgage is understood to be one without intervening liens between it and the first. When a contract calls for a first mortgage, it means one prior to all other liens. *Appeal of Green*, 97 Pa. 842, 847.

### FIRST MORTGAGE BONDS.

"First mortgage bonds" mean bonds secured by a first mortgage. *Bank of Atchison County v. Byers*, 41 S. W. 325, 331, 139 Mo. 627 (citing *Clark v. Edgar*, 84 Mo. 106, 110, 54 Am. Rep. 84). It is usual for railroad companies, after surveying and locating their roads, to make careful estimates of the cost of building and stocking the same, and then, if sufficient money is not raised otherwise, to provide for the issue of bonds based upon these estimates to raise money to build and equip them. These bonds are secured by a mortgage on the road and franchises, and are called first mortgage bonds. They are then put into market and sold as the exigencies of the roads require. The words "first mortgage bonds," in the state Constitution, which provides, "And as a further security, an amount of first mortgage bonds on the road," etc., "shall be transferred to the treasurer," refer simply to bonds of this class, and do not give to the state exclusive lien on the road, etc., to the extent of the bonds which may be received; and it is not necessary that the deed of trust specify a priority of lien to such bonds as are delivered to the state. *Minnesota & P. R. Co. v. Sibley*, 2 Minn. 13, 18 (Gil. 1, 6).

Where a railroad company gave the state a bond of indemnity, secured by a first mortgage on the property of the company, to indemnify the commonwealth for advances, as required by St. 1854, c. 226, which was a his-

torical fact and a matter of common notoriety, and shortly afterwards the railroad company issued another mortgage to secure bonds of the company to an amount of \$900,000, such latter bonds were the first mortgage bonds of the railroad company, within the meaning of a vote of a town requiring a deposit of first mortgage bonds of the railroad as security for the town's subscription to the capital stock; these bonds being the first and only bonds of the company secured by a mortgage, except the bond of indemnity to the commonwealth, and there being no room for doubt that these were the bonds contemplated by the town, and not a single bond issued by the state. *Commonwealth v. Inhabitants of Williamstown*, 30 N. H. 472, 473, 156 Mass. 70.

### FIRST PLACE.

See "In the First Place."

### FIRST PROPER ELECTION.

See "Proper Election."

### FIRST PURCHASER.

A first purchaser is defined by Blackstone to be he who first acquired the estate through his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent. At common law, a bastard, being nullius filius and without heritable blood, was a first purchaser, and could transmit estate only to his own lawful issue. *Blair v. Adams* (U. S.) 59 Fed. 243, 247.

### FIRST PUT IN REPAIR.

A lease provided that the lessee should pay and discharge all rates, taxes, etc., on the premises, and also maintain and keep in good tenable repair the said premises, etc., the same being first put in good, tenable repair by the lessor. Held, that the words "the same being first put in tenable repair by the lessor" constituted a condition precedent to the obligation of the tenant to keep in repair, which not having been performed, the tenant was not liable for failure to keep in repair. *Neall v. Ratcliff*, 15 Q. B. 916, 922.

### FIRST TERM.

Acts 1827, c. 30, § 2, providing that if the defendant in a criminal case, in which a change of venue is not allowed by law, will make oath that there exists too great an excitement, to his prejudice, to come to trial at the first term, it shall be a sufficient cause for a continuance for one term only, means the term at which the prosecuting officer of the government demands the arraignment and trial of the defendant. *John v. State*, 38 Tenn. (1 Head) 49, 50.

A special act requiring that a report of the sale of the property of certain wards

should be approved or rejected at the first term after filing the same was construed not to mean the term at which the report was filed, but the succeeding term. *Highley v. Barron*, 49 Mo. 103, 105.

#### FIRST TRIED.

The term at which a cause could be first tried, within the meaning of Act March 3, 1875, c. 137, § 3, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510], relating to petitions for removal, is the term at which the issues are first made up; the party applying for removal not having been guilty of negligence. *Scott v. Clinton & S. R. R. Co.* (U. S.) 21 Fed. Cas. 820, 822.

The phrase "first tried," as used in Act March 3, 1875, c. 137, § 3, 18 Stat. 470 [U. S. Comp. St. 1901, p. 510], fixing the time when the application to remove must be made as "the term at which said cause could be first tried," means a term after the law mentioned took effect. When no legal obstacle to a trial exists at a particular term, it may be said that the trial could be had at that term, although, in point of fact, the state of the business of the term may satisfy the court that the particular cause will not be called for trial. But if a legal obstacle exists to a trial at a particular term, it is difficult to see in what just sense it can be said that the trial could be had at that term. The application must be made before the trial, and before or at the earliest term at which a trial could be had. But if, by reason of a stay of proceedings, or for any other cause, the case could not be brought to trial at a particular term, even if it were the only case pending, then that is not such a term as is described in the statute. *Warner v. Pennsylvania R. Co.* (U. S.) 29 Fed. Cas. 260.

#### FIRST YEAR.

Where a gas company is required to furnish free of cost a certain quantity of gas for the first year, a certain larger quantity for the second year, and so on to the end of its charter, and the law fixes the time when the gasworks shall be finished, but does not fix the date when the furnishing of gas shall commence, the company is entitled to have a reasonable time after the gasworks are finished to lay pipe and prepare for distribution, and therefore the first year for distribution will commence after the lapse of a reasonable time from the completion of the works. *Virginia City Gas Co. v. Virginia City*, 3 Nev. 320.

#### FISCAL.

"Fiscal": Belonging to the fisc or public treasury; relating to accounts or the management of revenue. *Black, Law Dict.*

#### FISCAL AFFAIRS.

Fiscal concerns synonymous, see "Fiscal Concerns."

Section 172, Const., provides that, until the government of a county is changed to the township system, the "fiscal affairs" shall be transacted by board of county commissioners. Held, that the fiscal affairs there referred to are not limited to matters pertaining solely to public revenue, but refer rather to the business transactions of the county—the performance of such duties as the law has placed upon county commissioners, or such as uniformly pertain to that office. *Martin v. Tyler*, 60 N. W. 392, 396, 4 N. D. 278, 25 L. R. A. 838.

#### FISCAL AGENT.

See "Chief Fiscal Officer."

The term "fiscal agent," as used in Act No. 3 of April, 1874, § 2, providing that the Governor, Lieutenant Governor, Auditor, Treasurer, Secretary of State, and the Speaker of the House of Representatives should constitute a board of liquidation, and should elect a fiscal agent for the state, does not necessarily mean a depository of public funds, so as to make it the duty of the State Treasurer to deposit all moneys with such agent, or confer on him power to compel such deposit to be made. *State ex rel. Baldwin v. Dubuclet*, 27 La. Ann. 29, 33.

In Act Aug. 6, 1864 (9 Stat. 59), defining the duties of the United States Treasurer, and providing for assistant treasurers, one of whom was to act in the city of New York, in rooms provided for the purpose, and made part of the treasury by the act, who was required to make transfers and payments of all the public moneys deposited with the same, faithfully and promptly, when ordered to do so, and perform all other duties as fiscal agent of the government which might be imposed on him, "fiscal" should be construed as referable to the fiscal duties of the officer within official limits defined by law, and does not enlarge the scope of the duties of such assistant treasurer so as to authorize the Secretary of the Treasury to impose on him duties connected with the collection as well as with the custody and disbursement of revenue. *Folger v. United States* (U. S.) 13 Ct. Cl. 86, 92.

#### FISCAL CONCERNS.

In sections 170, 171, and 172 of the state Constitution, the words "fiscal concerns," "fiscal affairs" and "affairs" and "government" are used interchangeably. *Martin v. Tyler*, 60 N. W. 392, 396, 4 N. D. 278, 25 L. R. A. 838.

**FISCAL OFFICER.**

The term "fiscal officers," whenever used in the article relating to cities of the first class, shall include all persons engaged in any relation in the collection and disbursement of the city's money. Rev. St. Mo. 1899, § 5333.

**FISCAL QUARTER.**

The term as used in Const. art. 3, § 19, which provides that "all appropriations shall end with such fiscal quarter," means one-fourth of a calendar year, for which the Legislature is required to make provision for the expenses of the several departments of the state government. Opinion of the Judges, 5 Neb. 566, 570.

**FISCAL YEAR.**

The term "fiscal year," as far as it relates to the financial operation of counties, where the law has not declared when it shall begin or end, must mean the current year, embraced between the dates of the collector of taxes' annual settlements. *Moose v. State*, 5 S. W. 885, 887, 49 Ark. 499.

**FISH.**

See "Food Fish"; "Royal Fishes."

The term "fish," as used in the chapter relating to fish and game, embraces all manner of fresh-water fish. Code Miss. 1892, § 2118.

"The common law has always recognized the right of the riparian owner to take fish in the waters running over his own soil and appropriate them to his own use, but, the fish being the common property of the people, the owner has never had the right to obstruct their passage from that portion of the river which flows over his land, nor has he the right to destroy the fish, and thus deprive the community of their right to, and ownership in, the fish." *Parker v. People*, 111 Ill. 581, 603, 53 Am. Rep. 643.

Fish themselves are *feræ naturæ*—the common property of the public or of the state—in this country. *State v. Theriault*, 41 Atl. 1030, 1032, 70 Vt. 617, 43 L. R. A. 290, 67 Am. St. Rep. 695.

Fish, before they are taken, are property of no one. *Fuller v. Fuller*, 84 Me. 475, 479, 24 Atl. 946.

Fish in streams or bodies of water have always been classed by the common law as *feræ naturæ*, in which the riparian proprietor or the owner of the soil covered by the waters, even though he have the sole and exclusive right of fishing in such waters, has, at best, but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly devoted

the moment the fish escape to other waters. *People v. Bridges*, 31 N. E. 115, 117, 142 Ill. 30, 16 L. R. A. 684; *Peters v. State*, 96 Tenn. 682, 36 S. W. 399, 400, 33 L. R. A. 114.

**Oysters and shellfish.**

Under a contract whereby defendant agreed that he would not thereafter engage in the retail sale of fish in a certain city so long as defendant should engage therein, oysters were included. *Caswell v. Johnson*, 58 Me. 164, 167.

The common and general right of fishing in the sea and its shores, at common law, extended to shellfish—as well those which are embedded in the soil as those which lie on the surface. *Bogott v. Orr*, 2 Bos. & Pul. 472; *Martin v. Waddell*, 41 U. S. (16 Pet.) 414, 10 L. Ed. 997; *Peck v. Lockwood* (Conn.) 5 Day, 22; *Weston v. Sampson*, 62 Mass. (8 Cush.) 347, 353, 54 Am. Dec. 764 (cited and approved in *Moulton v. Libbey*, 37 Me. 472, 493, 59 Am. Dec. 57).

The compact between Maryland and Virginia entered into March 28, 1785, relating to fishing rights, provided that all laws which might be necessary for the preservation of fish in the Potomac river should be made with the mutual consent of both states. It was held that the word "fish," as used in this agreement, did not include oysters; the laws necessary and relating to the protection of fish being necessarily of a very different nature from those necessary to the protection of oyster beds. *Ex parte Marsh* (U. S.) 57 Fed. 719, 722.

**FISH OIL.**

The words "fish oil," in Tariff Act July 24, 1897, c. 11, § 2, Schedule A, par. 42, 30 Stat. 153 [U. S. Comp. St. 1901, p. 1620], placing a duty on seal, herring, whale, and other fish oils, are used in their common sense, as meaning every oil that is made from fish, though commercially different designations are used to distinguish one oil from the other. It seems quite clear that Congress used the words "fish oils" in the sense in which they are used in common speech. Paragraph 42 provides for "seal, herring, whale, and other fish oils." Evidently these words are not used with technical precision, for neither the seal nor the whale is a fish, and therefore oil made from them, or from any part of them, is not technically fish oil. *Swan & Finch Co. v. United States*, 113 Fed. 243, 244, 51 O. C. A. 200.

**FISHERY.**

See "American Fishery"; "Common of Fishery"; "Free Fishery"; "Royal Fishery"; "Several Fishery"; "Sole and Exclusive Fishery"; "Right of Fishery."

Right of, as franchise, see "Franchise."



Fisheries are of three kinds: First, several; second, free; third, common. (1) The right of several fisheries, as already shown, is founded on and annexed to the soil, and is by reason of and in concomitance with the ownership of the soil. When the soil of a navigable river is granted, the right of several fishery therein begins. (2) A free fishery is altogether different. It is a royal franchise, distinct from the land, and founded on grant or prescription. By the grant of a free fishery, the right of fishery only passes. The right of soil remains in the King. Citing 2 Cruise, 297, § 70; 5 Com. Dig. 290. A free fishery separate from the soil, appropriating not the land, but the fishery, might, on sound principles of policy, be prohibited in every well-regulated government. If permitted, every part of the British Channel might have been parceled out among courtiers and favorites, and thus the ocean itself made tributary to the avarice of man. The right of several fishery, however, springing from and connected with the possession of the soil, stood on wholly different grounds. It gave an incentive to industry, and would benefit the public. The sound, rational principle on which the distinction between the ownership of rivers navigable and not navigable rests is that, as to the latter, a subject must be the owner of it, and may be of the former, but *prima facie* it is in the King, and, until granted, he holds it as the agent of the people, and for their benefit, and it is public and subject to (3) the right of common fishery. But this right of common of fishery continues only while the soil remains in the public. But there are not wanting authorities among those already cited to prove that the King may grant a free fishery. But the position now contended for is that the authorities which deny the right of the King to grant a fishery in navigable waters, when properly understood, apply only to free fisheries, which is a royal franchise, and not to several fisheries. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 22, 10 Am. Dec. 356.

Fishery is a right in rivers not navigable, belonging to the proprietors of the land on the respective sides thereof, and generally exists *ad flum medium aquæ*. In navigable rivers the right does not belong to the proprietor of the land on each side, but the fishery is common, and *prima facie* in the King, and is public. If any one claims it exclusively, he must show a right. If he can show a right by prescription, he may then exercise an exclusive right, though the presumption is against him unless he can prove such a prescriptive right. *Gould v. James* (N. Y.) 6 Cow. 369, 376.

The term "fishery," in any act of Assembly in Pennsylvania, or in common parlance in such state, is not applied to any thing else than to a place where a seine or

net is drawn to take shad or herring, or to a right to fish with a net or seine in a particular part of a river to take those fish, though perhaps those who have the exclusive right to a certain fishery to take those fish may also have the same kind of right to fish in the same place at all seasons with a net for any kind of fish. A fishery is in the river. Rafts, boats, or vessels are not to cast anchor in it. The seine or net is cast out in the river. It is drawn through the river. It swings in the river, and the owner of the shore has the right, and sole right, unless he has parted with it, to fish with nets opposite his land. The owner below cannot come a foot above the right angle from dividing point. The owner above cannot even let his net swing below the line from the dividing point, and no person can come there and fish under a claim of common right. Originally it was a privilege or franchise appurtenant to the shore, but may be leased, sold, or devised to a person now owning the land on the shore; and such lessee, devisee, or purchaser has no other right to the adjacent land than is necessary to the full use of the fishery. The fee simple and all other rights not inconsistent with the use of the fishery may remain in the owner of the land adjoining the river opposite to the fishery. *Hart v. Hill* (Pa.) 1 Whart. 124, 132.

A fishery is in the river, and is not the space between high and low water mark, though the use of that space may be necessary in the use of it, and may be included in the term. *Tinicum Fishing Co. v. Carter*, 61 Pa. (11 P. F. Smith) 21, 37, 100 Am. Dec. 597.

The words "fishery, pool, or fishing place," as defined in the act of 1808, can only refer to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river. A person thus fishing can be in no sense the owner or possessor of a fishery. There can be no pool or fishing place which is his by any other right, and authority is given to all the inhabitants of the state. *Bennett v. Boggs* (U. S.) 3 Fed. Cas. 221, 225.

## FISHING.

All fishing, see "All."

The right to fish and take fish is not an easement. It is a right of profit in lands. *Wickham v. Hawker*, 7 M. & W. 63. The right to subject the soil of the individual proprietor to the servitude of a public use for the purposes of a highway is a mere easement, one of the distinguishing features of which is the absence of all right to participate in the profits of the soil charged with it. Fishing cannot be claimed under the designation of an easement. In *Peers v. Lucy*, 4

Mod. 362, which was an action of trespass for fishing in plaintiff's fishery, a plea prescribing for a right to enter and catch fish, as an easement, was held bad. The court said the word "easement" is known in law, but here the thing itself is set out, namely, to catch fish, and certainly no instance can be given of a prescription for such a liberty by such word or name. *Cobb v. Davenport*, 33 N. J. Law (4 Vroom) 223, 225, 97 Am. Dec. 718.

The slaughter of fish by the explosion of dynamite is not fishing, within any fair interpretation of the term. By this means large numbers of fish are destroyed, and only a few are secured. Young and old alike are killed. Their habits of breeding and taking food are disturbed and interfered with. A statute prohibiting the use of dynamite in a stream, except for mechanical or mining purposes, is wise and just, and should be upheld. *People v. Pierce*, 41 N. Y. Supp. 858, 860, 18 Misc. Rep. 88.

#### FISHING BANKS.

"Fishing banks," as defined by the Century Dictionary, consist of a fishing ground of comparatively shoal water in the sea. Thus on the Atlantic coast of North America the Banks of Newfoundland are famous fishing grounds, and another about 20 miles off Cape May; but the term "fishing ground" has never been held to include the bank of a tide stream or slough. *Parker v. Thompson*, 28 Pac. 502, 504, 21 Or. 523.

#### FISHING BILL.

Bills by which defendants are called upon to show that certain other parties, who were not defendants, whose names were unknown, who were not alleged to exist at all, in whom no interest was shown, were interested, how interested, and who they were, are sometimes called "fishing bills." *Hurricane Tel. Co. v. Mohler*, 41 S. E. 421, 428, 51 W. Va. 1.

"A fishing bill, in the objectionable sense, is one in which the plaintiff shows no cause of action, and endeavors to compel the defendant to disclose one in the plaintiff's favor." *Carroll v. Carroll* (N. Y.) 11 Barb. 293, 298.

#### FISHING PLACE.

A pool or fishing place is defined by the statute to be "from the place or places where seines or nets have been usually thrown into the water to the place or places where they have been usually taken out, or from the place or places where they may be hereafter thrown into the water to the place or places where they may be taken out." *Tinicum*

*Fishing Co. v. Carter*, 61 Pa. (11 P. F. Smith) 21, 36, 100 Am. Dec. 597.

The term "fishing place," in a will devising a fishing place, was construed to mean merely an easement in the river, or the right to use so much of the shore as was necessary for the purpose of the fishery, but not to pass any right in the soil on the bank of the river. *Hart v. Hill* (Pa.) 1 Whart. 124, 132.

The words "fishery, pool, or fishing place," as defined in the act of 1808, can only refer to a place on the shore to which a fishery is annexed, and there can be no pool or fishery in reference to fishing by claim of common right on the river. A person thus fishing can be in no sense the owner or possessor of a fishery. There can be no pool or fishing place which is his by any other right, and authority is given to all the inhabitants of the state. *Bennett v. Boggs* (U. S.) 3 Fed. Cas. 221, 225.

#### FISSURE.

A fissure is defined by Webster as a narrow opening made by the parting of any substance; a cleft, as a fissure of a rock. The definition, taken literally, is circumscribed in its meaning, and, as used in a patent describing groves or channels having "fissures in the sides or bottom, carrying the ink to the pen," the term should be understood as an indentation in the fountain pen or ink duct. *L. E. Waterman Co. v. Forsyth* (U. S.) 121 Fed. 107, 108.

#### FISSURE VEIN.

A fissure vein, in mining parlance, is a longitudinal opening, with a foreign substance in it. *Crocker v. Manley*, 45 N. E. 577, 579, 164 Ill. 282, 56 Am. St. Rep. 198.

#### FIT.

See "Think Fit."

#### For cultivation.

The words "fit for cultivation," with reference to land, mean that condition of the soil in its natural condition which will enable a farmer, using a reasonable amount of skill, to raise regularly and annually, by tillage, grain or other staple crops. *Keeran v. Griffith*, 34 Cal. 580, 581.

#### For distillation.

Act July 20, 1868, § 4 (15 Stat. 126), provides that no mash, wort, or wash fit for distillation, or the production of spirits or alcohol, shall be made or fermented in any building or any premises other than a distillery duly authorized according to law. Any mash, wort, or wash from which alcohol might be

separated by distillation is "fit for distillation" even though such distillation might not be profitable, and the alcohol is never released from its impure state, but kept down by a sour ferment. *United States v. Prussing*, 27 Fed. Cas. 626, 627.

#### For the voyage.

A charter party providing that the vessel should be in "every way fitted for the voyage" includes the furnishing of all necessary ballasts, since it is the duty of the owner to find proper ballast for the ship, in order to make her trim for the voyage. It includes the proper equipment of the vessel in every respect. *Sumner v. Caswell* (U. S.) 20 Fed. 249, 251.

Under a charter party containing the agreement that the vessel was in "every way fitted for the voyage," it was held that the taking of a small quantity of additional coal at a port in the course of the voyage, which did not detain the vessel to exceed five hours, was not a breach of this condition. *Von Lingen v. Davidson* (U. S.) 1 Fed. 178, 187.

#### FIT OF MANIA.

A fit of mania includes a temporary depression or aberration of the mind, which sometimes accompanies or follows intoxication, and is often accompanied by delusions, hallucinations, and illusions. *Gunter v. State*, 3 South. 600, 607, 83 Ala. 96.

#### FIT OUT.

"To fit" is defined by Webster as "to make suitable"; "furnishing a thing suitable for the use of another"; "to prepare"; "to furnish with things proper or necessary." The use of the words "fitted out," as used in a declaration alleging that defendant carelessly and negligently fitted out his stagecoach, and that, while he was driving and conducting the same, it broke down, thereby injuring plaintiff, who was a passenger, means the furnishing of a convenient and proper stagecoach, and therefore proof that the injury was occasioned because of an insufficiency in the coach itself—that is, the failure to properly secure one of the wheels by a proper nut—constituted no variance. *Ware v. Gay*, 28 Mass. (11 Pick.) 106, 109.

Under an act of Congress declaring that no person shall build a ship for carrying on the slave trade, and that any ship so fitted out shall be forfeited to the United States, the forfeiture is not incurred by the building of the vessel, but only by the fitting out. *The Caroline* (U. S.) 5 Fed. Cas. 90, 91.

#### FIT UP.

An authority from the common council to fit up rooms for city officers includes the

power on the part of the committee to make contracts with tradesmen for the necessary supplies, though the council have not specified the amount to be disbursed for such purpose. *Kramrath v. City of Albany*, 6 N. Y. Supp. 54, 55, 53 Hun, 206.

In a lease providing that, in case the landlord terminates the lease before the expiration of the term, the tenant shall be entitled to compensation for the loss occasioned in consequence of expenditures incurred in fitting up the premises, such phrase is not limited to actual additions to the real estate, in the nature of permanent fixtures. "They have a broad signification, and include not only the fitting of the building and premises to the uses of the lessee, but a fitting of his furniture to the building." *Pratt v. Paine*, 119 Mass. 439, 446.

#### FITNESS.

See "Personal Fitness."

The word "fitness," as used in Laws 1897, c. 428, requiring candidates for office to pass an examination for merit by the civil service board, and for fitness by the appointing official, is not synonymous with "merit"; and the statute is not repugnant to Const. art. 5, § 9, requiring the passing of an examination for merit and fitness. "Merit" is defined by the Am. Enc. Dict., so far as applicable, as follows: "(1) The quality of deserving, whether well or ill; desert of good or evil. (2) Excellence, deserving honor or reward; desert; worth; worthiness. (3) That which is deserved, earned, or merited; a reward, return, or recompense earned or merited; deserts." "Fitness" is defined by the Am. Enc. Dict., so far as applicable, as follows: "(1) The quality or state of being fit; suitable, or adaptedness. (2) Serviceableness; use; utility." "Merit," as it relates to the question under discussion, means the quality of deserving the office because of excellence and worth. This comprises competency, intelligence, and education, with special reference to an understanding and knowledge of the duties of the office. "Fitness" means the quality of being suitable and adapted to the performance of those duties. This in some cases obviously includes habits, industry, energy, ambition, tact, disposition, knowledge of human nature, discretion, shrewdness, suitable physical presence, etc.—matters which require an examination of a very different character from that which may test the competency, excellency, and worth of a candidate. A man may be of great mental competency, moral excellence, and worth, and yet possess very little adaptation for the performance of the duties of the office, because lacking in one or more of the qualities mentioned under the term "fitness." Therefore the terms are not synonymous and convertible. *People v.*

Knauber, 57 N. Y. Supp. 782, 783, 27 Misc. Rep. 253. See, also, *People v. Knauber*, 60 N. Y. Supp. 298, 300, 43 App. Div. 342.

## FITTINGS.

See "Brass Fitting"; "Gas Fittings."

A fitting has been defined to be anything used in fitting up, especially, in the plural, necessary fittings or apparatus; as, the fittings of a church or study. It has also been defined as anything employed in fitting up permanently, used generally in the plural, in the sense of fixtures, tackle, apparatus, equipment. Hence the term as used in an indictment charging a theft of certain lot of brass fittings is too indefinite to identify the articles alleged to have been stolen. *Brown v. State*, 42 S. E. 795, 116 Ga. 559.

A marriage settlement of a house and the "fixtures and fittings up" will not include the household furniture. *Simmons v. Simmons*, 6 Hare, 351, 357.

## FIVE-TWENTY BONDS.

Five-twenty bonds were bonds issued by the United States government under Act Cong. March 3, 1865, 13 Stat. 468, § 77, and derived their name from the fact that they were redeemable after 5 years, but were not payable until 20 years, after July 1, 1865. *Morgan v. United States*, 5 Sup. Ct. 588, 589, 113 U. S. 476, 28 L. Ed. 1044.

## FIX.

See "Definitely Fix."

On a prosecution for murder, evidence that about a month before the homicide the accused, having some difficulty with decedent, threatened to fix him, was competent to show express malice, premeditation, and deliberation. *State v. Foster*, 41 S. E. 284, 130 N. C. 666, 89 Am. St. Rep. 876.

### As allow.

"Fix," as used in an order of the board of county commissioners stating that "we hereby fix" the compensation of the district attorney at a certain sum, is synonymous with "allow," as used in Sess. Laws 1885, p. 83, providing that the district attorneys shall receive such salaries for their services as the board of county commissioners shall allow. *Polk v. Minnehaha County*, 37 N. W. 93, 94, 5 Dak. 129.

The word "fixed," in Nat. Banking Act, § 30, providing that every association recognized under the act may charge the rate of interest allowed in the state or territory where the bank is located, and no more, and providing that, when no rate is fixed by the

laws of the state or territory, the bank may charge a rate not exceeding 7 per cent., is used in the same sense as the word "allowed." *Hinds v. Marmolejo*, 60 Cal. 229, 231; *Guild v. First Nat. Bank*, 57 N. W. 499, 501, 4 S. D. 566; *Wolverton v. Exchange Nat. Bank of Spokane*, 89 Pac. 247, 248, 11 Wash. 94; *Daggs v. Phoenix Nat. Bank (Ariz.)* 53 Pac. 201, 204.

### As dependent on contingency.

"Fixed" means "settled, established, firm." The term "fixed," in Const. 1879, art. 14, § 1, providing that certain water rates shall be annually fixed by the board of supervisors, is not satisfied by making the rates of compensation depend on a contingency or contingencies. To say that certain ratepayers shall pay certain sums, provided the city and county shall pay a certain other sum or sums, in which event the amount to be paid by the ratepayers shall be proportionately reduced, is not to fix anything, and does not answer the requirement of the Constitution. *San Francisco Pioneer Woolen Factory v. Brickwedel*, 60 Cal. 166, 177.

Laws 1896, p. 478, c. 425, § 30, authorizing the city council to enforce obedience to ordinances by ordaining "fixed" penalties, means that the precise amount of the penalty must be prescribed, and will not authorize a fine of not less than \$10 or more than \$25. *City of Poughkeepsie v. King*, 57 N. Y. Supp. 116, 117, 38 App. Div. 610.

### As determine.

In Rev. St. § 4461, providing that the commissioners shall, upon actual view of the premises sought to be taken for public use for the construction of a ditch, fix and allow compensation for the lands appropriated to each person or corporation making application, "fix" means to determine the amount of compensation to be allowed. *Zimmerman v. Canfield*, 42 Ohio St. 463, 468.

Act of Territorial Legislature, chapter 10, Laws 1887, creating the office of county auditor, provided that his salary should be regulated by the value of the property in their respective counties as fixed by the Territorial Board of Equalization for the preceding year. Held, that the word "fix" as used in such connection meant to determine; to settle. *Bunn v. Kingsbury County*, 52 N. W. 673, 674, 3 S. D. 87.

### Finality implied.

In Act July 27, 1866, § 13, providing that the directors of a certain railroad company should, from time to time, fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property, "fix" does not imply that the action designated by the word should be final, and therefore exempt from government

supervision. *Atlantic & P. R. Co. v. United States* (U. S.) 76 Fed. 186, 193.

The word "fix" means to make fast, firm, or immovable. Thus a reservation in an ordinance granting a franchise to a gas company of the power to "fix" the rates clothes the city with power to fix the rates without ascertaining the reasonable price of gas, and without interference by other person or tribunal. *Logansport & W. V. Gas Co. v. City of Peru* (U. S.) 89 Fed. 185, 187.

#### Judicial determination implied.

"Fixed," as used in Code Civ. Proc. § 3228, subd. 2, providing that, in an action to recover chattels, where the value of the chattels recovered by plaintiff, as fixed, together with the damages, is less than \$50, etc., calls for a judicial determination ascertaining such value; and where plaintiff testified as to the value, but no further evidence was given on the subject, and the verdict did not state its value, the value of the property was not fixed. *Wolff v. Moses*, 57 N. Y. Supp. 696, 697, 26 Misc. Rep. 500.

#### As prescribe.

Const. art. 2, § 20, providing that the General Assembly shall "fix the compensation" of all officers, etc., does not mean that the General Assembly is required to fix the sum or amount which each officer is to receive, but only requires that it shall prescribe or fix the rule by which such compensation is to be determined. *Cricket v. State*, 18 Ohio St. 9, 21.

Under a city charter providing for a committee to audit all demands against the city, except salaries of city officers fixed by the charter, where the salary of an officer provided for by the charter is, pursuant to charter authority, fixed by an ordinance, such salary is fixed, within the meaning of the charter, and is not required to be audited. *State v. Daggett*, 68 Pac. 340, 28 Wash. 1.

#### As settle or remain.

Webster defines the word "fix" to mean "to settle or remain permanently." *Huck v. Gaylord*, 50 Tex. 578, 582.

#### FIXED.

As used in a note payable on the 1st of May next, "fixed" makes the note payable on the 1st of May, absolutely and invariably, and no days of grace are allowed on it. Among the definitions of the verb "to fix," one is to direct without variation; another, to establish invariably. The idea of invariability is attached in both. The word "fixed" is used in the note evidently with a view to make the payment on that day more certain than it otherwise would be. *Dunford v. Patterson* (La.) 3 Mart. (O. S.) 626.

In commercial paper, "fixed" has a well-ascertained legal significance, and means that the paper in which it is written shall be payable upon the exact date named for its maturity, and its insertion by the maker is the legal equivalent of a waiver of his days of grace. *Steinau v. Moody*, 28 S. E. 30, 31, 100 Ga. 136.

As used in a note falling due on December 1, 1892, "fixed" means without grace. *Fifth Nat. Bank v. Woolsey*, 48 N. Y. Supp. 148, 150, 21 Misc. Rep. 757 (citing *Durnford v. Patterson* [La.] 7 Mart. [O. S.] 460, 12 Am. Dec. 514).

#### FIXED BELIEF.

An opinion is not the exact conclusion of a belief. It may be simply a judgment founded on a given statement of facts, which will yield when the facts disappear. A belief of another's guilt may be a prejudice, and exist with little or no evidence. A fixed belief of guilt shuts the door against explanatory evidence, and renders the judgment unsound; and an opinion which has become a fixed belief of the prisoner's guilt, even without evidence, disables the juror from performing his duties with fairness to the prisoner, and the statement by a juror that he had no such opinions as would influence or control him in any degree as a juror, or which would influence him to give an undue weight to evidence against the prisoner, is not an opinion formed on the evidence to be given, so as to constitute a fixed belief. *Curley v. Commonwealth*, 84 Pa. 151, 156.

A juror whose opinions are founded on rumors or newspaper statements, which he feels conscious he can dismiss, and when he is able to say he can fairly try the prisoner on the evidence, free from the influences of such opinions or impressions, has no fixed belief or prejudice. *Staup v. Commonwealth*, 74 Pa. (24 P. F. Smith) 458, 461.

#### FIXED BY LAW.

"Fixed and established by law," as used in Acts 1871, c. 226, § 4, authorizing the commissioner of public parks to establish and fix the grade of the streets in a certain district, where the same had not theretofore been fixed and established by law, cannot be construed to except from the authority of the commissioners only such grades as had been fixed by an act of the Legislature, but also excepts those which had been established by ordinance of the city council. An ordinance of the city council, regularly passed, and within the scope of the authority conferred on it by the legislature, is a law. That it is local, and not general, in its operation, does not alter its inherent character, or modify its binding effect. A grade fixed

by such an ordinance is fixed by law. In re Mutual Life Ins. Co., 89 N. Y. 530, 532.

### FIXED FURNITURE.

A chimney glass fixed to the wall, and a bookcase screwed or fastened to the wall, are "fixed furniture," within the meaning of that term as used in a will, but a bookcase merely placed in a recess, and not fastened, was not within the term. *Birch v. Dawson*, 6 Car. & P. 658.

### FIXED MACHINERY.

"Fixed machinery," as used in a mechanic's lien act granting a lien for the price of fixed machinery, cannot be construed to include a complete machine, stayed in place merely to make it steady, and not for the purpose of incorporating it and making it into part of the realty. *Campbell v. John W. Taylor Mfg. Co.*, 49 Atl. 1119, 1121, 62 N. J. Eq. 307.

A mortgage deed conveying a piece of land, a factory located thereon, and all the fixed machinery contained in the factory, would include the factory bell placed in a tower built upon the factory for the purpose, and also a blower pipe conveying air from a blower to a forge. *Alvord Carriage Mfg. Co. v. Gleason*, 36 Conn. 86, 87.

The term "fixed machinery," in Revision, p. 669, giving a mechanic's lien on fixed machinery, does not include movable shells, used in cloth-printing machines, on which the designs are engraved, though the printing machines are fixed machinery. *Griggs v. Stone*, 18 Atl. 1094, 1095, 51 N. J. Law (22 Vroom) 549, 7 L. R. A. 48.

### FIXED OPINION.

The fixed opinion as to the guilt or innocence of the defendant, which would render a person incompetent as a juror, must be such as would prevent him from rendering a verdict in accordance with the evidence as disclosed on the trial, and the law as pronounced by the court. An opinion founded merely on the form or hypothesis of facts which he has heard, and without the hearing of other facts which may contradict them or lessen their weight, does not disqualify him. *Bales v. State*, 63 Ala. 30.

### FIXED SALARY.

"Fixed," as used in Const. art. 174, providing that the district attorney shall be paid a fixed salary, is only used in contradistinction to the fee system, and does not render unconstitutional a legislative provision directing a deduction from the salary of that officer when he shall be absent from a term of court. *Cole v. Humphries*, 28 South. 808, 809, 73 Miss. 163.

The word "fixed," as used in the constitutional provision that the judges shall receive fixed salaries, does not mean unchangeable, but means about the same thing as "at stated times"—the expression used in a similar connection in the United States Constitution; that is, that the compensation of the judges should not be made to depend upon fees and other contingent emoluments, but might nevertheless be increased by the Legislature when additional duties were imposed. Hence a per diem allowed the judges, in addition to their regular salaries, during a period when extra duties were imposed upon them, is constitutional. *Sharpe v. Robertson* (Va.) 5 Grat. 518-638.

A salary is fixed when it is at a stipulated rate for a definite period of time. A pay or emolument is fixed when the amount of it is agreed upon, and the service for which it is to be given is defined. A salary, pay, or emolument is fixed by law when the amount is named in a statute; and by regulation when it is named in a general order, promulgated under provisions of law, and applicable to a class or classes of persons. *Hedrick v. United States* (U. S.) 16 Ct. Cl. 88, 101.

It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary may be a very inadequate remuneration for the services; nor does it alter the case that by subsequent statutes and ordinances his duties are increased, and not his salary. *Dougherty v. Austin*, 28 Pac. 834, 835, 94 Cal. 601, 16 L. R. A. 161 (citing *Evans v. Inhabitants of City of Trenton*, 24 N. J. Law [4 Zab.] 764, 766).

### FIXED TIME.

"Fixed time," as used in Const. art. 5, § 24, providing that officials shall hold their office during the pleasure of the appointing power, or for a "fixed time," does not necessarily mean a definite period—as, for instance, one year, two years, or three years—but refers to a term of office which is established or settled, as contradistinguished from a term which depends upon the mere will or pleasure of the appointing power. *People v. Loeffler*, 51 N. E. 785, 791, 175 Ill. 585.

### FIXTURE.

See "Barroom Fixtures"; "Domestic Fixtures"; "Gas Fixtures"; "Irremovable Fixtures"; "Permanent Fixtures"; "Store Fixtures"; "Tenant's Fixtures"; "Trade Fixtures"; "Yard Fixtures."

Other Fixtures, see "Other."

Fixtures are a species of property which are the dividing line between real and personal property. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 60, 24 Am. Rep. 719.

The term "fixture" has a well-ascertained and certain meaning, as something affixed to realty. *Hegard v. California Ins. Co.* (Cal.) 11 Pac. 594, 598.

A fixture is an article of a personal nature which has been affixed to land. *Stillman v. Hamer* (Miss.) 7 How. 421, 422.

Fixtures are articles which have an existence independent of a freehold, and are afterwards annexed to and become part of it. *Hamilton v. Austin* (N. Y.) 36 Hun, 138, 142.

Fixtures are those articles which were chattels, but which have become a part of the realty by reason of being affixed thereto. *Davis v. Mugan*, 56 Mo. App. 311, 316; *Tyler v. White*, 68 Mo. App. 607, 609.

A fixture is an article which was a chattel, but by being physically annexed to the realty, by one having an interest in the soil, becomes a part and parcel of it. *Padgett v. Cleveland*, 33 S. C. 339, 344, 11 S. E. 1069; *Cole v. Roach*, 37 Tex. 413, 417.

The term "fixture" is used in different senses. Sometimes it is used in its general sense of a thing which is affixed to land. Sometimes it is used to designate a thing which can be severed from the land after having been affixed to it. In this sense it is a term denoting the very reverse of the name. Less frequently it has been used to designate a thing which cannot be removed after having been affixed to land. *Miller v. Waddingham* (Cal.) 25 Pac. 688, 689, 11 L. R. A. 510.

There is great confusion in the books in the definition of the term "fixtures." It is held to denote such articles of a chattel nature as, when once annexed to the realty, may not be removed by the party annexing them as against the owner. On the other hand, just the reverse is held to be the true definition; that is, chattels annexed that may be removed, etc. A definition that is sustained by all the authorities is that a fixture is an article which was a chattel, but which, by being physically annexed or affixed to the realty became accessory to it, and a part and parcel of it. *Fechet v. Drake*, 12 Pac. 694, 695, 2 Ariz. 239.

Fixtures are such articles of property as are deemed personal, in contradistinction to real, but for their attachment or connection with the land, or the rights of inheritance, or such parts of the land or realty which, being partly separated or severed, have not changed their character for want of a complete severance in fact, or by contract, and

so as, in either case, to change their character. *Cook v. Whiting*, 16 Ill. (6 Peck) 480, 482.

The weight of modern authority seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests: (1) Real or constructive annexation of the article in question to the realty; (2) appropriation or adaptation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 511, 525, 530, 59 Am. Dec. 634; *Scobell v. Block*, 31 N. Y. Supp. 975, 976, 82 Hun, 223; *Taylor v. Collina*, 8 N. W. 22, 24, 51 Wis. 123; *Homestead Land Co. v. Becker*, 71 N. W. 117, 118, 96 Wis. 206; *Hinkle v. Dillon*, 17 Pac. 148, 150, 15 Or. 610; *Dudley v. Hurst*, 8 Atl. 901, 902, 67 Md. 44; *Cook v. Condon*, 51 Pac. 587, 589, 6 Kan. App. 574. It is in the power of the owner of the inheritance to affix any property to it he pleases, and when he does so it becomes a fixture in the general sense of the term, and part of the freehold, and, if the inheritance be afterwards sold or mortgaged, the fixture goes with it. *Fifield v. Farmers' Nat. Bank*, 35 N. E. 802, 804, 148 Ill. 163, 39 Am. St. Rep. 166; *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; *Hamilton v. Huntley*, 78 Ind. 521, 41 Am. Rep. 593; *Parker Land & Improvement Co. v. Reddick*, 47 N. E. 848, 849, 18 Ind. App. 616; *Helm v. Gilroy*, 26 Pac. 851, 853, 20 Or. 517; *Gunderson v. Swarthout*, 80 N. W. 465, 466, 104 Wis. 186, 76 Am. St. Rep. 860; *Post v. Miles*, 34 Pac. 588, 589, 7 N. M. 317; *Quimby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. (9 C. E. Green) 260, 264; *Rogers v. Borkaw*, 25 N. J. Eq. (10 C. E. Green) 496, 498; *Langston v. State*, 11 South. 334, 335, 96 Ala. 44; *Dodge City Water & Light Co. v. Alfalfa Land & Irrigation Co.*, 67 Pac. 462, 464, 64 Kan. 247; *Hutchins v. Masterson*, 46 Tex. 551, 554, 26 Am. Rep. 286. The question of intention is given pre-eminence by modern authorities. *Post v. Miles*, 34 Pac. 586, 589, 7 N. M. 317; *Hutchins v. Masterson*, 46 Tex. 551, 554, 26 Am. Rep. 286. This intention is inferred from the nature of the article annexed, the situation of the party making the annexation, the mode of annexation, and the purpose for which it was annexed. *Teaff v. Hewitt*, 1 Ohio St. 511, 525, 530, 59 Am. Dec. 634; *Dudley v. Hurst*, 8 Atl. 901, 902, 67 Md. 44; *Fifield v. Farmers' Nat. Bank*, 35 N. E. 802, 804, 148 Ill. 163, 39 Am. St. Rep. 166; *Langston v. State*, 11 South. 334, 335, 96 Ala. 44; *Helm v. Gilroy*, 26 Pac. 851, 853, 20 Or. 517; *Winslow v. Bromich*, 38 Pac. 275, 277, 54 Kan. 300, 45 Am. St. Rep. 285; *Hutchins v. Masterson*, 46 Tex. 551, 554, 26 Am. Rep. 286; *Menger v. Ward* (Tex.) 23 S. W. 821, 823. The first requisite so laid down seems

uncertain and unsatisfactory, and only of value in determining the intent of the owner of the freehold in making the annexation. The second is fully met by the case of the machinery in a mill, while the third is really the controlling consideration in determining the question. *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 60, 24 Am. Rep. 719; *Lavenson v. Standard Soap Co.*, 22 Pac. 184, 185, 80 Cal. 245, 13 Am. St. Rep. 147; *Fifield v. Farmers' Nat. Bank*, 35 N. E. 802, 804, 148 Ill. 163, 39 Am. St. Rep. 166.

Bouvier defines "fixtures" as personal chattels, affixed to real estate, which may be severed and removed by the party who has affixed them, or by his personal representative, against the will of the owner of the freehold. Not only window blinds, furnishings, cupboards, shelves, locks, gas fixtures, pier and chimney glasses attached to the walls, grates, and the like, but millstones, bakers' ovens, salt pans, carding machines, cider mills, barns, a varnish house, and a ball room attached to an inn, when erected by a tenant, have been held to be fixtures. *Flint & Walling Mfg. Co. v. Douglass Sugar Co.*, 54 Kan. 456, 460, 88 Pac. 566, 568.

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Rev. St. Okl. 1903, § 4023; Rev. Codes N. D. 1899, § 3272; Civ. Code S. D. 1903, § 183.

All fixtures for the time being are part of the freehold, and if any right to remove them exists in the person erecting them this must be exercised during the term, and if not so done the right to remove is lost. *Preston v. Briggs*, 16 Vt. 124, 125.

#### Agreement by parties as to character.

It is well settled that houses or other structures of a permanent character, erected upon the land of another under an agreement, express or implied, that they are to remain the personal property of the builder, do not attach to and become annexed to the realty. In the absence of any agreement, express or implied, or evidence of intention, everything which is annexed to the freehold becomes a part of the realty, and cannot be severed from it and reinvested with the character of personal property except by the owner of the land. *Freeman v. Lynch*, 8 Neb. 192, 199.

Ordinarily a building placed upon land as a fixture becomes a part of the real estate and passes with it, but the building may be personal property under some circumstances. The parties may by agreement in due form give to fixtures the legal character of realty or personalty at their option,

and the law will respect and enforce their understanding whenever the rights of third parties will not be prejudiced. Thus a house constituting part of the realty may by mortgage or sale be separated from the land, and the mortgage or sale be perfectly valid, if made in such form as to be sufficient under the statute of frauds. *Myrick v. Bill*, 17 N. W. 268, 269, 3 Dak. 284.

When things personal in their character are about to be annexed to the realty, and before such annexation the parties by express agreement provide that such chattels shall retain their character as personalty, they do retain their character as chattels. Although attached to the realty in such manner that, without such agreement, they would receive that character, they will continue to be chattels, if they can be removed without material injury to the articles themselves or to the freehold. *Henkle v. Dillon*, 17 Pac. 148, 150, 15 Or. 610. Where there was an agreement between the vendor and vendee of an engine and boiler that they should retain their character as chattels, they did not become fixtures, though annexed to realty. *Tift v. Horton*, 53 N. Y. 377, 380, 13 Am. Rep. 537; *Fifield v. Farmers' Nat. Bank*, 35 N. E. 802, 804, 148 Ill. 163, 39 Am. St. Rep. 166; *John Van Range Co. v. Allen (Miss.)* 7 South. 499.

Where machinery was firmly fastened to the realty, it will not, as between a subsequent mortgagee and a levying judgment creditor, be treated as personalty because a chattel mortgage on it was given to the mortgagee of the realty at the time the real estate mortgage was given. *Homestead Land Co. v. Becker*, 71 N. W. 117, 118, 96 Wis. 206.

Where, prior to the surrender of the possession of land by a tenant, the landlord agreed to endeavor to sell for the tenant a steam engine placed by the tenant upon the land to a person who was in treaty for the purchase of the land, and in reliance on such agreement the tenant left the engine on the premises when he vacated, such agreement and the action of the tenant thereunder barred the landlord from claiming that the chattel in question became his as an irremovable fixture. *Torrey v. Burnett*, 38 N. J. Law (9 Vroom) 457, 459, 20 Am. Rep. 421.

Where trade fixtures placed in a building by the lessee are insured in a policy by the lessee as fixtures, the lessee will be entitled to recover, though in fact, as between the lessee and landlord, the fixtures were the property of the landlord. *Clark v. Svea Fire Ins. Co.*, 102 Cal. 252, 36 Pac. 587.

#### Annexation.

"Fixtures are chattels or articles of a personal nature, which have been affixed to the land in such a manner as to constitute a part of the realty to which they adhere,



and to therefore partake of its incidents and properties." *Tayl. Landl. & T.* 544. "If there be anything well settled," say the Supreme Court of Ohio, "in the doctrine of fixtures, it is this: that to constitute a fixture it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this." *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634. *Amos & F. Fixt.* p. 2, says: "It is necessary, in order to constitute a fixture, that the article should be let into or united with the land, or to substance previously connected therewith." In 3 *Dane, Abr.*, p. 156, it is said: "It is very difficult to extract, from all the cases as to fixtures in the books, any one principle on which they have been decided, though being fixed or fastened to the soil, house, or freehold seems to have been the leading one in some cases, yet not the only one." The great weight of authority, say the Supreme Court of Connecticut, in *Capen v. Peckham*, 35 Conn. 88, 93, "is in favor of the doctrine that, to constitute a fixture, it is necessary that the article should be annexed to the freehold, as the name itself imports." Connection with or annexation to the freehold in some way is indeed held to be indispensable by almost the unbroken current of authorities. Nothing less is deemed sufficient, although more is required by many very well-considered cases. Thus in the case of *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203, the court expressed the opinion that actual annexation to the freehold and adaptation to its purposes must unite in order to render personal property incident and appurtenant to the realty. So Mr. *Dane* remarks, in speaking of this question: "Not the mere fixing or fastening is alone to be regarded, but the use, nature, and intention." *Brown v. Lillie*, 6 Nev. 244, 248; *Miller v. Wadingham* (Cal.) 25 Pac. 688, 689, 11 L. R. A. 510.

"Fixtures" are defined to be chattels or articles of a personal nature which have been affixed to the land. The ancient distinction between actual annexation and total disconnection is most certain and practical, and hence should be maintained, except where plain usage or authority has created exceptions. *Baker v. Davis*, 19 N. H. 325, 333.

The fact of actual and permanent annexation of the thing personal in its nature to the freehold was formerly regarded as essential; but this has been found to be unsatisfactory, and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test. *Strickland v. Parker*, 54 Me. 263, 265.

The great weight of authority is in favor of the doctrine that, to constitute a fixture, it is necessary that the article should be an-

nexed to the freehold, as the name itself implies; but there is a great diversity of opinion in reference to the degree of annexation which is essential for this purpose. Perhaps the rule that comes nearer being one of general application than any other is that it is essential, to constitute a fixture, that the article should not only be annexed to the freehold, but that it should clearly appear from an inspection of the property, taking into consideration the character of the annexation, the nature and the adaptation of the article annexed to the uses and purposes to which the building was appropriated at the time the annexation was made, and also the relation of the party making it to the property in question, that a permanent accession to the freehold was intended to be made by the annexation of the article. *Capen v. Peckham*, 35 Conn. 88, 92, 93; *Tolles v. Winton*, 28 Atl. 542, 63 Conn. 440.

Kent defined a "fixture" to be an article of personal nature affixed to the freehold. 2 *Kent, Comm.* p. 344. Judge Cowen in *Walker v. Sherman* (N. Y.) 20 Wend. 636, upon an elaborate review of the case, observed: "The word 'fixtures' is derived from the thing signified by its being fastened or affixed." And the author in *Smith, Lead. Cas.* p. 238, says: "The general rule is that, to constitute an article a fixture—that is, a part of the realty—it must be annexed thereto." "If there be anything well settled," says the Supreme Court of Ohio, "in the doctrine of fixtures, it is this: that to constitute a fixture it is an essential requisite that the article be affixed or annexed to the realty." *Brown v. Lillie*, 6 Nev. 244, 248 (citing *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Capen v. Peckham*, 35 Conn. 88, 93).

"Fixtures" in the primary meaning of the term, means chattels annexed to the realty so as to become a part of it. While not agreeing as to the necessity for, or to the degree of importance to be attached to, the fact of actual physical annexation, yet the authorities generally unite in holding that, to constitute a fixture, a thing must be of an accessory character, and must be in some way in actual or constructive union with the principal subject, and not merely brought upon it; that, in determining whether the article is personal property or has become a part of the realty, there should be considered the fact and character of the annexation, the nature of the thing annexed, the adaptability of the thing to the use of the land, the intent of the party in making the annexation, the end sought by annexation, and the relation of the party making it to the freehold. A thing may be said to be constructively attached where it has been annexed, but is separated for a temporary purpose, or where the thing, although never physically fixed, is an essential part of some-

thing which is fixed, as in the case of keys to a door. But mere loose machinery or utensils, even where they are the main agent or principal thing in prosecuting the business to which the realty is adapted, do not constitute fixtures. In order to do so they must be attached in some way, or at least must be mechanically fitted, so as in ordinary understanding to constitute a part of the structure itself. They must be permanently attached, or the component part of some erection, structure, or machine which is attached, to the freehold, and without which the erection, structure, or machinery would be imperfect or incomplete. Thus casks or hogsheads and fermenting tubs and a copper cooler in a brewery are not fixtures. *Wolford v. Baxter*, 21 N. W. 744, 83 Minn. 12, 53 Am. Rep. 1.

The cases are innumerable that hold actual physical annexation and attachment to the realty necessary to change the character of a personal chattel to that of a fixture. *Blancke v. Rogers*, 26 N. J. Eq. (11 C. E. Green) 563, 567.

Although the being fastened or fixed to the freehold is the leading principle in many of the cases in regard to "fixtures," it has not been the only one. Windows, doors, and window shutters are often hung, but not fastened, to a building, yet they are properly part of the real estate and pass with it, because it is not the mere fixing or fastening which is regarded, but the use, nature, and intention. So, while a considerable portion of the machinery and power of a mill is designed to be applied to draw up logs into it, that being essential to the operation of a mill of that construction, a chain used in connection with such machinery in hauling such logs into the mill, although not physically attached or fixed to the mill, is a fixture, and passes by a conveyance of the mill. *Farrar v. Stackpole*, 6 Me. (6 Greenl.) 154, 158, 157, 19 Am. Dec. 201.

A fixture is something so attached to the realty as to become for the time being a part of the freehold, as contradistinguished from a mere chattel. Wooden buildings resting by their own weight on flat stones laid on the surface of the ground are not fixtures. *Carlin v. Ritter*, 13 Atl. 370, 372, 68 Md. 478, 6 Am. St. Rep. 467; *Dubois v. Kelly* (N. Y.) 10 Barb. 496, 504, 508.

"Fixtures are defined to be chattels or articles of a personal nature which have been fixed to the land. To make an article a fixture, it must not only be essential to the business of the erection, but it must be attached to it in some way; at least, it must be mechanically fitted, so as, in ordinary understanding, to make a part of the building itself." *Vanderpoel v. Van Allen* (N. Y.) 10 Barb. 157, 162.

Where annexation to realty is spoken of, mere physical annexation is not exclusively  
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meant. A carpet is not a fixture, though nailed to the floor, and a key carried in the vest pocket may be part of the realty and pass as incident to the estate. It is generally conceded, however, that where a thing is adapted to the use of that part of the realty to which it is connected, and is annexed either constructively or actually to the realty, with the intention on the part of the party making the annexation to make the article a part of the building itself, it is a fixture. But each particular case of fixtures must be determined by its own facts, and is more for the jury than for the court. A heating plant, put into a building and connected with the furnace, cemented into the foundation, is a fixture and part of the realty, so as to be subject to a mechanic's lien. *Goodin v. Elieardsville Hall Ass'n*, 5 Mo. App. 280, 293.

Valves attached to a pump and boiler, used and intended as a permanent improvement on a plantation for irrigating purposes, and arranged on skids laid on brick on the surface of the ground, so as to be readily moved from place to place, are not, on account of annexation to the freehold, a part of the freehold. But valves secured to iron pipes, attached to the sides of a building and used in a manufacturing business, are a part of the freehold. *Langston v. State*, 11 South. 834, 835, 96 Ala. 44.

A fixture is an article of a personal nature affixed to the freehold, and may exist on public land. A steam engine and boiler, fastened in a frame of timber imbedded in the ground in a quartz ledge to make it level, with a roof to protect the machinery, and used for the purpose of working the ledge, is so annexed to the freehold as to become a fixture. *Merritt v. Judd*, 14 Cal. 59, 64.

A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs, or imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of buildings, or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. Civ. Code, § 680; *McNally v. Connolly*, 11 Pac. 320, 321, 70 Cal. 8. Thus houses built on mud sills resting upon the soil, which is not disturbed, are affixed to the land within the terms of such section. *Miller v. Waddingham* (Cal.) 25 Pac. 688, 689, 11 L. R. A. 510.

#### As associated directly with buildings.

Fixtures, to a great extent, are directly connected with buildings as a part of the realty, and but for the buildings they could in no sense be considered as real estate. Where buildings are a part of the realty, law writers and courts are wont to associate the term "fixture" directly with the buildings, and to speak of them as fixtures to the mill, store, or other buildings. This is because of the relationship of the fixtures

to the building, as distinct from the land, and is by no means a misapplication of the term. Thus a track scale, used mainly in the business of an elevator, and erected for that purpose, which is closely connected with the hopper, from which grain can be taken by means of conveyors to and from the elevator, and to which it is joined by a visible framework, is a fixture to the building, and will pass under a chattel mortgage with the elevator and fixtures. *McGorrick v. Dwyer*, 43 N. W. 215, 78 Iowa, 279, 5 L. R. A. 594, 16 Am. St. Rep. 440.

Fixtures are a part of the building itself, and are included in the estimates of its value. They are like the term "appurtenances" when applied to insurance on a vessel, and hence it is held that the words "and the fixtures in the same," used in an insurance policy on a building, do not constitute the fixtures a subject of separate insurance. *Holmes v. Charlestown Mut. Fire Ins. Co.*, 51 Mass. (10 Metc.) 211, 216, 43 Am. Dec. 428.

#### Complete unity of title.

To constitute a fixture there must not only be physical annexation in some form to the realty, but there must be unity of title, so that a conveyance of the realty would of necessity convey the fixture also. When the ownership of land is in one person, and the thing affixed is in another, and in its nature is capable of severance without injury to the former, the latter cannot in the contemplation of the law become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only; and the fact that the owner of the thing affixed to the freehold has also an undivided interest in the latter cannot render the former a fixture, when the interests are different in extent. *Adams v. Lee*, 31 Mich. 440. Thus, where plaintiff sold a portable sawmill, consisting of boiler, engine, etc., the title and right of possession to remain in plaintiff until the price was paid in full, the purchaser being permitted to set it up on his farm, in which he has an undivided interest, a conveyance by the purchaser of his interest in the farm does not convey the mill as a fixture. *Lansing Iron & Engine Works v. Walker*, 51 N. W. 1061, 1062, 91 Mich. 409, 30 Am. St. Rep. 488.

The shop of one person, placed on the land of another with the permission of the landowner, is a chattel, liable to attachment and seizure under execution against the owner of the shop. *Doty v. Gorham*, 22 Mass. (5 Pick.) 487, 489, 16 Am. Dec. 417.

Where a person sold a house, mill, and machinery to another, retaining title until fully paid, and such person then moved the property onto a lot of his own, and the price was not paid, such property did not become a

part of the realty. *Harkey v. Cain*, 6 S. W. 637, 639, 69 Tex. 146.

#### Consent of owner to removal.

In its correct sense the term "fixtures" includes such things only of a personal character as have been annexed to the realty, and which may afterwards be severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold. *Freeman v. Lynch*, 8 Neb. 192, 199; *Pickrell v. Carson*, 8 Iowa (8 Clarke) 544, 551; *Goodin v. Ellearsville Hall Ass'n*, 5 Mo. App. 289, 293; *Fletcher v. Kelly*, 55 N. W. 474, 475, 88 Iowa, 475, 21 L. R. A. 347; *Brown v. Baldwin*, 25 S. W. 863, 864, 121 Mo. 128.

The term "fixture" itself, although always applied to articles in the nature of personal property which have been affixed to land, has been used with different signification, until it has become a term of ambiguous meaning; and this ambiguity, which has attended the use of this word in various adjudications and by different writers, has been productive of much uncertainty. There may be some propriety in the definition of the term as denoting personal chattels annexed to land, which may be removed against the will of the owner, when confined in its application to the relation of landlord and tenant; but it does not appear to express the accurate meaning of the term in its general application. The term "fixture," in its ordinary signification, is expressive of an act of annexation, and denotes the change which has occurred in the nature and legal incidents of the property. *Teaff v. Hewitt*, 1 Ohio St. 511, 525, 527, 59 Am. Dec. 634.

The word "fixture" is used in a variety of senses. In its broadest signification it is sometimes used to designate anything which is by artificial means attached permanently or substantially to the soil or freehold. But there is another and more technical meaning sometimes given to the word; that is, something substantially affixed to the land, but which afterwards may be lawfully removed therefrom by the party affixing it, or his representative, without the consent of the owner of the freehold. *Prescott v. Wells, Fargo & Co.*, 3 Nev. 82, 89, 90.

#### Design or intention.

It is regarded as one of the indications that the thing in question is a fixture that it appears from the whole case that such was the intention of the owners of the soil who erected it. *Strickland v. Parker*, 54 Me. 263, 265, 268.

If it be the intention that a chattel annexed to realty shall not thereby become a part of the freehold, as a general rule it will not. The limitation is that where the subject or mode of annexation is such that

the attributes of personal property cannot be predicated of the thing in controversy, as where the property could not be removed without practically destroying it, or where it is essential to the support of that to which it is attached. *Tift v. Horton*, 53 N. Y. 377, 380, 13 Am. Rep. 537.

The primary meaning of the word "fixtures" was anything fixed; but this meaning, if carried too far, will not give the proper signification to the word. Often the word is used to signify all articles attached to the realty, such as permanent buildings, together with the windows, doors, keys, etc. These it would seem are indeed really portions of the realty, and should not be included in the word "fixtures." The better reasoning seems to be that the word "fixtures" may designate property which by its use is attached to the soil, but is capable of being removed. Fixtures that are not removable exist only between the grantee and grantor, or between heir and executor and the like; but as between landlord and tenant the other class only is applicable. The character of trade fixtures does not depend on annexation to the soil, nor mere weight and bulk; and it has been held in many cases that a tenant may take away whatever he erects for the purpose of carrying on his trade, whether it be machinery or building, and even though attached to the soil. The intention of the tenant in making the annexation is, according to a later authority, the controlling test. It is natural that the intent of the owner shall be to make permanent improvements. It is natural that the tenant, in making improvements to assist him in his trade, shall make them with the intention of removing them to other land. *Menger v. Ward* (Tex.) 28 S. W. 821, 823.

The use and meaning of the term "fixture" has never been definitely fixed, and depends more upon the intention of the party than upon constructive annexation to the freehold. It has been held that movable property which is attached to the realty, and which is capable of being removed without being itself destroyed and without damage to the freehold, is generally called a "fixture"; but, using the word in its more general sense, whether a fixture is to be deemed real or personal property depends in many cases upon circumstances which may reasonably be presumed to manifest the intention of the parties concerning its annexation to the realty. The mere fact that personal property is attached to the freehold by nails or otherwise does not, as a question of law, render it a part of the realty. *Copp v. Swift* (Tex.) 26 S. W. 438, 439; *Harkey v. Cain*, 6 S. W. 637, 639, 69 Tex. 146.

As a general rule, all things that are annexed to the land become a part of it; but to this there are exceptions, as where there

is a manifest intention to use the alleged fixtures in some employment distinct from that of the occupier of real estate, or where the chattel has been annexed for the purpose of carrying on a trade, it is not in general considered as a part of the realty. *Evans v. McLucas*, 15 S. C. 67, 70; *De Laine v. Alderman*, 31 S. C. 287, 274, 9 S. E. 950, 952.

The term "fixtures" may embrace other things than such as are denoted by the word in its strict etymological sense; and whatever has been placed on the soil or on a building for the purpose of being used as a part of the realty may properly fall under the denomination of a "fixture," although not so attached to it that it cannot be severed without disturbing or breaking the soil. *Woodman v. Pease*, 17 N. H. 282, 284.

The question of fixture or not depends upon the nature and character of the act by which the structure is put in place, the policy of the law connected with its purpose, and the intentions of those concerned in the act. *Appeal of Meigs*, 62 Pa. (12 P. F. Smith) 28, 1 Am. Rep. 372. The clear tendency of modern authorities seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the other tests seem to derive their chief value as evidence of such intention. *McLean v. Palmer* (Pa.) 2 Kulp, 349, 353.

The things that are annexed to land become a part of it; but to this there are exceptions, as where there is a manifest intention to use the alleged fixture in some employment distinct from that of the occupier of real estate, or where the chattel has been annexed for the purpose of carrying on trade, in which case it is not in general considered as part of the realty. *Evans v. McLucas*, 15 S. C. 67, 70.

As between mortgagor and mortgagee, if the thing appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, it is a fixture, resulting to the benefit of the mortgagee. If the article is attached for temporary purposes, with an intention to remove it, the mortgagee cannot interfere with its removal by the mortgagor. *Roger v. Brokaw*, 25 N. J. Eq. (10 C. E. Green) 496, 498.

As between a vendor and a vendee, the purpose of an annexation of machinery to real property and the intent with which it was made is the most important consideration. The permanency of an attachment does not depend so much upon the degree of physical force with which the machinery is attached as upon the motive and intention of the party attaching it. The mode of attachment may, it is true, in the absence of other proof, be controlling, as, for instance, where the building is constructed expressly to re-

ceive the machinery and it could not be removed without material injury to the building, or where the article would be of no value except for use in that particular building, or could not be removed therefrom without being destroyed or greatly damaged. But, while these tests have been frequently applied, it is not indispensable that any of them should exist. The object, and not the method, of the attachment, is considered the controlling feature. *McRea v. Central Nat. Bank*, 66 N. Y. 489, 498.

Where, in the erection of a church, a recess was left to receive an organ, which was required to complete the design and finish of the building, and the organ was attached to the floor and intended to be permanent, the organ must be considered as affixed to the freehold, and so must pass, as between the vendor and the vendee, by a sale of the realty. *Rogers v. Crow*, 40 Mo. 91, 94, 93 Am. Dec. 299.

#### Detriment to freehold by removal.

Anything is a fixture which cannot be removed without injury to the freehold. *Hoyle v. Plattsburgh & M. R. Co.* (N. Y.) 51 Barb. 45, 62.

Whether property ordinarily treated as personal goes with the realty as fixtures, or otherwise, is not determined by its capability or incapability of being detached and removed from the premises without injury to the freehold, but depends on the particular circumstances of the case. *Quinby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. (9 C. E. Green) 260, 264.

It is a general rule that an article which is affixed to the freehold becomes a part of it and necessarily passes with it. A thing which is susceptible of being removed without injury to the freehold, or any part thereof, and even without disfiguring the premises, which, it seems, is sometimes made a criterion, cannot be regarded as a fixture. *McClintock v. Graham* (S. C.) 8 McCord, 553, 556; *Farrar v. Charfette* (N. Y.) 5 Denio, 527; *Swift v. Thompson*, 9 Conn. 63, 66, 21 Am. Dec. 718.

In law, fixtures are anything fixed or attached to a building, and used in connection with it, movable or immovable. When the appendage is of such a nature that it is not a part and parcel of the building, then it is a movable fixture, and does not pass with the conveyance of the freehold. If, however, it be so connected with the building as that it cannot be severed from it without injury to the building, then it is part of the realty, and passes with the conveyance of the soil. *Capital City Ins. Co. v. Caldwell*, 10 South. 355, 357, 95 Ala. 77; *Horne v. Smith*, 11 S. E. 373, 374, 105 N. C. 822, 18 Am. St. Rep. 903; *Dudley v. Hurst*, 8 Atl. 901, 902, 67 Md. 44,

1 Am. St. Rep. 368; *Harkey v. Cain*, 6 S. W. 637, 639, 69 Tex. 148.

A personal chattel does not become a fixture, so as to be a part of the real estate, unless it is so affixed to the freehold as to be incapable of severance from it without violence and injury to the freehold; and if it be so annexed it is a fixture, whether the annexation be for use, for ornament, or for mere caprice. Consequently it was held that gas pipes laid in the soil to a depth of several feet, and which could not be removed without the digging up of the earth, were fixtures. *Providence Gas Co. v. Thurber*, 2 R. L. 15, 22, 55 Am. Dec. 621.

As a general rule implements of agriculture, that can be detached without injury to the freehold, do not become a part of it, so as to prevent one who has a temporary right to the land on which they are used from removing them at pleasure. Consequently a holder of a vendor's lien on land had no lien upon a cotton gin, a press, and a gristmill put upon the land after the sale in such a manner that they could be removed without injury to the freehold. *McJunkin v. Dupree*, 44 Tex. 500, 501.

A padlock can in no sense be called a fixture, for it can be taken away without injuring or defacing the building. The same thing is true of boards used in the construction of bins, and which were loose and movable. *Whiting v. Brastow*, 21 Mass. (4 Pick.) 810, 811.

Seven years after a mortgage was executed the mortgagor placed on the premises a boiler, saw rig, shingle mill, and planer, which could be removed without injury to the freehold. Held, that they were not fixtures. *Choate v. Kimball*, 19 S. W. 108, 109, 56 Ark. 55.

#### Different relationship of parties.

"It is a rule of law of great antiquity that whatever is affixed to the soil becomes in contemplation of law a part of it, and is consequently subjected to the same rights of property as the soil itself. 2 Smith, Lead. Cas. (8 Am. Ed.) 206; *Wood, Landl. & T.* § 325. Yet it is also well settled that erections made by a tenant on the demised premises for purposes of trade, as well as for some other purposes, are removable, and that he may exercise his right of removal at his will at any time before the end of the term. But an essential quality of all removable erections is that they shall have been made under such circumstances as to show that the tenant made them of his own will or choice, and for his own benefit, intending that they should remain his property, and not in fulfillment of a duty or obligation to his lessor." *Deane v. Hutchinson*, 2 Atl. 292, 295, 40 N. J. Eq. (18 Stew.) 83.

The general rule of the common law is that whatever is once annexed to the freehold becomes part of it and cannot be afterwards removed, except by him who is entitled to the inheritance. This rule, however, was never inflexible and without exception. It was construed most strictly between executor and heir in favor of the latter, and more liberally between tenant for life and in tail, and remainderman and reverser, in favor of the former, and much more liberally between landlord and tenant in favor of the tenant. The more extensive exception to the rule has been of fixtures erected for the purposes of trade. Fixtures which were erected to carry on trade and manufacture were from an early period of the law allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes. The question whether buildings erected for the purpose of trade are or are not removable by the tenant does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is whether it is designed for the purposes of trade or not. If the house is built principally for a dwelling house for the family, independently of carrying on a trade, it would doubtless be deemed a fixture, falling under the general rule, and irremovable. If a residence of the family were merely an accessory, for the more beneficial exercise of the trade, and with a view to superior accommodations in this particular, then it is within the exception. *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 7 L. Ed. 374.

The line of demarcation between realty and personalty in cases between landlord and tenant is by no means the same as in cases between vendor and vendee, mortgagor and mortgagee, lienor and lienee; and this, for the very sound reason that the relation of landlord and tenant is transitory. The use of the property is by one who is to stay for a limited time. Many articles are placed upon the realty by the tenant which both parties intend to have removed at the end of the term, while the things placed upon the realty by the vendor, mortgagor, and lienor are put there by one whose term of occupancy is unlimited, generally with the intention that they shall become a part of the real estate, and that they shall be perpetually and habitually used with it. In cases of the latter class, and especially where ponderous machinery whose weight is sufficient alone to hold it in place, is in question, permanent attachment to the realty is by no means an indispensable attribute of the fixture. The true test is the intent to permanently incorporate the article with the plant or property, and the permanent and habitual use of it as a part of the real estate. Thus engines, machinery, houses,

buildings, etc., which are essential to the particular use to which the realty is applied, constitute fixtures between lienor and lienee. *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons* (U. S.) 111 Fed. 81, 94, 49 C. C. A. 229.

A definition of a fixture in law conveys a clear idea as to the character of the property in itself. But in its application great difficulty and confusion of ideas is produced by the many definitions introduced to favor the interest of particular owners or to promote the public good in the uses made of the particular property. Thus a vendee might take it where an heir might lose it, and an heir might take it where a landlord could not. Personalty attached for the purposes of trade may be removed, while attachments made merely for the enjoyment of the premises might not. Things attached by the owner of the inheritance are distinguished by that fact from things annexed by the lessee. Viewing a vendee as one strictly protected in regard to things actually annexed or attached to, and in regard to things not fully severed from, the freehold, we should give him all that in law belongs to the land under the terms and description in his deed. *Cook v. Whiting*, 16 Ill. (6 Peck) 480, 482; *Miller v. Plumb* (N. Y.) 6 Cow. 665, 667, 16 Am. Dec. 456; *Kirwan v. Latour* (Md.) 1 Har. & J. 289. 291, 2 Am. Dec. 519.

There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of the parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee, and this distinction is observed in the case between mortgagor and mortgagee, and again modified between the heir and the executor. *Strickland v. Parker*, 54 Me. 263, 265.

A fixture is something in its nature a chattel, but which has been so planted in or so attached to the soil as to be in contemplation of law a part of it, so that it cannot be removed without the consent of the owner, and partakes of all the legal incidents of the freehold. The rule has been relaxed by exceptions in favor of trade, and in favor of agriculture, and in favor of the tenant as against the landlord; but the doctrine of fixtures is not to be established in the exceptions to it, and for the purpose of the mechanic's lien law the rules applicable between heir and executor should be applied, and that only should be considered a fixture which is so attached as to become a part of the building, which is itself a part of the land. *Gordin v. Elleadsville Hall Ass'n*, 5 Mo. App. 289, 293.

In determining whether chattels attached to or used with the realty are fix-

tures, regard must be had to the relation which the parties claiming bear to each other. As between heir and executor, the rule obtains with the utmost rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold. As between the executor of a tenant for life and the reversioner or remainderman, the right is considered more favorably for the executor. As between tenant and landlord, the tenant who claims to have articles considered as personal property is treated with the greatest latitude and indulgence. If the articles are used for the purpose of trade or manufacture, the right of the tenant to remove is even broader in extent. The strict rule as to fixtures which applies between the heir and executor applies equally as between the vendor and vendee and the mortgagor and mortgagee. The question whether an article be a fixture or not is governed very much by the intention of the owner and the purpose for which the erection was applied. *William Firth v. South Carolina Loan & Trust Co.* (U. S.) 122 Fed. 569, 578, 59 C. C. A. 73 (citing *Hill v. Farmers' & Mechanics' Nat. Bank*, 97 U. S. 450, 24 L. Ed. 1051).

What constitutes a fixture turns largely on the particular circumstances of each case. In controversies between landlord and tenant there is a most liberal indulgence toward the claim of the tenant; but as between vendor and vendee, heir and executor, mortgagor and mortgagee, there is no such indulgence toward him who annexes personal property to the land. *Tyler v. White*, 68 Mo. App. 607, 609.

The rule as to fixtures between the owner and purchaser at a sheriff's sale is the same as between vendor and purchaser at private sale. *Farrar v. Chauffetete* (N. Y.) 5 Denio, 527.

In general terms it may be said that when a building is erected as a mill, and the waterworks or steam works which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it or with it, though not at the time of the mortgage attached to the mill, such works are yet parts of it, and pass with it by a conveyance, mortgage, or attachment. A different rule may exist in regard to the respective rights of tenant and landlord, tenant for life and remainderman, and generally when one has a temporary, and not a permanent, interest in land. In those cases the rule is much relaxed in favor of those who make improvements on the real estate of others. But the improvements which a mortgagor, remaining in possession and enjoyment of the premises, makes in contemplation of law he makes for himself and to enhance the general value of the estate. Further-

more the expectation of such improvement and such increased value often enter into the consideration of the parties in estimating the value of the property to be bound, and its sufficiency as security for the money advanced. *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 306, 314, 38 Am. Dec. 368.

#### Enhancement of value of realty.

When the owner of land attaches personal property to it as a permanent accession to the value of the freehold, it becomes a part of the realty. A tenant, on the other hand, who with the consent of his landlord annexes chattels to land in such manner that they can be removed without damage to the realty, does not thereby part with his title to them. *Harkey v. Cain*, 6 S. W. 637, 639, 69 Tex. 146. In *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, 16 Am. St. Rep. 471, it was observed that one of the tests of whether personal property retains its character or becomes a fixture is the use to which it is put. If it is placed on the realty to improve it and make it more valuable, it is some evidence that it is a fixture; but, if placed there for use that does not enhance the value of the realty, this is some evidence that it is personal property. A movable sugar wagon, used in a sugar mill for the purpose of holding syrup and conveying it from place to place, not being annexed to the realty or anything appurtenant thereto, and being placed in the mill for use only, and not to enhance the value of the realty, is not a fixture. *Winslow v. Bromich*, 38 Pac. 275, 277, 54 Kan. 300, 45 Am. St. Rep. 285.

By the term "fixtures" are designated those articles which were chattels, but which by physical annexation are affixed to the real estate, and become a part of and accessory to the freehold. Whether a structure is a fixture or not depends on the nature and character of the act by which it is put in its place and the purpose for which it is intended to be used. In determining what is a fixture the simple criterion of the physical annexation is so limited in its range and so productive of contradiction that it will not apply with much force. One of the tests of whether personal property retains its character or becomes a fixture is the use to which it is put. If it is placed on the realty to improve it and make it more valuable, it is some evidence that it is a fixture; but, if it is placed there for some use that did not enhance the value of the realty, it is some evidence that it is personal property. Thus, where a railway company dug a well, and put in a pump and boiler, for the purpose of filling its tank on the line of the railroad, believing the well and attachments were on its own land, when it was discovered that they were on another's land, they did not become fixtures. *Atchison, T. & S. F. R. Co. v. Mor-*

gan, 21 Pac. 809, 811, 42 Kan. 23, 4 L. R. A. 284, 16 Am. St. Rep. 471.

**Essential to use and permanent.**

The proper rule in regard to fixtures is that if articles are essential to the use of the realty, have been applied exclusively to use in connection with it, are necessary for that purpose, and without such or similar articles the realty would cease to be of value, then they may properly be considered as fixtures, and should pass with it. *Hoyle v. Plattsburgh & M. R. Co.* (N. Y.) 51 Barb. 45, 62; *Cary Hardware Co. v. McCarty*, 50 Pac. 744, 751, 10 Colo. App. 200.

The term "fixture" is properly used to designate a thing attached to a freehold by the owner with the intention of making it a part thereof, if essential to the enjoyment of the freehold. Thus wires and insulators which are used in forming and completing a connection between an electric light and power plant and dwellings, stores, and other public places, for the purpose of conveying or transmitting light and heat thereto, are "fixtures" within the provisions of the mechanic's lien law. *Hughes v. Lambertville Electric Light, Heat & Power Co.*, 32 Atl. 69, 70, 53 N. J. Eq. (8 Dick.) 435.

The true rule in determining what are fixtures of a manufacturing establishment, where the land and buildings are owned by the manufacturer, is that, where machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and pass with the building, and that whatever is essential to the purpose for which the building is used will be considered as a fixture, although the connection between them be such that it may be severed without physical or lasting injury to either. In other words, it is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty. Pursuant to this decision, it is held that machinery in a mill house, which was attached to an engine in the building, and could not be detached and moved without injuring the house or other machinery, and without which the mill could not be operated, was a fixture, passing with the realty. *Sinker, Davis & Co. v. Comparet*, 62 Tex. 470, 476.

The term "improvement," in a mechanic's lien law, giving a mechanic's lien for an improvement or fixture erected by tenants, etc., does not include a railroad constructed by a lessee for mining coal in the slope of a mine, as such railroad is necessarily temporary, and the act only applies to such permanent and substantial erections as do essentially augment the interest which the tenant has in the land. *Appeal of Esterley*, 54 Pa. 192, 195.

Code, § 2219, provides that anything intended to remain permanently in its place, though not actually attached to the land, such as a rail fence, is a part of the realty and passes with it. Machinery not actually attached, but movable at pleasure, is not a part of the realty. While the law classifies such articles, it nevertheless permits the parties to class them differently in different instances. The element of intention enters into the question of permanency, whether of attachment or placing, and the intention is open to investigation by parol evidence. *Smith v. Odom*, 63 Ga. 499, 502.

As between a mortgagor and mortgagee, when the fixture appertains to the real estate, is necessary for its enjoyment, and is permanently attached to the freehold, it will be treated as realty. The permanency of the fixture depends upon the motive and intention of the party attaching it. If attached for a temporary use, with the intention of removing it, the mortgagor may remove it; otherwise, if attached for the permanent improvement of the freehold. *Quimby v. Manhattan Cloth & Paper Co.*, 24 N. J. Eq. (9 C. E. Green) 260, 264.

Whether fast or loose, all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, is a part of the freehold as between vendor and vendee, heir and executor, debtor and execution creditor, and between co-tenants of the inheritance. *Voorhis v. Freeman* (Pa.) 2 Watts & S. 116, 119, 37 Am. Dec. 490; *Gray v. Holdship* (Pa.) 17 Serg. & R. 413, 415, 17 Am. Dec. 680; *President of Union Bank v. Emerson*, 15 Mass. 159.

**As property.**

See "Chattel"; "Effects"; "Real Property."

**Cistern.**

A wooden cistern, placed by the side of a house and depended upon to supply water for the premises, is a fixture. *Cole v. Roach*, 37 Tex. 413, 417.

**Floating dock.**

A floating dock is not a "building" or a "fixture," within the meaning of those words as used in a mechanic's lien law. *Coddington v. Dry Dock Co.*, 31 N. J. Law, 477, 487.

**Furnace in house.**

A furnace so placed in a house that it cannot be removed without disturbing the brick work of the house adjoining the furnace, and without properly causing a portion of the ceiling to fall, is a fixture, and passes with the realty to a purchaser of the build-



ing. *Main v. Schwarzwaelder* (N. Y.) 4 E. D. Smith, 278.

There are two widely different rules as to fixtures—a very lax one as between lessor and lessee, making nothing a fixture not integral to a house, and a very strict one as between vendor and vendee, making almost everything a fixture which is in any way made stationary about it. Air-tight stoves, portable cupboards, a wooden cistern on blocks in the cellar, stoves, grates, kitchen ranges, and even hoop poles, stuck in the ground during the previous season, but at the time of the sale taken down and stacked in heaps on the ground, have been held to be fixtures as between vendor and vendee and mortgagor and mortgagee. But the rule is different as to a mechanic's lien under a statute providing that every mechanic who shall do any work upon or furnish materials, fixtures, etc., shall have a lien on the real estate. Hence, while a furnace not fastened down, but merely incased with brick and mortar to a platform of brick work, which was there before the furnace was put into the house, and connected with pipes running through the house, which were also there before the furnace was put in, might, as between vendor and vendee, be regarded as a fixture; yet placing it there would not entitle one to a lien on the real estate for his work, labor, and materials. *Baldwin v. Merrick*, 1 Mo. App. 281, 283.

Iron stoves fixed to the brick work of the chimneys of a house are fixtures, and pass with the house on the levy of an execution against it. *Goddard v. Chase*, 7 Mass. 432.

#### Furniture.

"Fixtures," as used in a marriage settlement of a house and the fixtures and fittings up thereof, does not include the household furniture. *Simmons v. Simmons*, 6 Hare, 352, 357.

"Fixtures of a saloon," within the meaning of a fire policy on a saloon and the fixtures thereof, does not include chairs. *Manchester Fire Assur. Co. v. Feibelman*, 23 South. 759, 118 Ala. 308.

"Tools, implements, and fixtures," within the meaning of a statute exempting from execution tools, implements, and fixtures necessary for carrying on the trade or business of a debtor, includes a clock, stove, screen, pitcher, and table cover belonging to a milliner, if the jury find them necessary for carrying on the business. *Woods v. Keyes*, 96 Mass. (14 Allen) 236, 237, 92 Am. Dec. 766.

#### Gin.

The term "fixtures" does not include a cotton gin, its band, and rollers, and therefore they may be removed from land after

a sale thereof by the vendor. *Gresham v. Taylor*, 51 Ala. 505, 507.

A gin house, running gear thereon, and packing screw are fixtures, inseparable from the realty, and would pass with the freehold. *McDaniel v. Moody* (Ala.) 3 Stew. 314, 317.

A gin stand, not attached to the realty, though used for the purposes of a farm, was not a fixture; nor a bell, only set upon posts and not permanently affixed, though used for farm purposes. *Cole v. Roach*, 37 Tex. 413, 417.

#### Light fixtures.

Electric light fixtures, which take the place of and serve the same purpose as ordinary gas fixtures, are a part of the realty. *Canning v. Owen*, 48 Atl. 1083, 1035, 22 R. I. 624, 84 Am. St. Rep. 858.

Lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses by means of gasoline, oil, or other fluids, are not fixtures, and form no part of the freehold. *Rogers v. Crow*, 40 Mo. 91, 94, 98 Am. Dec. 299.

The authorities are in conflict as to whether gas attachments are fixtures, so as to pass by grant to the freeholder. In *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38, 37 Am. Rep. 471, it was held that fixtures simply screwed on projections of the pipes from the walls are not appurtenances, and do not pass with the realty. To the same effect is *Guthrie v. Jones*, 108 Mass. 193. *Vaughen v. Haldeman*, 33 Pa. (9 Casey) 522, 523, 75 Am. Dec. 622; *Jarechl v. Philharmonic Soc.*, 79 Pa. 403, 21 Am. Rep. 78; *Shaw v. Lenke* (N. Y.) 1 Daly, 487; *Montague v. Dent* (S. C.) 10 Rich. Law, 185, 188, 67 Am. Dec. 572; *Rogers v. Crow*, 40 Mo. 91, 93 Am. Dec. 99; *Laurence v. Kemp*, 8 N. Y. Super. Ct. (1 Duer) 363; *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353. Contra, see *Johnson's Ex'r v. Wiseman's Ex'r*, 61 Ky. (4 Metc.) 357, 83 Am. Dec. 475; *Smith v. Commonwealth*, 77 Ky. (14 Bush) 31, 29 Am. Rep. 402. As a general rule those articles which are accessory to a building for its more convenient use are considered to pass by a deed of the premises. *Parsons v. Copeland*, 38 Me. 537; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 306, 38 Am. Dec. 368; *Hays v. Doane*, 11 N. J. Eq. (3 Stockt.) 84; *Keeler v. Keeler*, 31 N. J. Eq. (4 Stew.) 181; *Green v. Phillips* (Va.) 26 Grat. 752, 21 Am. Rep. 323; *Shelton v. Ficklin* (Va.) 32 Grat. 735. Property which the law regards as fixtures may by the parties to a deed be considered as personalty, and that which is considered in law as personalty they may regard as fixtures. *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 563; *Hunt v. Bay State Iron Co.*, 97 Mass. 279; *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Horton*, 53 N. Y. 377, 13 Am.

Rep. 537; *Ford v. Williams*, 24 N. Y. 359; *Smith v. Benson* (N. Y.) 1 Hill, 176; *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683. In accordance with these definitions, gas fixtures, a kitchen range, with boiler attached, patent water filter, tanks, and mosquito screens, attached to a building, known and sold as a hotel by a deed which reserved as personalty the "furniture, carpets, and pictures, but none of the permanent fixtures or appurtenances," were fixtures, and passed with the deed of the property. *Fratt v. Whittier*, 58 Cal. 126, 132, 41 Am. Rep. 251.

#### Light plant.

Where an electric light company owned a lot upon which a plant was placed, including boilers, engines, and dynamo, and the company erected in the street 18 masts, and wires were strung upon them along which the electric current was conducted through the lamps, it was held that the wires form an integral part of the machinery situated upon the lot, and passed as fixtures to the mortgagee under a mortgage of the lot. *Fechet v. Drake*, 12 Pac. 694, 695, 2 Ariz. 239.

A dynamo and appurtenant machines, used by an electric light company, come within the class of fixtures. *Gunderson v. Swarthout*, 80 N. W. 465, 466, 104 Wis. 186, 76 Am. St. Rep. 860.

#### Loose material.

Taking "fixture" in its broadest meaning, as all that belongs to the land, it will not include hewed timbers, posts, and round logs lying loosely about upon the land, although originally provided and intended for a granary on the land, as fixtures becoming a part of it. *Cook v. Whiting*, 16 Ill. 480, 482.

#### Machinery.

If machinery is attached to a factory, with intention of using it permanently and as a part of the same, and it is adapted to that use, it becomes an immovable fixture. *Phelan v. Boyd* (Tex.) 14 S. W. 290, 294.

In New York, Ohio, Vermont, and some other states it is held that the machinery of a mill, fastened to the mill by screws or kept in position by its own weight, is personal, and does not pass by a mortgage or conveyance of the real estate. *Corwin v. Cowen*, 12 Ohio St. 629; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634; *Farrar v. Chauffetete* (N. Y.) 5 Denio, 527; *Murdock v. Gifford*, 18 N. Y. 28, 32; *Potter v. Cromwell*, 40 N. Y. 287, 297, 10 Am. Dec. 485; *Cresson v. Stout*, 17 Johns. 116, 119, 120, 8 Am. Dec. 373; *Voorhees v. McGinnis*, 48 N. Y. 278, 286; *Smith v. Odom*, 63 Ga. 490, 502; *Helm v. Gilroy*, 26 Pac. 851, 853, 20 Or. 517; *Swift v. Thompson*, 9 Conn. 63, 66, 21 Am. Dec.

718; *Taffe v. Warnick* (Ind.) 3 Blackf. 111, 23 Am. Dec. 383; *Hill v. Wentworth*, 28 Vt. (2 Williams) 428; *Bartlett v. Wood*, 32 Vt. 372; *Gale v. Ward*, 14 Mass. 352, 7 Am. Dec. 223. In Maine, Pennsylvania, New Hampshire, and in other states the courts hold that such property is not personal, and passes by mortgage or deed of the real estate. *Farrar v. Stackpole* (Me.) 6 Greenl. 154, 155, 19 Am. Dec. 201; *Corlies v. McLagin*, 29 Me. (16 Shep.) 115, 116; *Parsons v. Copeland*, 38 Me. 537, 545; *Burnside v. Twitchell*, 43 N. H. 390; *Voorhis v. Freeman* (Pa.) 2 Watts & S. 116, 37 Am. Dec. 490; *Harlan v. Harlan*, 15 Pa. (3 Harris) 507, 513; *Ege v. Kille*, 84 Pa. 333, 340; *Appeal of Morris*, 88 Pa. 368, 383; *Gray v. Holdship* (Pa.) 17 Serg. & R. 413, 415, 17 Am. Dec. 680; *Wilder v. Kent* (U. S.) 15 Fed. 217; *Powell v. Monson & Brimfield Mfg. Co.* (U. S.) 19 Fed. Cas. 1229, 1230; *State v. Driscoll*, 44 Iowa, 65, 70; *Hathaway v. Orient Ins. Co.*, 11 N. Y. Supp. 413, 415, 58 Hun, 602; *Willis v. Morris*, 1 S. W. 799, 801, 66 Tex. 628, 59 Am. Rep. 634; *Cook v. Condon*, 51 Pac. 587, 589, 6 Kan. App. 574; *Cary Hardware Co. v. McCarty*, 50 Pac. 744, 751, 10 Colo. App. 200.

Under a statute giving to one who furnishes any material, machinery, or fixtures for any improvement on land a lien on such improvement and the land on which it is situated, there is no lien for wrenches or belting furnished, in no way attached to the real estate or a necessary part to the machinery which is thus attached. *Meek v. Parker*, 63 Ark. 367, 369, 38 S. W. 900, 58 Am. St. Rep. 119.

Where one purchasing machinery gives a chattel mortgage for its price, and orally agrees that it shall be treated as personalty until paid for, and the realty to which it is afterwards attached by him will not be injured by its removal, the machinery will be considered as personal property, as against a prior mortgagee of the realty, and not as a fixture. *Binkley v. Forkner*, 117 Ind. 176, 180, 19 N. E. 753, 3 L. R. A. 33.

An engine placed on land by a manufacturing company as a part of the machinery and buildings on the lot did not become a part of the realty, so as to pass to a mortgagee under a mortgage of the land on which the factory stood, together with all the machinery and buildings on said lot, consisting of an engine, etc., where on the destruction of the factory by fire the machinery was removed to another tract of land. *Padgett v. Cleveland*, 33 S. C. 339, 344, 11 S. E. 1069.

Where at the time of the conveyance of a tract of land there were situated thereon a sawmill, engine boiler, and the usual machinery pertaining to such a mill, the mill and machinery, if attached and affixed to the land, were fixtures, and constituted a part

of the realty, and passed with the land to the vendee. *Pea v. Pea*, 35 Ind. 387, 390.

Machinery not actually attached to the realty and movable at pleasure is not in the strict sense of the term a fixture. Anything detached from the realty becomes personalty instantly on being so detached, and may be subject-matter of larceny, even by the person so detaching it. A tenant cannot remove permanent fixtures. Thus chattels real are personal property in every respect, if not so annexed to the freehold as to go along with it by alienation. Movable fixtures are considered the personal property of the tenant, so that, when not exempt, they may be stripped from the house and sold on process against him as goods and chattels. *McCall v. Walter*, 71 Ga. 287, 290.

Machinery attached to a building with bolts and screws is a fixture, as between the owner of the premises and a creditor, though placed there by a tenant under a lease authorizing him to remove such machinery on the expiration of his lease, under Civ. Code, § 860. *McNally v. Connolly*, 11 Pac. 320, 321, 70 Cal. 3.

A cider mill and press, erected by a tenant of farm property holding from year to year, erected at his own expense and for his own use, are not fixtures, but personal property, and the tenant may remove them at the expiration of his tenancy; and this, whether the mill was let into the ground or not. *Holmes v. Tremper* (N. Y.) 20 Johns. 29, 30, 32, 11 Am. Dec. 238.

#### Portable mill.

A portable gristmill, annexed to a building erected on the land, to be applied and appropriated to the business then carried on, with the design that it should be a permanent structure for use as a custom gristmill for the neighborhood existing about it, is a fixture. *Potter v. Cromwell*, 40 N. Y. 287, 297, 100 Am. Dec. 485.

Where a portable engine and sawmill in some degree attached to the soil are used on a leasehold for the purpose of sawing logs into lumber, and have no relation to the convenient use of the land as such, they do not become fixtures. *Hughes v. Edisto Cypress Shingle Co.*, 23 S. E. 2, 12, 51 S. C. 1.

A sawmill, built upon timbers lying upon the surface of the ground, and constructed with the object and purpose, after sawing the timber within a convenient distance, to be removed to another locality, is a mere personal chattel, and will not pass by a conveyance or patent of the land. *Brown v. Lillie*, 6 Nev. 244, 247, 248.

#### Railroad equipment.

The word "fixtures" does not refer to movable things. It refers to things that are

fixed. Thus an ordinance granting the right to a street railway company to construct and operate a railway within the city, which reserved the right to require the defendant to use such fixtures and appliances upon its road, plant, and cars as might be deemed necessary, the term "fixtures" includes trolley poles, overhead wires, rails, and ties, and therefore authorized the city to require the railway company to put down a different kind of rail. *City of Kalamazoo v. Michigan Traction Co.*, 85 N. W. 1067, 1071, 128 Mich. 525.

A building known as a "depot," erected by the lessee railroad company upon the leased premises, not for the purpose of improving the inclosure, but to aid and assist the company in carrying on its business, is a trade fixture, and may be removed before the expiration of the term. *Carr v. Georgia R. Co.*, 74 Ga. 73, 81.

A marine railway, consisting of iron and wooden rails and sleepers, endless chain, gear, wheels, and ship cradle, and constructed in the usual manner, is a fixture, and the title thereto will pass under a levy on the land and execution sale thereof. *Strickland v. Parker*, 54 Me. 263, 265.

An exemption from taxation of the capital stock of a railroad company and the road, with fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, does not include a hotel building erected within the space which the company is entitled to hold for a right of way, though it is built under a lease from the company, and is a convenience to passengers and a means of profit to the road. The ticket offices, however, which are kept within such building, are exempt. *Day v. Joiner*, 65 Tenn. (6 Baxt.) 441, 442.

#### Rolling stock.

The property of a railway company consists of the roadbed, the rails upon it, the depot erections, the rolling stock, and the franchises to hold and use them. The roadbed, the rails fastened to it, and the buildings at the depots are clearly real property. That the locomotives, and passenger, baggage, and freight cars are a part, and a necessary part, of the entire establishment, there can be no doubt. It may be that, if an appeal should be made to the common sense of the community, it would be determined that the term "fixtures" could not well be applied to such movable carriages as railway cars; but such cars move no more rapidly than do pigeons from a dovecote or fish in a pond, both of which are annexed to the realty. It has been admitted that a machine, movable in itself, may become a fixture by being connected in its operation by bands or in any other way with the permanent machinery. It results from many cases that it

is not absolutely necessary that things should be stationary in any one place or position, in order that they should be technically deemed fixtures. The movable quality of these cars has frequently, if not generally, induced the opinion that they are personal property. Hence railway mortgages of the rolling stock have been generally filed in the office of the clerks of all the towns through which the roads pass. That was undoubtedly the more prudent course, as it saved any question as to the character of the property; but as these cars are a necessary part of the entire establishment, without which it would be inoperative and valueless, there can be no doubt but that they are fixtures, and the title thereto will pass under a mortgage of the railroad and its appurtenances. Their wheels are fitted to the rails. They are constantly upon the rails, and, except in cases of accidents or when taken off for repairs, nowhere else. They are not moved off the land belonging to the company. They are peculiarly adapted to the use of the railway, and in fact cannot be applied to any other purpose. *Farmers' Loan & Trust Co. v. Hendrickson* (N. Y.) 25 Barb. 484, 493, 494.

"Fixtures," as used in the chapter relating to railroad corporations, and providing that fixtures shall be subject to mortgage, include all rolling stock of any railroad corporation organized under the provisions of this article, used and employed in connection with its railroad, and all fuel necessary to the operation of the same. Rev. Codes N. D. 1899, § 2957.

#### Statue.

A statue placed in a courtyard before the house, on a base erected on an artificial mound raised for the purpose of supporting it, the statue not fastened to the base by either clamps or cement, but resting firmly on it by its own weight, which was three or four tons, the base being of masonry and the mound an artificial and permanent erection raised some two or three feet above the surrounding land, with a substantial stone foundation, is a fixture, and should be considered a part of the real estate as between a purchaser of the premises at a sale on foreclosure of a mortgage thereon and one who purchased the statue at an execution sale under a levy thereon as personal property. *Snedeker v. Warring*, 12 N. Y. 170, 175.

#### Steam engine.

The owner of mills operated by water power, for the purpose of increasing the power and enlarging the capacity of his mills, had a steam engine, with boilers, placed on a solid brick foundation resting on the ground excavated for the purpose, and also placed in said mills certain fire pumps, saw benches, and saws. In a contest, the plaintiff claiming the property under foreclosure of a

mortgage on the real estate, and the defendant claiming under chattel mortgages executed by the owner, who executed the real estate mortgage, the court held that the engine, boilers, shafting, and gearing were fixtures, and a part of the real estate. *Voorhees v. McGinnis*, 48 N. Y. 278, 286.

The term "fixtures" includes a steam engine erected in a permanent manner in a tanyard to facilitate the process of tanning, and used there for such purpose for two or three years, but which could be removed without injury to the building, with which it was connected by braces. *Sparks v. State Bank* (Ind.) 7 Blackf. 469, 471.

A steam engine and boiler, situated in a shed attached to a two-story building used as a mill, the shed planked up all around, so that the engine could not be removed without tearing the planking away, and the sawmill attached to the land in the usual way and operated by the engine, are fixtures, and pass under a deed of the land. *Horne v. Smith*, 11 S. E. 373, 374, 105 N. C. 322, 18 Am. St. Rep. 903.

A steam engine and boiler, fastened to a frame of timber bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, was a fixture. *Merritt v. Judd*, 14 Cal. 59, 61, 64.

Where the owner of a building placed an engine in the basement to furnish power to tenants, fastening it by bolts imbedded in a foundation of stone and cement laid in the basement floor for the purpose, the engine became a part of the realty. *Tolles v. Winton*, 28 Atl. 542, 63 Conn. 440.

Where machinery consists of a steam boiler set in a brick arch, which rests on a stone foundation, and an engine which rests on brick masonry, together with a line shaft adapted to the shop in which it is to run, and the machinery in a planing mill is securely fastened in the usual manner, such engine and machinery were fixtures. *Taylor v. Collins*, 8 N. W. 22, 24, 51 Wis. 123.

#### Tools.

The term "fixtures" does not include tools. *Gordon v. Miller*, 63 N. E. 774, 775, 28 Ind. App. 612.

#### Trade fixtures.

Movable fixtures are considered the personal property of the tenant, and when not exempt they may be taken from the house and sold on process against him as goods and chattels. Accordingly a mortgage by a tenant of a stock of goods "and all fixtures and utensils in said store belonging to the mortgagor" covered an iron safe, the showcase, platform, scales, and trucks, copying press,

chandelier, and cheese case, which were in use in the store at the execution of the mortgage. *McCall v. Walter*, 71 Ga. 287, 290, 292.

In holding that the word "fixtures," in a mortgage covering the fixtures of a store, in the sense used by the parties, meant chattels of a permanent nature, in contradistinction from those kept for sale, such as were incident to the convenient use of the store, the courts say that chattels known as "fixtures of trade," when placed for use, partake of the realty, because used with it. They may be attached to it or placed upon it. If removed by the tenant during his term, they remain chattels; but, if left, they belong with the freehold as permanently fixed to it. Chattels of this sort, while in use in a store, have always been spoken of as fixtures. Strictly, the word "fixture" relates to a freehold. It refers to a chattel transformed into land by assimilation. Commonly, it refers to a chattel, used with land, that may be or become a part of the freehold or not as conditions may require. Sometimes it is used to indicate articles of furnishing or furniture, necessary or convenient for the carrying on of business, trade, or manufacture, in contrast and to distinguish them from merchandise dealt in or goods manufactured. *Sawyer v. Long*, 30 Atl. 111, 112, 86 Me. 541.

Where it does not appear whether a pump and pipe, balance and scales, and a beer pump, were annexed to the freehold at all, or, if so, in what manner, they will be considered as prima facie personal property, and not fixtures, and as such given to the executors or administrators. *Hovey v. Smith* (N. Y.) 1 Barb. 372, 376.

Tables placed in a store building for the use and the promotion of the business there carried on, but not attached to the building, are not fixtures, so as to support a subcontractor's and materialman's lien. *Rinzel v. Stumpf*, 93 N. W. 36, 87, 116 Wis. 287.

Shelving placed on the owner's order, so as to conform to the inside contour of a store building, and nailed to the walls and floor, so as to make it stationary and permanent, was sufficiently annexed and adapted to the use of the building to constitute a fixture, and, having been attached with that intent, to support the lien of a subcontractor for the materials furnished therefor. *Rinzel v. Stumpf*, 93 N. W. 36, 87, 116 Wis. 287.

In modern times, for the encouragement of trade, many things are now considered as personal property which seem to be attached to the freehold. This is particularly true as between landlord and tenant for years. The tenant may take away chimney places, or a cider mill or press, and a pump erected on the land. *Evans v. McLucas*, 15 S. C. 70. Rails of a tramway, laid temporarily for the purpose of connecting a sawmill with a rail-

road, held not fixtures as to one upon a corner of whose land the track was laid. *De Laine v. Alderman*, 31 S. C. 267, 274, 9 S. E. 950, 952.

#### Walls.

"Fixtures," as used in a contract to furnish scenery and fixtures for a theater, meant all the fittings up necessary for a theater or to make it suitable for a theater. It did not require the painting of the walls. *Forbes v. Howard*, 4 R. I. 364, 368.

#### Warehouse.

Where a railroad company consented to have erected upon its right of way a warehouse to facilitate the company's business, the person erecting the building might, without damaging the landlord, the owner in fee, remove it at any time, if it could be done in such a way as not to injure the land itself, and under such circumstances the builder could also sell the building. *Evans v. McLucas*, 15 S. C. 67, 70.

#### Water course.

As used in 1 Rev. St. p. 514, § 57, providing that no public road shall be laid out through any buildings, or any fixtures or erections for the purpose of trade or manufacture, without the consent of the owner, cannot be construed to include the channel by which water is conducted from a creek to a sawmill, within any natural or fair meaning of the term. *People v. Kingman*, 24 N. Y. 559, 562.

#### Wharf.

A dock used as a landing for a ferry is a fixture, within the statute forbidding the laying out of any road through any erection or fixture used for the purpose of trade, or the grounds adjoining. *Flanders v. Wood*, 24 Wis. 572.

### FIXTURES FOR MANUFACTURING PURPOSES.

The words "fixtures for manufacturing purposes," as used in the provision extending the right to a mechanic's lien for work done or materials furnished for or about the repairing of any fixed machinery or gearing, or other fixtures for manufacturing purposes, shall be construed to include any building, erection, or construction, of whatever description, attached or annexed, or intended to be attached or annexed, to any land or tenement, and designed to be used in the building or repairing of vessels, whether the same be permanently attached to the freehold, or so built as to be removed from place to place, and only temporarily attached to the land, and whether the same be intended and designed for use on land or water. *Gen. St. N. J. 1895, p. 2064, § 6.*

Act March 11, 1853, § 5, providing that any addition united to a former building, and any fixed machinery or gearing or other "fixtures for manufacturing purposes," shall be considered a building for the purposes of a lien, means trade fixtures. *Oddington v. Beebe*, 29 N. J. Law, 550, 558.

## FLAG.

The words "flag, standard, color, or ensign of the United States," as used in an act prohibiting and punishing the desecration of the flag of the United States, shall include any flag, any standard, any color, any ensign, or any representation of a flag, standard, color, or ensign, or a picture of a flag, standard, color, or ensign, made of any substance whatever, or represented on any substance whatever, and of any size whatever, evidently purporting to be either said flag, standard, color, or ensign of the United States, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars and stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, or the colors, or the standard, or the ensign of the United States of America. Ann. Codes & St. Or. 1901, § 2092.

"Flagged," as used in an ordinance requiring the removal of snow from sidewalks except on streets which have not been "flagged," does not determine the extent to which the sidewalk is covered. The test is whether there is a substantial and suitable flagging, furnishing a convenient and sufficient mode of travel to pedestrians. Thus a sidewalk with bluestone four feet in width is flagged, though the whole surface of the sidewalk is not covered. *City of New York v. Brown*, 57 N. Y. Supp. 742, 743, 27 Misc. Rep. 218 (citing *In re Garvey*, 77 N. Y. 523).

## FLAGGING.

As paving, see, also, "Pave—Pavement."

"Flagging" is a pavement of flag stones. *City of Roanoke v. Harrison* (Va.) 19 S. E. 179, 180.

"Flagging" is one species of pavement, to wit, a paving with flat stones, and is more peculiarly adapted and generally used in paving the sidewalks, or that part of the street set apart for the use of pedestrians, and perhaps it may be suitable in some cases for carriageways; but, wherever used, it is a pavement, and a relaying of flags is a paving of the portion of the street so relagged. *In re Phillips*, 60 N. Y. 16, 21.

## FLANKING.

"Flanking" is simply permitting a tow to float down stream with the current along the

channel, without any assistance from the towboat, which in fact, instead of propelling the tow, controls its movements by reversing its engines and backing with such speed as will give to it the control of the tow without overcoming entirely the force of the current. *The George Shiras* (U. S.) 61 Fed. 800, 301, 9 C. C. A. 511.

## FLAT.

The term "flat," when used in a statement that bonds are sold flat, means that they are sold for a price which includes accrued interest. *Hemenway v. Hemenway*, 134 Mass. 446, 448.

## FLAT STEEL WIRE.

"Flat steel wire, or sheet steel in strips," as used in Tariff Act Oct. 1, 1890, par. 148, includes strips of steel, 3 inches wide, from 100 to 250 feet long, and less than .025 of an inch in thickness, which have been shaped by passing through cold rolls. *United States v. Wetherell* (U. S.) 65 Fed. 987, 13 C. C. A. 204.

## FLATS.

Flats have always been deemed an appurtenance to the adjoining river front, and they pass with it in a conveyance, if not expressly excluded. *Jones v. Janney* (Pa.) 8 Watts & S. 436, 443, 42 Am. Dec. 309; *Saltonstall v. Proprietors of Long Wharf*, 61 Mass. (7 Oush.) 195, 200.

Any boundary at tide water, by whatever name, whether sea, harbor, or bay, includes the land below the high-water mark, as far as the grantor owns; but a boundary of that land, whether described as shore, beach, or flats, excludes it. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

The word "flat," when used as descriptive of anything respecting an arm of the sea, means a level place over which the water stands or flows. *Church v. Meeker*, 34 Conn. 421, 424.

### As land between high and low tide.

Mr. Justice Story, in *Thomas v. Hatch*, 23 Fed. Cas. 946, defines "flats" to be the spaces between the margin of the water at a low stage. *State of Alabama v. State of Georgia*, 64 U. S. (23 How.) 505, 513, 16 L. Ed. 556.

"Flats" are defined to be a peculiar kind of right situate in the bed of a navigable river, where the tide flows and refloes, which is covered by water at high tide and left bare at low tide. While covered with water they are part of the river, in which the public has the right of navigation, fishing, passing and repassing, and in many instances they are not capable of being reclaimed, except by

wharves or piers. *Jones v. Janney* (Pa.) 8 Watts & S. 436, 443, 42 Am. Dec. 309.

**As a place under shallow water.**

"The term, when used as descriptive of anything respecting an arm of the sea, means a level place over which the water stands or flows." *Church v. Meeker*, 34 Conn. 421, 424.

In Gen. St. tit. 23, § 2, which provides that whoever shall first make a weir for catching fish on any flat within any river, cove, or harbor shall not be interrupted in the enjoyment of it by any other person, etc., "flat" means some place or places within a river, cove, creek, or harbor, where fish may be taken. It implies, therefore, that it must be a place more or less under water; a place not navigable with safety by ordinary vessels, on account of the shallowness of the water; a shallow or shoal water. *Stannard v. Hubbard*, 34 Conn. 370, 376.

## FLATTERY.

"Flattery," as the term is used in the statement that seduction must be accomplished by means of temptation, deception, arts, or flattery, is an effort to influence another by the use of false or excessive praise,—insincere complimentary language, or conduct. *Hall v. State*, 32 South. 750, 758, 134 Ala. 90; *Suther v. State*, 24 South. 43, 45, 46, 118 Ala. 88.

## FLAX.

An insurance policy on grain in stacks and granary on the farm will be held to cover flax; flax coming to a certain extent within the definition of grain. *Hewitt v. Watertown Ins. Co.*, 7 N. W. 596, 55 Iowa, 823, 324, 39 Am. Rep. 174.

Flax is grain, within the provisions of Gen. St. 1894, § 7645, relating to the storage of grain in warehouses. *State v. Cowdery*, 81 N. W. 750, 751, 79 Minn. 94, 48 L. R. A. 92.

## FLAX FACTORY.

Within the meaning of a policy insuring a building as a "flax factory," the erection therein and operation of machinery for the manufacture of rope is authorized; it being the usual part of the business of a flax factory and within the definition of the term. *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213, 221.

## FLEE FROM JUSTICE.

In extradition laws, see "Fugitive from Justice."

"Fleeing from justice," within the meaning of the act of Congress requiring criminal prosecutions to be had within two years, ex-

cept in the case of persons fleeing from justice, means to leave one's home, residence, or known place of abode within the district, or to conceal one's self therein, with intent in either case to avoid detection or punishment for some public offense against the United States. *United States v. O'Brian* (U. S.) 27 Fed. Cas. 212, 213.

Gantt's Dig. § 1666, providing that the limitations of certain preceding sections shall not avail to any person who shall flee from justice, does not mean that a defendant must leave the state to constitute a fleeing from justice within the meaning of the statute. It is sufficient that he absconded from his home, his known place of abode, and secreted himself in another county, to avoid arrest and prosecution for the offense. *Lay v. State*, 42 Ark. 105, 110.

To constitute fleeing from justice, within the meaning of Rev. St. § 1045 [U. S. Comp. St. 1901, p. 726], providing that the three-year limitation fixed by the previous sections of all prosecutions for a criminal offense should not apply to one so fleeing, an intent to avoid the justice of the United States is not necessary; an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act being sufficient, and in the Constitution, laws, and treaties of the United States the words "fleeing from justice" or "fugitives from justice" as of themselves implying flight from justice of nation only. *Streep v. United States*, 16 Sup. Ct. 244, 245, 160 U. S. 128, 40 L. Ed. 385.

The expression "fleeing from justice," as used in the crimes act (1 Stat. 119), providing that the limitations against the prosecution for criminal offenses shall not extend to any person fleeing from justice, does not apply to the mate of a whale ship who commits a crime on the high seas and does not return to the United States for the entire period of limitations, and hence a prosecution for the offense is barred. *United States v. Brown* (U. S.) 24 Fed. Cas. 1263, 1264.

Act Cong. April 30, 1790, § 31 (1 Stat. 112), providing for two-year limitation for the prosecution of a misdemeanor, provided "that nothing herein contained shall extend to any person or persons fleeing from justice," includes a defendant who, after the commission of the offense, left the district within which it was committed within two years, with intent to avoid detection or punishment for the offense, though he might at various other periods within the two years have been arrested in the United States. Held, that "fleeing from justice" means not merely a fleeing at the date of the statute, or at the time of the arrest of the offender, nor at the time of finding the indictment. Having once fled, he is a person fleeing from justice, and has lost the benefit of the limitation forever. If in any case a return would

restore the benefit, it must be a surrender of himself into the hands of justice. *United States v. White*, 28 Fed. Cas. 568, 569.

The phrase "fleeing from justice," in Rev. St. U. S. § 1045 [U. S. Comp. St. 1801, p. 726], relating to the limitation of criminal prosecutions, is not restricted to cases in which indictments have actually been found; so that, if a person under indictment for one crime, but guilty of several, flees from the jurisdiction, the statute will not constitute a bar to prosecution for such other crimes after three years without indictment found. *Howgate v. United States*, 7 App. D. C. 217, 247.

"A fleeing from justice," within the statute of limitations, is nothing more than a going out of the jurisdiction to avoid prosecution. "It makes no difference whether a prosecution is commenced or not." *United States v. Smith (Conn.)* 4 Day, 121, 125, 27 Fed. Cas. 1158.

"Fleeing from justice," as used in the Missouri statute of limitations, includes absence for the purpose of avoiding arrest or escaping prosecution. *State v. Washburn*, 48 Mo. 240, 241.

## FLEECES.

"Fleeces, yarn, and cloth," within the meaning of a statute exempting from execution ten sheep, their fleeces, and the yarn or cloth manufactured from the same, is to be construed as including fleeces, yarn, and cloth equal in amount to that grown on ten sheep, even though the debtor never owned the sheep on which the wool was grown. *Hall v. Penney* (N. Y.) 11 Wend. 44, 45, 25 Am. Dec. 601; *Brackett v. Watkins* (N. Y.) 21 Wend. 68, 69.

## FLEEING BEFORE ARREST.

As used in Code 1892, § 1387, providing a reward for the arrest of any one who has killed another and is fleeing or attempting to flee before arrest, the term "arrest" refers to an arrest for the offense arising from the killing of another, and the term "fleeing before arrest" means the fleeing of one who has killed another before arrest for the offense arising from that killing; so that where one who wounded another, while his victim was still alive, was arrested and tried for assault with intent to kill, and discharged, and, on his victim's subsequently dying, fled, one who then arrested him for the offense of killing his victim was entitled to the reward. *Newton County v. Doolittle*, 18 South. 451, 72 Miss. 929.

## FLEEING HOMICIDE.

One may be said to be a "fleeing homicide" when he has inflicted a mortal wound,

although the wounded party may not at the time he flees be dead. *Newton County v. Doolittle*, 18 South. 451, 452, 72 Miss. 929.

## FLESH.

Under P. L. 1860, p. 401, § 69, declaring the selling or exposing for sale of the "flesh of any diseased animal or other unwholesome flesh, knowing the same to be diseased or unwholesome," to be a misdemeanor, a drover who sells to a butcher a live steer admittedly and visibly diseased is guilty, since the word "flesh" means, and always meant, both live flesh and dead flesh. *Commonwealth v. Horn*, 13 Pa. Co. Ct. R. 164, 166, 2 Pa. Dist. R. 487, 488. Under a contract in which one of the parties agreed to pay the other 10 cents per pound on each and every pound of "flesh gained" by cattle of the former which are contracted to be kept by the latter, it was held that payment was to be made for each pound of weight gained. *Winch v. Baldwin*, 28 N. W. 62, 64, 68 Iowa, 764.

## FLIGHT.

Where a defendant was shown to have left the town on a day after the robbery, if his conduct was induced by fear of an arrest, then it was a flight from justice and is strong presumptive evidence of guilt; but if his going was the carrying out of a long determined purpose, hastened by matters unconnected with the crime, his journey was not a flight, and furnished no presumption of guilt. *United States v. Candler* (U. S.) 65 Fed. 308, 312.

## FLOAT.

A float is two or more rafts attached together, prepared by proper fastenings and suitable arrangement to withstand the winds and waters. *Tome v. Four Cribs of Lumber* (U. S.) 24 Fed. Cas. 18, 23.

"The master of a float, which includes every boat, vessel, raft, or floating thing navigable on a canal, meeting another float, shall turn to the right, so as to be wholly on the right side of the center of the canal." *Laws 1894, c. 338, § 166; Wagner v. Buffalo & R. Transit Co.*, 69 N. Y. Supp. 113, 117, 59 App. Div. 419.

The term "float," within Gen. St. 1878, c. 32, §§ 1, 78, is not limited to actual floating in streams which are capable of floating logs without artificial aid, but includes such streams as with artificial contrivances and with the means ordinarily employed are capable of floating logs. *Merriman v. Bowen*, 23 N. W. 843, 33 Minn. 455.

### As displaced ore.

"Float" is those pieces of ore which have become detached and broken loose from the



mother lode and "floated" down hill. *Synnot v. Shaughnessy*, 7 Pac. 82, 84, 2 Idaho (Habb.) 122.

#### As land grant.

"Float" is a term applied to a grant of land by the government, the land not having been specifically selected; that is, a general grant of a certain amount of land, which is to be selected in the future by the grantee. *United States v. Central Pac. R. Co.* (U. S.) 28 Fed. 479, 480; *United Land Ass'n v. Knight* (Cal.) 23 Pac. 267, 270.

A float, as applied to a grant of public lands, is a grant of quantity only within a larger tract, to be located by the consent of the government before it can attach to any specific land. *Hays v. Steiger*, 18 Pac. 670, 672, 76 Cal. 555.

Floats are grants of a quantity of land to be located within a certain tract or territory, whether of limited extent, marked by certain bounds, or anywhere in the state. *United States v. McLaughlin*, 8 Sup. Ct. 1177, 1190, 127 U. S. 428, 32 L. Ed. 218.

"Float" is the term applied to a grant of lands along the line of a railroad, which had not been located, in aid of such railroad, the title of which was necessarily an imperfect one, because, until the lands were identified by the definite location of the road, it could not be known what specific lands would be embraced in the sections named. *Wisconsin Cent. R. Co. v. Price County*, 10 Sup. Ct. 341, 346, 133 U. S. 496, 33 L. Ed. 687.

"Float" is the term used to designate the right of a railroad company to select lands within certain limits, to take the place of lands granted to the railroad company in its aid which have been lost by previous appropriation, which attaches to no specific tracts until the selection is actually made in the manner prescribed by law. *Elling v. Thexton*, 16 Pac. 931, 934, 7 Mont. 330.

Until definite location of land covered by the general route of a railroad to whom there had been a grant of public lands, a particular section of land was a "float"; that is, at large. *Nelson v. Northern Pac. R. Co.*, 23 Sup. Ct. 302, 306, 188 U. S. 108, 47 L. Ed. 406.

A grant of ten sections to the mile out of any swamp lands then belonging to, or that might thereafter belong to, the state, without any limitations or restrictions as to sections or locality, being a grant of a certain quantity out of a larger quantity of land, is what is termed in land-grant law a "float." *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 45 Minn. 104, 110, 47 N. W. 464, 466.

#### As a warehouse.

A float is a stationary craft kept for the purpose of receiving goods brought up the

river by boats, and is not in any proper legal sense a warehouse. *Miller v. Steam Nav. Co.* (N. Y.) 18 Barb. 361, 363.

#### FLOATABLE STREAM.

A floatable stream is a stream capable of valuable use in bearing the products of mines, forests, and tillage of the country it traverses to mills and markets. *Gwaltney v. Scottish Carolina Timber & Land Co.*, 16 S. E. 692, 693, 111 N. C. 547; *McLaughlin v. Hope Mills Mfg. Co.*, 9 S. E. 307, 309, 103 N. C. 100.

The term "floatable stream" is used to designate a stream which is of sufficient capacity to float logs, rafts, etc., though not large enough to be considered technically a navigable stream. Such a stream is a public highway. *Gerrish v. Brown*, 51 Me. 256, 260, 81 Am. Dec. 569.

The term "floatable stream" is used in the United States to designate a class of navigable streams of such a character that, though they are not navigable for boats or lighters, they may be used for bearing logs, or the products of mines and tillage of the country they traverse, to mills or markets. *Gaston v. Mace*, 10 S. E. 60, 62, 33 W. Va. 14, 5 L. R. A. 892, 25 Am. St. Rep. 848; *Allison v. Davidson* (Tenn.) 39 S. W. 905, 907.

A floatable stream is one not navigable for craft of any kind at ordinary water, but which is used to float logs to mills or markets lower down at certain seasons of high water; and in order to constitute a stream a floatable one the rises of water must be at recurring seasons during each year with tolerable regularity. They must not be produced by artificial means, but must be habits of the stream produced by natural causes, to be known and to be anticipated, and on which prudent business men might make investments with the hope of reasonable returns. *Parker v. Hastings*, 31 S. E. 833, 834, 123 N. C. 671.

#### FLOATING DEBT OR INDEBTEDNESS.

Under Laws 1875, c. 517, authorizing the settlement of the floating debt of the village of S., the term "floating debt" only includes the "unpaid legally authorized obligations of the village." *Cooke v. Village of Saratoga Springs* (N. Y.) 23 Hun, 55, 59.

The words "floating indebtedness" have a clear and well-understood meaning in the commercial world. They do not mean void paper semblances of obligations, which neither create nor evidence a debt. They mean "that mass of lawful and valid claims against the corporation for the payment of which there is no money in the corporate treasury specifically designated, nor any taxation or other means of providing money to pay, particularly provided." *City of Huron v. Second*

Ward Sav. Bank (U. S.) 86 Fed. 272, 276, 30 C. C. A. 38, 49 L. R. A. 534 (citing *People v. Wood*, 71 N. Y. 871, 874).

A stipulation in an action to recover on municipal bonds stated that it was agreed that the floating indebtedness of the municipality exceeded the sum in which the municipality was allowed to become indebted. It was held that the use of the words "floating indebtedness" indicated that the indebtedness was at the highest evidenced by outstanding warrants. *German Ins. Co. v. City of Manning* (U. S.) 95 Fed. 597, 610.

The term "floating debt," in a statute authorizing a city to issue bonds for the purpose of paying off the present floating debt of the city, is used to distinguish indebtedness to be provided for from the bonded debt of the city, which is in its nature fixed, and for the time it has to run permanent. *State v. Faran*, 24 Ohio St. 536, 541.

The *Encyclopædia Britannica*, under the title of "national debt," in drawing the distinction between a "funded debt," which term is said to apply to a debt which is recognized at least as quasi permanent and for the payment of the interest on which legal provision is made, says that "unfounded or floating debt, on the other hand, means strictly loans for which no permanent provision requires to be made, which have been obtained for temporary purposes, with the intention of paying them off within a brief period. Exchequer and treasury bills are included in this category, and such other moneys in the hands of a government as it may be required to reimburse at any moment." *People v. Carpenter*, 52 N. Y. Supp. 781, 785, 81 App. Div. 603.

#### FLOATING DOCK.

As building, see "Building (In Lien Laws)."

As fixture, see "Fixture."

As warehouse, see "Warehouse."

#### FLOATING DRY DOCK.

As ship or vessel, see "Vessel."

#### FLOATING ELEVATOR.

A floating elevator, constructed from a canal boat upon which had been built an elevating apparatus for hoisting grain, is a ship or vessel, and as such subject to maritime lien. *The Hezekiah Baldwin* (U. S.) 12 Fed. Cas. 93.

Floating elevators are primarily boats. Some are scows, and have to be towed from place to place by steam tugs; but the majority are propellers. When the floating elevator arrives at the ship and is made fast alongside of it, the canal boat carrying the grain is made fast on the other side of the

elevator, and the grain is by machinery discharged into the ship. *Budd v. People of New York*, 143 U. S. 517, 529, 3 Sup. Ct. 471, 36 L. Ed. 247.

#### FLOATING WHARF.

As a boat, see "Boat."

As building, see "Building (In Lien Laws)."

As vessel, see "Vessel."

#### FLOGGING.

Flogging, which is abolished as a punishment in the navy or in vessels of commerce, is corporal punishment by stripes inflicted with a cat, or any punishment which in substance or effect amounts thereto. The particular form of the instrument is not material, and it is the kind, and not the degree, of punishment which is forbidden. If punishment by stripes inflicted with a rope is in substance and effect the same kind of punishment as the punishment of flogging with a cat, it is prohibited by law. *United States v. Cutler* (U. S.) 25 Fed. Cas. 740.

#### FLOOD.

See "Extraordinary Floods"; "Ordinary Floods."

As an accident, see "Accident—Accidental."

A flood is defined by Webster to be "a great flow of water; a body of moving water; a body of water rising, swelling, and overflowing land not usually covered with water; an inundation; a great body or stream of any fluid or substance." It is essentially different from a storm or tempest. *Stover v. Ins. Co. (Pa.)* 3 Phila. 83, 42.

#### FLOOR.

The word "floor," as used in the lease of a first floor of a building, means a section of the building between horizontal planes, and naturally includes the walls. The apparent intention of the lease is to separate a section of the building as a distinct tenement. The words "first floor" define a floor in particular boundaries, and there is nothing to fix the lateral boundaries, except the boundaries of the building. In this respect the words differ somewhat from the word "room." The word "room" includes a description of a perpendicular wall, as well as the horizontal plane which bounds a portion of the house described by it, and includes the outside or lateral walls, at least when they constitute the walls of another room, as clearly as the words "first floor" exclude the flooring of the floor above it. The floor of the building in the lease must

be held to include the entire front wall of the lower part of the building. *Lowell v. Strahan*, 12 N. E. 401, 404, 145 Mass. 1, 1 Am. St. Rep. 422.

### FLOORCLOTH CANVAS.

Floorcloth canvas "is a canvas used exclusively for the manufacture of floor oilcloth. It has a harder twist, is heavier, is a more expensive article than burlaps, and is not calendered as burlaps are." The terms "floor cloth canvas" and "oilcloth foundations," as used in Act June 6, 1872, § 4, imposing a duty on such materials, are convertible terms designating the same article. *Arthur v. Cumming*, 91 U. S. 362, 364, 23 L. Ed. 438.

### FLORIDA WATER.

"Florida water" is a drug or medicine, within Pen. Code, arts. 186, 187, prohibiting the sale of merchandise on Sunday, except drugs and medicine; it being used as a deodorant in a sick room, and as a remedial agent in alleviating pain and sick headache. *Todd v. State*, 30 Tex. App. 667, 668, 18 S. W. 642.

### FLOTSAM.

When a ship is sunk or otherwise perishes, and the goods float upon the sea, this is flotsam. *Lacaze v. State (Pa.)* Add. 59, 64.

### FLOUR.

See "Mixed Flour"; "Patent Flour."

"Flour is the product from grain, both ground and bolted. The making of flour consists in both grinding the grain and bolting the meal." *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450, 486.

The term "flour," within the meaning of the statute exempting all necessary meat, fish, flour, and vegetables actually provided for family use, does not include wheat. *Salsbury v. Parsons* (N. Y.) 36 Hun, 12, 17.

"Flour," as used in Code Civ. Proc. § 1390, subd. 4, which exempts from sale under execution all necessary meat, fish, flour, and vegetables actually provided for family use, includes Indian corn meal. *Lashaway v. Tucker*, 15 N. Y. Supp. 490, 61 Hun, 6.

### FLOURING MILL.

The terms "mill" and "flouring mill" include the machinery necessary for the operation of the same, as well as the buildings. *Cook v. Condon*, 51 Pac. 587, 589, 6 Kan. App. 574.

Within a policy of fire insurance insuring a stock of flour, grain, and cooperage contained in a stone and brick steam flouring mill, prohibiting the buildings or any part from being used for any trade, business, or vocation declared hazardous, among which were specified gristmills and mills, manufactories, or mechanical operations requiring fire heat, the term "flouring mill" construed in its most restricted meaning, is to say the least a mill used for grinding one kind of grain for food, to wit, wheat. A flouring mill, if it grind nothing but wheat, is still a mill used for grinding grain for food. Whether a fire kiln for drying corn in connection with the grain mill, as well as the question whether the use of the corn mill itself was an incident to or an ordinary and appropriate part of the business of a flouring mill, is a question of fact for the jury, and not for the court. At this day there should be no uncertainty as to the distinctive significance of the terms "flouring mill" and "grist mill." Flour is the product of grain, both ground and bolted, while meal is the pulverized grain, ground, but not bolted. The making of flour, therefore, consists of grinding the grain and bolting the meal, while the making of meal consists of the simple process of grinding. The grinding or grist mill, therefore, is an essential part of all flouring mills, while the bolting apparatus is not an indispensable part of a grist mill. *Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co.*, 5 Ohio St. 450, 480.

### FLOW.

See "Natural Flow."

One of the definitions of the verb "flow," given by lexicographers, is to rise, as the tide. Hence the rise in a river caused by the backing up of its water by the rising of the tide at its mouth, brings it within the ebbing and flowing of the tide. *People v. Tibbetts*, 19 N. Y. 523, 527 (citing Worcester's Dict.).

The word "flowing," as used in a deed conveying to the grantee rights in a dam and the right of flowing a pond, meant such a flowing as was incident to the maintenance of the then existing dam, and not a greater flowing by the construction of a different dam. *Bennett v. Kennebec Fiber Co.*, 32 Atl. 800, 801, 87 Me. 162.

### FLOWAGE.

The right of flowage, as given by the mill acts to the mill owner, does not mean that of flowing or making any other direct use of his neighbor's land adjacent to the stream above his own, but only means the right to raise a dam on his own land to a height sufficient to raise a suitable bed of water and

to continue the same to his own best advantage, although the land of another is thereby flowed. *Isele v. Arlington Five Cents Sav. Bank*, 135 Mass. 142, 143 (citing *Fitch v. Seymour*, 50 Mass. [9 Metc.] 462).

## FLOWERS.

See "Artificial Flowers."

Though the word "flowers," standing alone, can have no new meaning given to it by the innuendo following a libel alleged as follows: "I have reason to suppose that many of the flowers of which I have been robbed are growing on your premises (innuendo, that the plaintiff had been guilty of larceny and stolen from the defendant certain plants, roots, and flowers)"—the whole passage naturally bore the meaning ascribed to it by the innuendo, and its evident meaning was that flowers capable of being planted, plants, roots, and flowers, had been stolen by the plaintiff from the defendant. *Williams v. Gardiner*, 1 Mees. & W. 245, 249.

## FLOWING LANDS.

"The term has acquired a definite and specified meaning in our law. It commonly imports raising and setting back water on another's land by a dam placed across a stream or water course which is the natural drain and outlet for surplus water on such land." *Call v. Middlesex County Com'rs*, 68 Mass. (2 Gray) 232, 235.

## FLUE.

See "Blind Flue."

A flue is defined to be the pipe, tube, or passage for the conveyance of the products of combustion, flame, smoke, hot gases, heated air, etc.; and within the tariff act a flue is none the less a flue because, after being placed in the boiler, part of the furnace. *In re Whitney* (U. S.), 53 Fed. 235, 236.

## FLUE POCKET.

A flue pocket is a short flue which extends into a boiler for about six or eight inches behind the flue sheet, and is closed at the inner end. Such flue pocket is located near the bottom of the flue sheet, and opens into the fire box. They are so attached to the flue sheet that they may be taken out when it becomes necessary to remove sediment or incrustations on the bottom of the boiler. The usual method of attaching flue pockets to the flue sheet of a boiler, so that they cannot be blown out, is to expand the flue on the inside next to the flue sheet, thus forming a shoulder which abuts against the sheet. *Atchison, T. & S. F. R. Co. v. Howard* (U. S.), 49 Fed. 206, 207, 1 C. C. A. 229.

## FLUID.

See "Burning Fluid."

"Fluid," as used in a specification in an application for a patent that a reservoir should contain water, oil, or other fluid to two-thirds of its height, more or less, cannot be construed to include air, but means a fluid that is tangible, that can be seen and handled, like water or oil, and with which a vessel can be filled wholly or in part at the option of the patentee, though the term "fluid," in its generic and technical signification, includes air and gases. *Sickels v. Youngs* (U. S.) 22 Fed. Cas. 73, 81.

## FLUME.

A flume, built of wood, 6 feet wide, 4 feet high, and from 60 to 100 feet long, running from a pond into a mill, and used to convey water upon the wheel within the building, is a building within the mechanic's lien law. *Derrickson v. Edwards*, 29 N. J. Law (5 Dutch.) 468, 473, 80 Am. Dec. 220.

## FLUSHED.

The term "flushed," as used in a contract providing that the brick is "to be laid close, and joints thoroughly flushed with mortar," is equivalent to the term "slushing," and does not mean that there should be no spaces between bricks which were not entirely filled with mortar, but that the face of the joints between the exterior brick should be filled, and each layer of interior brick covered with mortar before the next was laid on, so that some portion thereof crowds into the vertical interstices. *Laycock v. Parker*, 79 N. W. 327, 330, 103 Wis. 161.

## FLUTES.

Flutes are longitudinal parallel ruffles with round edges. The distinction between plaits and flutes is that the former have angular edges and are flat, whereas the latter have round edges and stand up. *Kursheedt Mfg. Co. v. Naday*, 107 Fed. 488, 490, 46 C. C. A. 422.

## FLYING SWITCH.

"A flying switch is one made by attaching to the car to be switched an engine, giving the car a sufficient impetus, and then detaching the engine, running it ahead out of the way, and allowing the car, with the impetus thus imparted, to run to the place desired." *Magner v. Truesdale*, 55 N. W. 607, 53 Minn. 436; *Dooner v. Delaware & H. Canal Co.*, 30 Atl. 269, 270, 164 Pa. 17; *Baker v. Kansas City, Ft. S. & M. R. Co.*, 48 S.

W. 838, 842, 147 Mo. 140; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa, 14, 39, 4 Am. Rep. 181.

A running or flying switch consists in kicking cars forward in breaking or making up trains by moving them forward at a rapid speed, detached from the engine or from a portion of the train, and then, by checking or increasing the speed of the engine, or of such portion of the train, allowing them to fly forward. *Chicago Junction Ry. Co. v. McGrath*, 68 N. E. 69, 70, 203 Ill. 511.

A flying switch is a switch operated in such a manner while the train is in motion as to send different parts of the train, previously connected, along different lines. A flying switch and running switch have the same identical meaning, and may be created in the way mentioned, or the locomotive, after being uncoupled, may back up to the car or a portion of the train with considerable speed, and, giving it a parting kick, send it off in the desired direction. *Baker v. Kansas City, Ft. S. & M. R. Co.*, 26 S. W. 20, 29, 122 Mo. 533.

"Making flying switch" and "kicking cars" are terms denoting very nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In "kicking cars" the disconnected cars are given their impetus by a backward motion of the engine, which does not follow them. *Bradley v. Ohio River & O. Ry. Co.*, 36 S. E. 181, 183, 126 N. C. 735.

## FOAL GETTER.

The term "foal getter," in a contract of warranty of a stallion, means that the horse would be able to do reasonable service in begetting foals. *Watson v. Roode*, 61 N. W. 625, 626, 43 Neb. 348; *Id.*, 80 Neb. 264, 46 N. W. 491, 492; *McCorkell v. Karhoff*, 58 N. W. 913, 914, 90 Iowa, 545; *Brown v. Doyle*, 72 N. W. 814, 815, 69 Minn. 543.

## FOG.

The term "fog," as used in Rev. St. § 4233 [U. S. Comp. St. 1901, p. 2893], providing that every steam vessel shall go at a moderate speed when in a fog, applies to all atmospheric conditions increasing the perils of navigation, such as mist or falling snow. *Flint & P. M. R. Co. v. Marine Ins. Co.* (U. S.) 71 Fed. 210, 215.

Acts 1864, c. 69, art. 10, provides that whenever there is a fog, whether by day or night, the fog signals described in the statute shall be used at least every five minutes. Held, that the true rule in relation to the density of a fog which would require the use

of the fog signal is that there must be fog enough by day to shut out the view of the sails or hull, or by night of the lights, within the range of the horn, whistle, or bell. *Dolner v. The Monticello* (U. S.) 7 Fed. Cas. 858, 859.

## FOLIE BRIGHTIQUE.

"Folie brightique," is a term used to designate craziness resulting from Bright's disease. In *re McKean's Will*, 66 N. Y. Supp. 44, 45, 81 Misc. Rep. 703.

## FOLIO.

Under Comp. Laws, § 7459, a legal folio of printed matter consists of 100 words. *Thornton v. Village of Sturgis*, 38 Mich. 639-642.

Rev. St. § 4971, subd. 14, providing that the term "folio," wherever it occurs, shall be construed to mean 100 words or figures, conclusively covers the compensation which may be given or paid for the publishing of any legal notice, where such compensation is fixed by law as so much per folio. *Bohan v. Ozaukee County*, 60 N. W. 702, 703, 88 Wis. 498.

Where the number of words in a record, certificate, return, etc., by the clerk of the federal court, are less than 100, they are to be counted as a folio in computing his compensation, under a fee bill allowing him a certain compensation for each folio. *Amy v. Shelby County* (U. S.) 1 Fed. Cas. 817, 818.

In determining the number of folios in a final record, each separate and distinct order, notice, or other paper is to be counted separately according to the rule prescribed in Rev. St. § 854 [U. S. Comp. St. 1901, p. 657], and the aggregate of the folios so found is the number of folios in the record. *Erwin v. United States* (U. S.) 37 Fed. 470, 493, 2 L. R. A. 229.

The word "folio" means 100 words. *V. S.* 1894, 5415.

The word "folio" shall be construed to mean 100 words or figures. Rev. St. Wis. 1898, § 4971.

A folio is 100 words, counting as a word each figure necessarily used. *Laws N. Y.* 1892, c. 677, § 11.

A folio shall consist of 100 words, and two figures shall be counted as one word. *Gen. St. Kan.* 1901, § 3043.

The term "folio" shall be construed to mean 100 words, and four figures shall be counted as one word. *Rev. St. Wyo.* 1899, § 4314.

The term "folio," when used as a measure for computing fees or compensation,

shall be construed to mean 100 words, counting every figure necessarily used as a word; and any portion of a folio, when in the whole draft or paper there shall not be a complete folio, and when there shall be an excess over the last folio, shall be computed as a folio. *Comp. Laws Mich.* 1897, § 11239; *Rev. St. Wis.* 1898, § 2935; *Gen. St. Minn.* 1894, § 255, subd. 4; *B. & C. Comp. Or.* § 2988; *Rev. St. Utah*, 1898, § 1022.

The term "folio," when used as a measure for computing fees or compensation, shall be construed to mean 100 words, counting every two figures necessarily used as a word. Any portion of a folio, when in the whole draft or paper there should not be a complete folio, and when there shall be an excess over the last folio exceeding a quarter, shall be computed as a folio. *Ballinger's Ann. Codes & St. Wash.* 1897, § 1612.

The term "folio," when used as a measure for computing fees or compensation, shall be construed to mean 100 words, counting every three figures necessarily used as a word. Any portion of a folio, when in the whole draft or paper there is not a complete folio, in excess over the last folio exceeding a quarter, shall be computed as a folio. *Pol. Code Idaho* 1901, § 1780.

#### As space of 250 ems.

*Gen. St.* 1878, c. 70, § 31, declares that for publishing any notice, etc., required by law to be published in any newspaper not more than 75 cents per folio for each insertion, and 85 cents per folio for each insertion after the first, shall be charged, and for the purpose of computing the same a folio shall be declared to be equal to the space occupied by 250 ems of solid matter of the kind of type used. Held, that though a folio in the printing business, as well as in the law business, means 100 words, the statute placed on the term a different and more limited meaning, and therefore it could not be held to mean 100 words, which might or might not be 250 ems, but must be confined to the measurement prescribed by statute. *Hobe v. Swift*, 59 N. W. 831, 832, 58 Minn. 84.

## FOLLOW—FOLLOWING.

#### See "As Follows."

The words "preceding" and "following," referring to sections in statutes, shall be understood as meaning the sections next preceding or next following that in which such words occur, unless some other section is designated. *Rev. St. Wyo.* 1899, § 2724; *Pub. St. N. H.* 1901, p. 63, c. 2, § 13; *Rev. St. Wis.* 1898, § 4971; *Ky. St.* 1903, § 462; *Rev. St. Me.* 1883, p. 59, c. 1, § 6, subd. 15; *Rev. Laws Mass.* 1902, p. 89, c. 9, § 5, subd. 18; *Rev. St. Mo.* 1899, § 4156; *Horne's Rev. St. Ind.* 1901, § 240, subd. 6; *Gen. St. Conn.* 1902, § 1;

*Code N. C.* 1883, § 3765, subd. 7; *Wilkinson v. State*, 10 Ind. 372, 373.

In the construction of statutes, the words "preceding" and "following," when used by way of reference to any section of the statutes, shall mean the section next preceding or next following that in which such reference is made. *Gen. St. Minn.* 1894, § 255, subd. 12; *V. S.* 1894, § 15; *Code Va.* 1887, § 5.

The words "preceding," "succeeding," or "following," used in reference to any section or sections of a chapter or statute, mean next preceding, next succeeding, or next following that in which such reference is made, unless a different interpretation be required by the context. *Code W. Va.* 1899, p. 133, c. 13, § 17.

In the construction of statutes the word "follow" means generally next after, unless the context requires a different construction. *Pen. Code Ga.* 1895, § 2.

The words "preceding" and "following" mean next before and next after. *Civ. Code Ala.* 1896, § 5.

The words "preceding" and "following," whenever used by way of reference to any chapter or section of these statutes, shall be construed to mean the chapter or section next preceding or next following. *Pub. St. R. I.* 1882, p. 78, c. 24, § 20.

The words "preceding" and "following," when used by way of reference to any title, chapter, or section in the statutes, shall be construed to mean the title, chapter, or section next preceding or next following that in which such reference is made, unless when some other title, chapter, or section is expressly designated in such reference. *Comp. Laws Mich.* 1897, § 50, subd. 13.

A reference to the next or following section or other division of a statute means the section or other division immediately following. *Laws N. Y.* 1892, c. 679, § 10.

A contract which declares that one thing is to have a "position following another," referring to some other thing, is to be construed to mean next following; for, if an indefinite number of other things about which the contract does not concern itself may be interposed, the specified two may be separated to such an extent as to destroy the force of the contract. *Hubbard v. Rowell*, 51 Conn. 423, 426.

Although the word "following" means generally next after, yet a different signification will be given to it if required by the context and the facts of the case. *Simpson v. Robert*, 35 Ga. 180.

#### Following avocation or occupation.

An insurance policy provided for benefits in cases of disability so as to disable the in-

sured from "following an avocation." The fact that a man may work for a few moments, or even though, perhaps, he may work for a few months, is not conclusive evidence that he can follow some avocation. *Starling v. Supreme Council Royal Templars of Temperance*, 66 N. W. 340, 341, 108 Mich. 440, 62 Am. St. Rep. 709.

The words "following any occupation," as used in an accident policy, mean something more than the doing of one or more acts pertaining thereto. They involve the idea of continuity, and involve also the doing of all those things which are an essential part of the work or business in which a party is engaged. A person is unable to follow any occupation where he is not able to do all of the essential acts necessary to be done in the prosecution of the occupation. *Monahan v. Supreme Lodge of Columbian Knights*, 92 N. W. 972, 974, 88 Minn. 224.

## FOLLY.

See "Sounding in Folly."

## FONDLING.

Webster's Dictionary defines "fondling" as a person or thing fondled or caressed, or treated with foolish or doting affection, and "fondle" as to treat with tenderness, to caress, as a nurse fondles a child. *Gay v. State*, 2 Tex. App. 127, 134.

## FONDNESS.

"Fondness for women" does not, *ex vi termini*, convey the meaning of lustful desire and its unlawful gratification. *Cauley v. State*, 9 South. 456, 92 Ala. 71.

## FONDS ET BIENS.

The words "goods and effects" are a correct translation of the French expression "fonds et biens." *Adams v. Akerlund*, 48 N. E. 454, 456, 168 Ill. 632.

## FOOD.

The term "food" includes all articles used for food or drink by man, whether simple, mixed, or compound. *Bates' Ann. St. Ohio* 1904, § 4200-5; *Commonwealth v. Hufnagel*, 4 Pa. Super. Ct. 301, 305, 325; *Cobbey's Ann. St. Neb.* 1903, § 9401; 3 P. & L. Dig. Laws Pa. 1897, col. 818, § 15; *Comp. Laws Mich.* 1897, § 5011; *Rev. Laws Mass.* 1902, p. 660, c. 75, § 17; *Arbuckle v. Blackburn* (U. S.) 113 Fed. 616, 622, 51 C. C. A. 122.

The term "food" includes every article used as food or drink by man. *Code Miss.* 1892, § 2095; *Gen. St. N. J.* 1895, p. 1175, § 75; *Pen. Code Tex.* 1895, art. 431.

The term "food," as used in an act relating to the adulteration or sale of adulterated foods and drugs, includes every article used for food and drink by man, other than drugs or water. *Comp. Laws N. M.* 1897, § 1256.

The term "food," as used in certain provisions of the article relating to the inspection of flour, etc., shall include every article used for food or drink by man, including all candies, teas, coffees, and spirituous, fermented, and malt liquors. *Civ. Code, S. C.* 1902, § 1581.

A statute making it unlawful to buy up "any provision or article of food coming to market" means an article of food for human beings, and does not refer to rye chop, suitable for horses. *Boteler v. Washington* (U. S.) 3 Fed. Cas. 962.

### Oleomargarine.

Act May 21, 1885, §§ 1, 3, prohibiting the manufacture and sale of oleomargarine as an article of food, construed not to include its sale as wagon grease, since the purpose of the act is only to protect the health of the public. *Commonwealth v. Schollenberger*, 25 Atl. 999, 1000, 153 Pa. 625.

### Tobacco.

Food is a substance that promotes the growth of animal or vegetable life. There is no nutriment in tobacco. It is merely a narcotic. It is not generally regarded as an article of food. It could hardly be said that an indictment for selling unwholesome food could be sustained by proof that defendant sold a bad or unwholesome cigar. So the sale of tobacco and cigars on Sunday is not authorized under a statute prohibiting the sale of any goods and wares on that day, except drugs or medicines, provisions, or other articles of immediate necessity. *State v. Ohmer*, 84 Mo. App. 115, 124, 125.

## FOOD FISH.

By the words "food fish" is meant such fishes as are used for food. *Rev. St. Fla.* 1892, § 2762.

## FOOL.

See "Natural Fool."

## FOOT.

"Foot of the mountain" as used "In the description of the lands in the deeds and locations in question, as bounded partly 'by the mountain,' or 'on the mountain,' or 'the foot of the mountain,' is too indefinite and uncertain to control the courses and distances and other references by which these lots are described, since the foot of the

mountain may in many cases be uncertain, the rise being so gradual and inconsiderable." *Williston v. Morse*, 51 Mass. (10 Metc.) 17, 28.

### FOOT-FRONTAGE RULE.

The "foot-frontage rule" is that used in the imposition of a tax upon special land without any reference to the benefit conferred upon such land. As a mode of assessment it is purely arbitrary. *Cronin v. Jersey City*, 38 N. J. Law (9 Vroom) 410, 412. Two lots with equal fronts, the one containing double the number of square feet contained in the other, are benefited in different degrees. This rule taxes them alike. This rule also ignores the value of the land benefited. Two different lots with the same width of front may differ greatly in value, owing to a difference in location or other causes, and hence be benefited in different degrees. *Donovan v. City of Oswego*, 79 N. Y. Supp. 562, 563, 39 Misc. Rep. 291 (citing *In re Klock*, 30 App. Div. 24, 29, 51 N. Y. Supp. 897).

### FOOTING.

"Footings," as used in the enabling act, providing that the state of Nebraska should be admitted into the Union on an equal footing with the original states, means firm position, established place, relative condition. *State v. Boyd*, 48 N. W. 739, 749, 31 Neb. 682.

### FOOTMAN.

"Footmen," within the meaning of Rev. St. 1881, § 3361, preserving sidewalks for the exclusive use of footmen, means pedestrians, or persons walking on the walk, and hence does not include a person on a bicycle. *Mercer v. Corbin*, 20 N. E. 132, 134, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. Rep. 76.

### FOOTWAY.

In a decree, one of the provisions of which was that "the defendant be forever enjoined not to place, erect, or maintain any wall on any part of the land included in said way in such manner as to obstruct plaintiff in the enjoyment of a footway over the whole length and breadth thereof," the term "footway" is used merely to distinguish the way from a horse or carriage way, for which it had never been used, and for which it was not suitable. It was not intended thereby to prevent the use on such way of vehicles which are usually drawn or propelled by foot passengers. *Gerrish v. Shattuck*, 132 Mass. 235, 238.

### FOR.

See "In and For."

The use of the word "for" by a teamster, delivering flour to a railroad company for

transportation and known by the company to be in the owner's employ, that the flour is "for" a third person, does not imply that it is to be delivered by the company to such third person without further instruction from the owner. It does not justify the inference either that it then belongs to him or that he is entitled to the possession of it. *Sawyer v. Chicago & N. W. Ry. Co.*, 22 Wis. 403, 409, 99 Am. Dec. 49.

"For," as used in Comp. Laws, § 5236, subd. 2, relating to appeals and declaring that an order affecting a substantial right upon a summary application in an action for judgment, is appealable, is construed to mean "after," on the ground that it is evidently a clerical or typographical error. *Weber v. Tschetter*, 46 N. W. 201, 205, 1 S. D. 205.

"For the purpose of obtaining an advance of wages," as used in a conviction reciting that defendants had attended a meeting for carrying on a combination of journeymen for the purpose of obtaining an advance of wages, was synonymous with the words of the act prohibiting combinations "to obtain an advance of wages," and the conviction was sufficient. *Rex v. Ridgeway*, 5 Barn. & Ald. 527.

### Agency or authority imported.

The mere insertion of "for," or "for and in behalf of," a principal, in the body of a note, should not be construed to be the contract of the principal, if the note is signed by the mere name of the agent without addition. *Barlow v. Congregational Society in Lee*, 90 Mass. (8 Allen) 460, 463 (citing *Bradlee v. Boston Glass Manufactory*, 33 Mass. [16 Pick.] 347; *Morell v. Coddington*, 86 Mass. [4 Allen] 403).

The use of the word "for" in a signature to a contract which A. signs for B. indicates that A. is signing on behalf of B. *Emmerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 240, 7 Am. Dec. 66.

The use of the word "for" in the execution of a deed by an attorney in behalf of his principal is sufficient to show that the person was acting in a representative, and not a personal, capacity, and to render the instrument the obligation of the principal; the word "for" meaning "on behalf of." *Donovan v. Welch*, 90 N. W. 262, 264, 11 N. D. 113 (citing *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101).

Where notes were signed by a firm, who were acting as agents for another, with their own firm name "for" their principal, giving his name, it was clearly a good execution of the notes for the purpose of binding the principal. *Rice v. Grove*, 39 Mass. (22 Pick.) 158, 161, 33 Am. Dec. 724.



The subscription of a deed by "M. W. for J. B." meant that it was the deed of J. B., executed for him by M. W. *Wilks v. Back*, 2 East. 142.

The words "for and on behalf," as used in a declaration describing defendants as owners of a certain steamboat and partners in running said boat, and alleging that a designated person, clerk of the boat, for and on behalf of the boat and its owners, made and delivered to the payee a certain note, are not of such pregnant import as to amount to an averment of authority. They are terms of extensive meaning, and are sometimes used to indicate the legal representative of another; but they are equally appropriate to characterize an act done in the name of another under an assumed agency, and, as words receivable in a double sense are to be they cannot be held to amount to an allegation that the note was signed by the authority of the defendants. *Childress v. Miller*, 4 Ala. 447, 450.

#### As during or for the period of.

In the statutes of North Dakota, providing that notice of sale under foreclosure must be given by publishing the same for six successive weeks, at least once in each week, the word "for" means "throughout" or "during the continuance of"; and hence publication six times, a week apart, and a sale before the expiration of another week, does not comply with the statute. *Finlayson v. Peterson*, 67 N. W. 953, 954, 5 N. D. 587, 33 L. R. A. 532, 57 Am. St. Rep. 584 (citing *Bacon v. Kennedy*, 56 Mich. 329, 22 N. W. 824; *Wilson v. Northwestern Mut. Life Ins. Co.*, 12 C. C. A. 505, 65 Fed. 38; *Boyd v. McFarlin*, 58 Ga. 208; *Pratt v. Tinkcom*, 21 Minn. 142; *Ogden v. Walker*, 59 Ind. 460; *Bunce v. Reed* [N. Y.] 16 Barb. 347, 350, 351; *Brod v. Heymann* [N. Y.] 3 Abb. Prac. [N. S.] 396; *Richardson v. Bates* [N. Y.] 23 How. Prac. 516; *Parsons v. Lanning*, 27 N. J. Eq. [12 C. E. Green] 70; *Early v. Homans*, 57 U. S. [16 How.] 610, 14 L. Ed. 1079; *In re North Whitehall Tp.*, 47 Pa. [11 Wright] 156; *Security Co. v. Arbuckle*, 123 Ind. 518, 24 N. E. 329; *Smith v. Rowles*, 85 Ind. 264, 265; *Market Nat. Bank v. Pacific Nat. Bank*, 89 N. Y. 397, 398). See, also, *Olcott v. Robinson* (N. Y.) 20 Barb. 148, 150.

In Rev. Codes 1895, § 1255, requiring notice of sales of property for taxes to be published for three consecutive weeks preceding the sale, "for" means "during" or "throughout," and thus includes a period of 21 days, or 3 full weeks of 7 days each. *Dever v. Cornwell*, 86 N. W. 227, 230, 10 N. D. 123.

In Comp. St. c. 18, art. 1, § 27, requiring notice of submission of questions to the people to be published for four weeks, "for" means "during," and is not satisfied by publication in four issues of a weekly paper.

*State v. Cherry County*, 79 N. W. 825, 826, 58 Neb. 734 (citing *State v. Cornell*, 54 Neb. 647, 75 N. W. 25; *Pisar v. State*, 56 Neb. 453, 76 N. W. 869).

In Comp. St. 1887, c. 12a, § 73, requiring the city council to publish a notice of its meeting as a board of equalization for the purpose of assessing special taxes in a paving district for at least six days prior to the meeting, "for" means "during," and hence a publication for five days prior to such meeting did not comply with the statute. *Leavitt v. Bell*, 75 N. W. 524, 527, 55 Neb. 57.

"For," as used in Code, § 497, providing that lands and tenements taken in execution shall not be sold until the officer cause public notice of sale for at least 30 days before the sale, by advertisement in some newspaper printed in the county, means "during"; and hence the notice must be published for or during the 30 days before the sale, not necessarily in a daily paper, but the publication must be continued for at least 30 days. *Lawson v. Gibson*, 24 N. W. 447, 448, 18 Neb. 187.

The use of the phrase "for three weeks," in a statute requiring notice of a sheriff's sale to be published for three successive weeks, once in each week, in a newspaper, does not require the notice of sale to be published three full weeks before the day of sale, but simply requires three successive weekly publications of such notice. It is true that the word "for," when applied to time, ordinarily means "during"; but, if the Legislature had intended that the first publication should be three weeks before the sale, they would probably have employed terms more explicit and more unmistakable. *Pearson v. Bradley*, 48 Ill. 250, 252.

In Act Cong. March 3, 1893, c. 225, § 3, 27 Stat. 751 [U. S. Comp. St. 1901, p. 710], providing that a notice of sale shall be given once a week for at least four weeks prior to such sale, "for" means "during" or "during the continuance of." *Wilson v. Northwestern Mut. Life Ins. Co.* (U. S.) 65 Fed. 38, 39, 12 C. C. A. 505 (citing 2 Cent. Dict. p. 2314, par. 15).

Gen. St. 1868, c. 80, § 457, requiring a notice to be published for at least 30 days, means that there must be 30 days of publication before the day of sale; the word "for" being used in the sense of "during," so that the publication must be at least during 30 days and continued up to the date of sale. *Northrop v. Cooper*, 23 Kan. 432, 439.

The word "for," in a statute requiring public notice to be given of a judicial sale for 30 days before sale, is equivalent to "during." *Whitaker v. Beach*, 12 Kan. 492-494.

Gen. St. c. 57, § 35, requiring notice of an administrator's sale of real estate to be

published "for three weeks successively next before such sale," means that there must be a publication for full three weeks once in each week next before that in which the sale takes place; in other words, that the sale may be made at any time within the week next after the three weeks of publication are completed. *Wilson v. Thompson*, 3 N. W. 699, 700, 26 Minn. 299.

Under a statute providing that a notice for an election under the local option law shall be published for 4 consecutive weeks, a notice first published on September 17th, and weekly thereafter, of an election to be held October 11th, was insufficient. The word "for," in this statute, has reference to time. Webster defines the word to mean "the space of all time through which an action or state extends; duration; continuance; to guide the sun's bright chariot for a day." It will be observed that the statute does not say the notice shall be inserted four times in as many consecutive weeks, nor does it say that it shall be published four times, but it says that it shall be published for 4 weeks. Now, when we say that anything shall be done for a certain time, we mean that the period named shall cover that time, and when that time is 28 days, it cannot be said to be covered by a period of 24 days, any more than it could be said to be covered by a period of 1 day. *State ex rel. Weber v. Tucker*, 32 Mo. App. 620, 630, 631.

The requirement that notice of an action be published for "two weeks successively before the term of the court" is complied with by a publication once in each of 2 successive weeks, though the first publication is made only 12 days before the first day of the term. *Knowlton v. Knowlton*, 89 N. E. 595, 155 Ill. 158.

#### As during existence of.

The words "for said firm," in a contract by persons operating a lottery, employing an attorney as special counsel for said firm during the existence or operation of said lottery, limits the contract to continue only during the existence of the partnership, and therefore the employment is terminated by its dissolution, though the lottery is continued by others. *Lochrane v. Stewart* (Ky.) 2 S. W. 908.

#### As for the purpose of.

Rev. Code, c. 141, p. 555, providing that, if any person shall maliciously disturb any congregation assembled for religious worship, etc., means assembled for the purpose of worship, but does not mean during worship only; and an offense under the statute may be committed before or after service, provided the congregation be assembled for religious worship. *Commonwealth v. Jennings* (Va.) 3 Grat. 624, 627.

"For a road," as used in an Ohio statute providing that an appeal from the final decision of the township trustees on petition or report for a road shall be allowed, etc., should be construed to include as well a proceeding for the vacation of a road, as for its establishment or alteration. *Buchanan v. Baker*, 43 N. E. 330, 331, 54 Ohio St. 324.

As used in a statute authorizing a hotel keeper having a liquor license to supply liquor on Sunday to guests who have resorted to his house for food, the words "resorted to his house for food" are satisfied, if to purchase food is the actual purpose of one who resorts to his house. They do not require the purpose mentioned to be the final motive. A man resorts to a house for food, who goes there intending to buy food and eat it, and none the less that the motive of his intent is an ulterior desire. *Commonwealth v. Regan*, 64 N. E. 407, 182 Mass. 22.

#### As in.

Within Gen. St. § 3312, subd. 71, providing that said last-mentioned tax shall not exceed the sum of three mills on the dollar for any one year the word "for" will not be held to be equivalent to "in," so as to limit the levy of the taxes to three mills each year, but merely to limit the total levy for a number of years to the three mills for each year. *Bowen v. West*, 50 Pac. 1085, 1086, 10 Colo. App. 322.

#### As in consideration of.

The word "for," in a contract in which a mill agrees to give flour for wheat, means "in consideration of," or "as an equivalent for." *Norton v. Woodruff*, 2 N. Y. (2 Comst.) 153, 156.

The word "for," as used in a will bequeathing a certain sum of money to a certain person "for his services in assisting me at different times," should not be construed as importing an indebtedness from the testatrix to the legatee, for which payment may be exacted by process of law. The words do not show that the services were not rendered gratuitously and that the legacy was given in grateful recognition of them. *Duncan v. Inhabitants of Franklin Tp.*, 10 Atl. 543, 547, 43 N. J. Eq. (16 Stew.) 143.

#### As in place of or in lieu of.

In a bond providing that the company issuing it might issue scrip for the interest when it became due, if there was an insufficiency of net earnings to pay the full interest, "for" means "in place of" the interest, and under the terms of the bond the company was bound to pay the interest on the day it was due, or else to issue the scrip. *Texas & P. R. Co. v. Marlor*, 8 Sup. Ct. 311, 312, 123 U. S. 687, 31 L. Ed. 303.

Under Const. art. 8, § 12, providing that the state shall be divided into judicial districts, in each of which there shall be elected one judge of the district court, and that any judge of the district court may hold court for any other district judge, when a judge goes out of his district to hold court for another, he holds court for another district judge—not concurrently with another district judge, but for him—and is not authorized to exercise his judicial powers in such district in any matters not properly brought before him while holding said court. *Wallace v. Helena Electric Ry. Co.*, 24 Pac. 626, 627, 10 Mont. 24.

"The very learned author of Wedgwood's Dictionary of English Etymology states that the radical meaning of "for" is "in front of," and, applying it to time, adds that the event of the present moment is before or in front of the train of futurity. Webster gives as a correct popular meaning "in place of." Thus, in a contract involving notes, one of which is payable on May 5, 1873, in which the payee states that "I hereby extend the time for the payment of the said \$2,000 until one year from April 21, 1873, and for said May 5, 1873, \$1,000 payments each," may be construed to show an extension of the time of the \$1,000 payments for a year. *Ready v. Sommer*, 37 Wis. 265, 268.

A will bequeathing to testator's wife a third of the remainder of his real and personal estate, "as and for her right of dower," during her life, should be construed to mean the whole right which she should have or be entitled to on his death. *Steele v. Fisher* (N. Y.) 1 Ed. Ch. 435, 437.

The word "for," in a treaty providing that there was to be divided a certain sum to a certain person for a tract of land to his Indian family at a certain place, means "in lieu of" or "in place of." *Cook v. Biddle*, 2 Mich. 269, 275.

#### As of.

The phrase "for the county," as used in a statute in reference to the clerks "for the county," is synonymous with the phrase "of the county" as used in the statute with reference to such clerks. *Slymer v. State*, 62 Md. 237, 242.

#### As on account of.

In a contract of insurance upon the body, apparel, etc., of a propeller, the insurers "not to be liable for the bursting of the boilers," the word "for" means "on account of," "by reason of," or "because of." *Strong v. Sun Mut. Ins. Co.*, 81 N. Y. 103, 105, 88 Am. Dec. 242.

In Comp. St. 1897, c. 28, § 20, providing that the county treasurer should receive for his services certain fees on all moneys collected by him for each fiscal year, "for"

means "on account of" or "during," and hence he is not entitled to commission on taxes levied one fiscal year, collected during another. *State v. Cornell*, 75 N. W. 25, 27, 54 Neb. 647 (citing *Lawson v. Gibson*, 18 Neb. 137, 24 N. W. 447).

The words "for each child," in Rev. St. U. S. § 4703 [U. S. Comp. St. 1901, p. 3242], providing that the pensions of widows shall be increased at a certain rate per month for each child, should be construed to mean on account of such child, and therefore the mother, drawing a pension after the majority of such child, is not required to pay the amount so received on account of the child over to it. *Creekbaum v. Sohner*, 1 Ohio Dec. 257, 258.

#### As on charge of.

The statement, in an article published of plaintiff, that "he was arrested for drunkenness," meant that he was arrested on a charge of drunkenness, and not that he was in fact drunk. *Stacy v. Portland Pub. Co.*, 68 Me. 279, 286.

#### As successively.

"For two years," as used in St. 1817, providing that any person shall obtain a settlement in a town who in such town has been "for two years" appointed and sworn to the faithful discharge of the office of town clerk or lister, etc., does not necessarily import that the two years are to be in succession. *Town of Lincoln v. Town of Warren*, 19 Vt. 170, 171.

A charter requiring tax sales to be advertised for 30 days before sale will be construed as requiring the advertisement for a period of 30 days, and not every day during 30 days, so that a publication once 30 days before the sale and once each week complied with the charter. *Montford v. Allen*, 56 S. E. 305, 306, 111 Ga. 18.

The use of the word "for," in an order requiring public notice of the time and place of a judicial sale for at least 30 days before the day of sale by judgment in some newspaper, requires an insertion in each successive issue of the paper up to the day of the sale; the first one being more than 30 days prior thereto. *McCurdy v. Baker*, 11 Kan. 111, 113.

In a statute requiring notice of sale of real estate under execution to be published in a newspaper for "at least 30 days" before the day of sale, the word "for" means "during," and the notice must be published in each issue between the first insertion and the date of sale. *Whitaker v. Beach*, 12 Kan. 492, 494.

#### As to the amount of.

In a policy of insurance upon "one bank barn of frame, 70 ft. by 86 ft., for \$1,500,"

the word "for" means "in a sum not exceeding," or "to the amount of." *Farmers' Mut. Fire Ins. Co. v. Moyer*, 97 Pa. 441, 448, 449.

An agreement for the sale of merchandise, and providing for the drawing of drafts "for the cost of the merchandise," does not mean that the drafts must represent in all cases the full amount of such cost. Its meaning plainly is to limit the amount for which the draft is to be drawn by the cost of merchandise against which it is drawn and on which the advance is to be made. "It must not in any event be for more than such cost, and it must be on account thereof. Within the limits of the full amount of such cost, the draft may be drawn for any sum, so long as it is on account of the cost and for no other consideration." *Drexel v. Pease*, 80 N. E. 732, 735, 133 N. Y. 129.

#### As creating trust.

Where, after the decedent's death, 13 bonds were found in his box in a trust company's vault, in an envelope indorsed: "Thirteen bonds, \$1,000.00 each, held for Tom Smith Kelly," signed by decedent, and in the private account book of deceased, in his own handwriting, appeared the recital, "\$13,000.00 of these bonds I bought for and are the property of my nephew and Godson K., and belong to him," there was sufficient to create a trust in favor of Tom Smith Kelly, irrespective of whether or not deceased in his lifetime actually declared to another his intention to create the trust. In *re Smith's Estate*, 22 Atl. 916, 918, 144 Pa. 428, 27 Am. St. Rep. 641.

#### As with respect to.

"For," as used in Const. art. 4, § 20, prohibiting the Legislature from passing local or special laws for the assessment and collection of taxes for state, county, and township purposes, means "with respect to," or "with regard to"; and hence a local or special law, levying a special tax, but in no way regulating the manner in which the proportion of each person is assessed, but leaving the assessing and the method of collecting to be governed by the general law, is not within the prohibition of the Constitution. *Gibson v. Mason*, 5 Nev. 283, 304.

The word "for," in Const. art. 4, §§ 20, 21, prohibiting the passage of any local or special law for the assessment and collection of taxes, means "with respect to," or "with regard to." Such are the definitions given by lexicographers. *State v. Consolidated Virginia Min. Co.*, 16 Nev. 432, 445.

#### As word of limitation.

A deed of conveyance of land to a school district, "for the erection of a schoolhouse thereon and for no other purpose," should be construed to mean that a schoolhouse only

was to be erected upon the property, and that such schoolhouse, or some other schoolhouse, should be maintained thereon forever, and that a school should be maintained in such schoolhouse forever; but they cannot be construed as creating a condition subsequent, and that for any breach of such condition, as by failing to erect a schoolhouse on the property, or to afterwards maintain the same, or to maintain a school on the property, a forfeiture of the title would ensue, and the title would revert back to the grantor. The words constitute only a limitation on the manner in which the property in controversy should be used, and do not constitute either a condition precedent or subsequent, on which only the estate is held. *Curtis v. Board of Education*, 23 Pac. 98, 100, 48 Kan. 188.

A conveyance reserving a certain portion of land "free for landing places, for the public use, for the inhabitants of Gloucester," does not mean that the public use should be limited to those inhabitants only, but the phrase is descriptive of those for whose use it was primarily and principally intended. *Attorney General v. Tarr*, 19 N. E. 358, 148 Mass. 309, 2 L. R. A. 87.

In a will giving property "for the maintenance and support of my said wife and my infant child," such provision must be considered as a limitation of a bequest, and as a declaration of the purpose for which the bequest was made and its extent. *Pratt v. Miller*, 37 N. W. 263, 265, 23 Neb. 496.

The words "for a home," as used in a devise to testator's wife, were insufficient to restrict it to a life estate. They do not qualify in any degree the absolute gift to the wife of testator's interest in the land described. *Wilkinson v. Chambers*, 37 Atl. 569, 181 Pa. 437.

The words "for private residence," in the habendum clause in a lease for 99 years of a lot for a private residence, cannot be construed as an express covenant not to use the premises for any other purpose than residence purposes. *Chautauqua Assembly v. Ailing* (N. Y.) 46 Hun, 582, 586.

The words "for her use while living," in a devise of all the testator's property to his wife while living, appears to limit the gift, and show that what the wife takes is not a fee-simple title, but merely an estate for life. *Coulson v. Alpaugh*, 45 N. E. 216, 163 Ill. 298.

Where an act incorporating a railroad company declared that, after condemnation by it, it should "hold the land for the purpose of preserving and keeping up the road," such phrase did not constitute a condition on the performance of which the estate depended, but merely assigned the reason why the law vested the estate in the corporation. *State v. Rives*, 27 N. C. 297, 304.

**FOR ACCOUNT OF.**

An indorsement, "Pay to A., or order, for account of B.," plainly means that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both of these remain, by the reasonable and almost necessary meaning of the language, in the indorser. *White v. Miners' Nat. Bank*, 102 U. S. 658, 661, 26 L. Ed. 250.

Where goods were shipped by a consignee, who took a receipt "for account and risk" of the consignee, such words imported a transfer of the title to the goods to the consignee, subject only to the consignor's right to divest such title by stoppage in transitu. *Coxe v. Harden*, 4 East, 211, 219.

Where a check, draft, or bill of exchange is indorsed for account of, etc., the phrase "for account of" will be construed as a notice to the drawee that the bank presenting the paper for payment is not the owner, but only the agent of the owner, and that the money is to be remitted to the owner, back through the same channel through which the paper was received, by the collecting bank. *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 50 N. E. 723, 724, 58 Ohio St. 207, 41 L. R. A. 584, 65 Am. St. Rep. 748.

An indorsement on a draft, "for account of it," is restrictive, and does not pass the title or the right to the proceeds of the instrument. The indorsee takes the instrument as the agent or trustee for the indorser; and, if he disposes of it for his own use, the indorser may recover from the purchaser the amount collected on it, or he may recover the bill itself in an action of trover. By such restrictive indorsement the indorsee takes the instrument subject to the trust created. *Freiberg v. Stoddart*, 28 Atl. 1111, 161 Pa. 259 (citing *Rand. Com. Paper*, § 726; *Daniel, Neg. Inst.* § 698; *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250; *Sweeny v. Easter*, 68 U. S. [1 Wall.] 168, 17 L. Ed. 681; *First Nat. Bank v. Gregg*, 79 Pa. [29 P. F. Smith] 384; *Hackett v. Reynolds*, 114 Pa. 828, 6 Atl. 689).

An indorsement on a bill of exchange, "Pay to A. for my account," has been held to be a restrictive indorsement which operates to put an end to the negotiability of the paper. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

**FOR ACCOUNT OF WHOM IT MAY CONCERN.**

See "Whom It May Concern."

**FOR ALL OTHER PURPOSES.**

Laws 1901, p. 318, c. 132, § 202, provides that personal property of corporations tax-

able under section 187a shall be exempt from taxation for all other purposes. Section 187a requires trust companies to pay a tax on their capital stock and profits. Held, that the phrase "for all other purposes" means more than for state purposes, and was meant to include local purposes also, and the personal property of such companies is exempt from local assessment and taxation. *People v. Lane*, 83 N. Y. Supp. 606, 607, 41 Misc. Rep. 1.

**FOR THE BENEFIT OF.**

See, also, "Benefit."

The Revised Statutes provide that words of inheritance shall not be requisite to convey or create a fee, and that every grant or devise shall pass all the grantor's or testator's estate or interest, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of such grant. Testator devised part of his farm to his wife, "to have and to hold for her benefit and support," and bequeathed to defendant the residue of his estate after paying certain legacies. Held, that the words "for her benefit and support" indicated the reason for the gift to the wife, rather than an intention to annex a condition or limitation, and that she, and not defendant, took the fee. *Crain v. Wright*, 21 N. E. 401, 114 N. Y. 307.

A. conveyed to B. one-half of certain capital stock, "in trust for the sole benefit of the wife of C. and her children"; also one-half of the profits arising from the stock to be applied by B. "for the benefit of C.'s wife and her children." Held, that the two clauses should be construed together, and that the words "for the benefit of," in the second clause, should be construed to mean "for the sole benefit of," and that hence the language was sufficient to exclude the wife's marital right to the profits, so that such profits could be sold under execution in favor of the creditor of her husband. *Clark v. Maguire*, 16 Mo. 302, 314.

A policy of insurance, procured by a husband on his life "for the benefit of his wife and children," made payable "to the said assured, their executors, administrators, or assigns, or guardian of children under age," is payable on his death to the wife and children in equal shares, and not as property of his estate, to be distributed in accordance with the laws of descent. *Cragin v. Cragin*, 66 Me. 517, 519, 22 Am. Rep. 588.

The words "for the benefit of," in a deed conveying land to J. for the benefit of his children that may survive him, are, to say the least, equivocal. Legal estates are created for the benefit of those for whom they are created, and so are equitable estates. It certainly cannot be said that the use of these words clearly and definitely indicates

a purpose to create a trust. *Mitchell v. Turner*, 44 S. E. 17, 18, 117 Ga. 958.

"For the benefit of intestate's estate," as used in a statute authorizing the allowance to an administrator of sums paid for the benefit of intestate's estate, means sums paid for the pecuniary interest of the estate, and does not include fees paid by an administrator for professional services rendered for the vindication of intestate's good name on the trial of a person who had killed him for alleged dishonorable conduct. *Woodard v. Woodard*, 15 S. E. 855, 86 S. C. 118, 16 L. R. A. 748.

#### FOR CASH.

Where a trust deed provided that the real estate mentioned therein should be sold for cash, the payment of liens on the property, as made by the purchaser, was equivalent to cash placed in the hands of the trustee. *Mead v. McLaughlin*, 42 Mo. 198, 208.

#### FOR CASH VALUE.

The term "for cash value," as used in the title relating to the revenue, means the amount at which the property would be taken in payment of a just debt due from a solvent debtor. *Pol. Code Idaho 1901*, § 1813, subd. 5.

#### FOR CAUSE.

The phrase "for cause," as used in connection with the removal of policemen, does not mean the arbitrary will of the appointing power, for that might be the outgrowth of passion, which would in reality be no cause at all; but the phrase must mean some cause affecting or concerning the ability and fitness of the incumbent to perform the duty imposed on him. It means inefficiency, incompetency, or other kindred disqualifications. *Street Com'rs of Hagerstown v. Williams*, 53 Atl. 923, 925, 96 Md. 232.

Power to remove a person from office for cause means that a reason must exist which is personal to the individual sought to be removed, which the law and sound public opinion will recognize as a good reason for another occupying the place. In *re Nichols* (N. Y.) 57 How. Prac. 395, 404.

#### FOR COLLECTION.

An indorsement on a check, "For collection, pay to the order of B., cashier," is notice to all purchasers of the check that the indorser is entitled to the proceeds, and that B. is only agent for collection. *Bank of the Metropolis v. First Nat. Bank of Jersey City* (U. S.) 19 Fed. 301, 302 (citing *Cecil Bank v. Farmers' Bank of Maryland*, 22 Md. 1148;

*White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250; *Lee v. Chillicothe Branch Bank* [U. S.] 15 Fed. Cas. 149; *Blaine v. Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Claffin v. Wilson*, 51 Iowa, 15, 50 N. W. 578). See, also, *First Nat. Bank of Belmont v. First Nat. Bank of Barnesville*, 50 N. E. 723, 724, 58 Ohio St. 207, 41 L. R. A. 584, 65 Am. St. Rep. 748.

An indorsement on the back of a draft, reciting that it is indorsed for collection, "was nothing more nor less than a warrant of attorney authorizing the indorsee to collect the amount due on the draft for the indorser." The effect of the indorsement was to show that the indorsee was merely the agent of the indorser for collection. *Central R. R. v. First Nat. Bank*, 73 Ga. 383, 385; *Armour Packing Co. v. Davis*, 24 S. E. 365, 366, 118 N. C. 548.

An indorsement on a note containing the words "for collection," is "intended to limit the effect which would have been given to the indorsement without them, and warned the party that, contrary to the purchase of a general or blank indorsement, this was not intended to transfer the ownership of the note or its proceeds. It prevented the further circulation of the paper, and its effect was limited to an authority to collect it." *Sweeny v. Easter*, 68 U. S. (1 Wall.) 166, 173, 17 L. Ed. 681; *Commercial Nat. Bank v. Armstrong*, 18 Sup. Ct. 533, 534, 148 U. S. 50, 37 L. Ed. 363; *Hoffman v. First Nat. Bank of Jersey City*, 46 N. J. Law (17 Vroom) 604, 606.

An indorsement on a draft "for collection for my account" is restrictive, and does not pass the title or the right to the proceeds of the instrument. The indorsee takes the instrument as agent or trustee for the indorser, and if he disposes of it for his own use the indorser may recover from the purchaser the amount collected on it, or he may recover the bill itself in an action of trover. By such restrictive indorsement the indorsee takes the instrument subject to the trust created. *Freiberg v. Stoddart*, 28 Atl. 1111, 161 Pa. 259; *First Nat. Bank v. Gregg*, 79 Pa. (29 P. F. Smith) 884, 887; *Hackett v. Reynolds*, 6 Atl. 689, 690, 114 Pa. 328.

An indorsement of a note "for collection for account of T." was not adequate to pass title. *Tyson v. Western Nat. Bank*, 26 Atl. 520, 521, 77 Md. 412, 28 L. R. A. 161.

A writing acknowledging the receipt of a claim "for collection" is a writing to collect, and, if given by one not an attorney, who at the time rates himself as such, it imposes on him the duty and liability of an attorney. *Foulks v. Falls*, 91 Ind. 815, 819.

#### As to collect.

The expression "for collection," as used in a note which provided for the payment of

10 per cent. attorney's fees if the note should be placed in attorney's hands for collection, meant the same as "to collect." *Shenandoah Nat. Bank v. Marsh*, 56 N. W. 458, 459, 89 Iowa, 273, 48 Am. St. Rep. 381.

#### As undertaking to collect.

Where a common carrier was doing business between certain points, and not undertaking personally for the carriage of goods to any further point, but merely engaging to forward them to their destination through established lines of transportation, its receipt for a bill of goods "for collection" from a person beyond the termination of their route did not make them liable for the failure of other carriers to whom the bill was intrusted for collection to pay for the amount received by them on the same. *Lowell Wire Fence Co. v. Sargent*, 90 Mass. (8 Allen) 189, 192.

The phrase "for collection," as used by a collection agency in a receipt for a claim reciting that the claim is received "for collection," is to be construed as meaning that the agency thereby undertakes to make the collection, and not that it merely acts for the owner of the claim in selecting the proper party to make such collection. *Bradstreet v. Everson*, 72 Pa. (22 P. F. Smith) 124, 133, 13 Am. Rep. 665.

Where an attorney's law takes a note "for collection," he undertakes thereby to collect, and not merely to remit for collection to some responsible attorney. *First Nat. Bank v. Craig*, 42 Pac. 830, 832, 3 Kan. App. 166 (citing *Cummins v. Heald*, 24 Kan. 600, 36 Am. Rep. 264).

#### As a warranty.

The words "for collection," indorsed by a bank on invoices accompanying drafts, imported nothing more than that the goods which the bills of lading stated had been shipped were to be held as security for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should not be paid, the holders were thereby authorized to take the goods. The indorsement created no responsibility on the part of the bank, nor did it imply a guaranty that the bills of lading were genuine; for, says the court, "to hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn." *Goetz v. Bank*, 7 Sup. Ct. 318, 320, 119 U. S. 551, 80 L. Ed. 515.

#### FOR COLLECTION AND CREDIT.

In an indorsement transmitting a draft or bill of exchange to a bank for "collection and credit," the words do not mean credit

in the sense that credit shall be given until the money is collected; but it is essentially material whether or not the bank ever receives the money, in deciding whether the holder has become entitled to the credit. *Levi v. National Bank of Missouri* (U. S.) 15 Fed. Cas. 415, 417.

#### FOR DEPOSIT.

Where a check is deposited in a bank by a customer, indorsed "for deposit," the bank is a bona fide holder of a negotiable instrument for value without notice of any facts which would invalidate the title of the indorsers, from whom they obtained it, and all commercial principles and usage require that such a title should be protected. *Ditch v. Western Nat. Bank*, 29 Atl. 72, 74, 138, 79 Md. 192, 23 L. R. A. 164, 47 Am. St. Rep. 375.

#### FOR HER OWN USE AND DISPOSAL.

A gift or bequest to a married woman, after marriage, giving her property "for her own use and at her own disposal," is to be construed as sufficient to exclude the marital rights of the husband, and the property will be for her exclusive use. *Clark v. Maguire*, 16 Mo. 302, 314 (citing *Story*, Eq. § 1382).

Where testator gave to his wife all his personal estate, after payment of his debts, enumerating part of it, "for her own absolute use and disposal," and, after giving her his life insurance and homestead for life, declared such legacy and devise to be in lieu of dower, and devised the residue of his real estate in trust for his children and grandchildren, thereafter providing that, in case of the death of his wife during his lifetime, the personal property given her should, after the payment of debts and funeral expenses, be held in trust for such children and grandchildren, it clearly appeared that it was testator's intention to discharge his personal estate from all liability for his debts in case his wife survived him, but not otherwise. *Calder v. Curry*, 17 R. I. 610, 617, 24 Atl. 103, 105.

#### FOR HIS OWN.

Where testator bequeathed all the rest and residue of his money in banks, stocks, and bonds to a certain person for his own, the words "for his own" show and indicate the testator's intent to bequeath the property mentioned to the person to whom he directs it to be paid. *Sanborn v. Clough*, 10 Atl. 678, 680, 64 N. H. 315.

#### FOR HIS SERVICES.

As used in a statute providing that an officer shall receive an annual salary as compensation "for his services," the quoted

phrase means "for all his services; for the entire and complete performance of his official duties." *Erie County Sup'rs v. Jones*, 23 N. E. 742, 743, 119 N. Y. 339.

#### FOR HIS SUPPORT.

A testator bequeathed to his son for his support, "and, if he should be spared to have family, I desire the above estate to go to the use of his children." Held that the phrase "for his support," taken in connection with the other language, showed that he was not to take only a life estate. *Oyster v. Knoll*, 137 Pa. 448, 20 Atl. 624, 21 Am. St. Rep. 890.

#### FOR LIFE.

A will giving all of testator's estate to his wife "for and during her natural life" gives her only a life estate therein, though it makes no other disposition of the property. *In re Reynolds' Estate*, 34 Atl. 624, 175 Pa. 257.

"For her life," as used in a will devising property to a wife for her life, are words of limitation. *Derse v. Derse*, 79 N. W. 44, 45, 103 Wis. 113.

#### FOR THE PURPOSE OF.

By a grant by the general court of the colony of New Haven, granting to individuals a tract of land "for the purpose of planting," no more was intended than that it was conveyed to them that they might establish themselves thereon and cultivate their settlement or plantation as they should think proper. *Inhabitants of Town of East Haven v. Hemingway*, 7 Conn. 186, 202.

2 Rev. St. 1876, p. 480, § 74, providing for the punishment of every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffleboards, faro bank, nine-pin alley, billiard table, or any other gaming apparatus, "for the purpose of wagering" any article of value thereon, means for the purpose of himself wagering, and not for the purpose of permitting others to wager, thereon. *Sumner v. State*, 74 Ind. 52, 54.

#### As a limitation.

In Sp. Laws 1865, c. 79, making it the duty of the common council of the city of St. Paul to elect an assessor, who shall perform all the duties required by law of assessors of property "for the purposes of taxation," such phrase does not limit his duties to such as relate to taxation only, but is intended to point out the kind of assessor referred to. *McClung v. City of St. Paul*, 14 Minn. 420, 422 (Gil. 315, 317).

In Laws 1878, c. 171, conferring on a city a portion of a canal "for the purpose of a street," conveys a fee to the street; such

phrase being no reservation of any part of the title. *De Witt v. Elmira Transfer Ry. Co.*, 32 N. E. 42, 43, 184 N. Y. 495.

Under the Texas Constitution, in the homestead article, relating to property "used for the purpose of a home," such exemption may include lots other than those on which the family reside, and whether they constitute a part of the homestead must depend on their use. The mere ownership of a vacant lot, when unconnected with the residence lot, will not make it a part of the homestead. *Axer v. Bassett*, 63 Tex. 545, 548.

A denial in an answer "for the purpose of this suit" would not be construed as such an unqualified denial of the fact positively asserted as will put the plaintiff on proof. *Buffalo, N. Y. & P. R. Co. v. Commonwealth*, 14 Atl. 443, 447, 120 Pa. 537.

#### As with intent.

"For the purpose of sale," as used in St. 1866, c. 253, § 1, making it criminal to kill a calf less than four weeks old for the purpose of sale, is equivalent to the phrase "with intent to sell," as used in an indictment under the statute charging the killing of such a calf with an intent to sell. *Commonwealth v. Raymond*, 97 Mass. 567, 570.

#### FOR THE RECOVERY OF.

See "Action for Recovery of Money";  
"Action for the Recovery of Real Estate."

#### FOR SALE.

The term "for sale," as used in the employment of an ordinary real estate broker, to negotiate for the sale of a parcel of land, usually means no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *O'Reilly v. Keim*, 34 Atl. 1073, 1075, 54 N. J. Eq. 418.

#### FOR THE SPACE OF.

In the statute making a sheriff liable for his neglect, failure, or refusal to return the execution according to the command thereof "for the space of one month after the return day thereof" such phrase is equivalent to the phrase "failure to return said execution within one month from the return day expressed in said execution." *Gore v. Hedges*, 23 Ky. (7 T. B. Mon.) 520, 521.

#### FOR — SUCCESSIVE ISSUES.

"For six successive weeks," as used in Act Feb. 24, 1834, requiring administrators to give notice to those having demands against the estate for six successive weeks, does not require that the first notice shall be six weeks prior to the last, and a publication in



six issues of a weekly paper was sufficient, though the publication of the paper was changed from one day in the week to a subsequent day in the same week. Appeal of Stoeber (Pa.) 3 Watts & S. 154, 157.

The phrase "for seven successive issues," when used in a statute with reference to a publication in a weekly newspaper, simply means that such publication appeared in the columns of the paper once each week for seven consecutive weeks, and when the date of the first and last publication is given the above conclusion is irresistible. *Iowa State Sav. Bank v. Jacobson*, 8 S. D. 292, 300, 66 N. W. 453.

#### FOR THEIR OWN USE.

See "Own Use."

#### FOR THE TIME BEING.

Where a by-law provided that every one of the livery of the company who should be chosen steward and refuse to take the office should forfeit 15 pounds to the master and wardens "for the time being," this gave the right to sue for such penalty to the wardens in office, and the right did not remain in them after they had quitted office. *Graves v. Colby*, 9 Adol. & E. 358.

St. 5 & 6 Wm. IV, c. 23, § 8, making certain notes payable to the treasurer "for the time being," though ambiguous, means that the notes shall be payable to the office, and not to the person who was treasurer at the time of giving the note. *Timms v. Williams*, 3 Q. B. 413, 422.

In the charter of a corporation, providing that when any one or more of the capital burgesses "for the time being" should die or dwell without the borough, or be removed from his office, the other capital burgesses "at that time surviving and remaining, or the greater part of the same," of whom the mayor was to be one, shall elect another burgess, the words "then surviving and remaining" are precisely of the same import and meaning as the words "for the time being," and a majority of the entire body of capital burgesses, and not merely of those then existing, must be present to make a good election. *Rex v. Devonshire*, 1 Barn. & C. 609, 618.

"Time being," as used in a written instrument promising to pay money to the "secretary for the time being" of a certain organization, with a repetition of them afterwards in the whole form and scope of the instrument, meant that the payment was to be made to the individual who at the time of the instrument falling due should fill the situation of the secretary, and not necessarily to the individual who was the secretary at the

time of the execution. *Storm v. Stirling*, 3 El. & Bl. 832, 842.

#### FOR THE USE.

"For the use of," as used in a deed by a corporation of land containing a bed of iron ore, reserving the right to the grantor of mining on the granted premises for the use of said company, "is expressive of the right of appropriation or enjoyment, rather than descriptive of the purpose or mode of use," and hence the company may assign such right, and is not limited to the mere personal exercise thereof. *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 324.

Laws 1850, p. 233, requiring railroads formed under the act to erect and maintain fences on the sides of their road, with farm crossings for the use of proprietors of lands adjoining such roads, implies "an exclusion of any right in others than the proprietors to use the farm crossings and the openings, gates or bars through the railroad fence." *Wademan v. Albany & S. R. Co.*, 51 N. Y. 568, 570.

In an action for the diversion of water from plaintiff's mill situated upon the stream below the mills and dams of defendant, it appeared that one P. became owner of a tannery and a lot of land on the east side of the brook. His deed was bounded by the easterly side of the stream, which excluded all common-law rights in the stream as a riparian proprietor. This deed granted him the right to draw water from the upper dam of the stream "for the use of all tanning purposes." It was held that the grant for the use of all tanning purposes was not a grant of sufficient water for such purposes, so that the grantee became entitled to such an amount of water regardless of the purpose and use, but that the grant was limited to some particular use. *Rackliff v. Rackliff*, 52 Atl. 839, 841, 96 Me. 261.

The use of the phrase "for the use and benefit of" some person named, other than the plaintiff, in the commencement of a declaration, and immediately following the name of the plaintiff, where no assignment is set forth, and no allusion made in the body of the declaration to any other interest or title than such as the plaintiff had, is of no effect whatever to make the issue different from what it would have been, had the words not been employed. *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich. 346, 351, 355.

An indorsement on a bill of exchange, "Pay to A. B., or order, for my use," has been held to be a restrictive indorsement, which operates to put an end to the negotiability of the paper. *Lee v. Chillicothe Branch of State Bank* (U. S.) 15 Fed. Cas. 151, 153.

An indorsement, "Pay to B., or his order, for my use," is restrictive, and a bank honoring the same without inquiry is liable for the amount paid, where the same was appropriated to the indorsee's own use. *Sigourney v. Lloyd*, 8 Barn. & C. 622.

#### As conveying fee simple.

A conveyance of streets and public squares "for the use of the United States, forever," vests an absolute unconditional fee simple in the United States. They are the appropriate terms of art to express an unlimited use in the government. They are the very words which should be adopted in order to grant an unlimited fee to the use of the government. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 3 Sup. Ct. 445, 449, 109 U. S. 672, 27 L. Ed. 1070 (citing *Van Ness v. Washington*, 29 U. S. [4 Pet.] 232, 7 L. Ed. 842).

#### FOR THE USE OF THE GOVERNMENT.

A captured vessel is not appropriated for the use of the government, within the meaning of sections 4615, 4624, Rev. St. [U. S. Comp. St. 1901, pp. 8127, 8130], so as to entitle the captors to prize money, where they destroy it to prevent recapture. *The Santo Domingo* (U. S.) 119 Fed. 388, 387.

#### FOR VALUABLE CONSIDERATION.

See "Valuable Consideration."

#### FOR VALUE.

See "Holder for Value."

#### FOR VALUE RECEIVED.

See "Value Received."

#### FOR WANT OF ISSUE.

The phrase "for want of issue," in connection with a devise of real estate, means an indefinite failure of issue. *Kay v. Scates*, 37 Pa. (1 Wright) 81, 33, 78 Am. Dec. 399.

It has been long settled that the words occurring in a will referring to the death of a person without issue, whether the terms be "if he die without issue," or "if he have no issue," or "if he die before he has issue," or "for want of or in default of issue," unexplained by the context, and whether applied to real or personal estate, are construed to import a general indefinite failure of issue. The rule, in the language of Lord Redesdale, is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise, or unless, in the language of Lord Alvaney, in *Poole v. Poole*, 3 Bos. & P. 620, the intent appears so plainly to the contrary that no one can misunderstand it. As to

3 Wds. & P.—55

personalty, it seems the word "issue" yields more readily to expressions and circumstances in a will tending to confine it to the restricted sense than when applied to real estate. *Tinsley v. Jones* (Va.) 13 Grat. 289, 292.

Either of the phrases, "die without issue," or "on failure of issue," or "for want of issue," or "without leaving issue," when used in a will in which a devise is first made to one in fee, and one of the phrases is then used as fixing a condition which will cause the estate to pass to another, operates to render the estate of the first taker a fee tail, which, if he have issue, passes to them ad infinitum by descent as tenants in tail. *Eichelberger v. Barnitz* (Pa.) 9 Watts, 447, 450.

The expressions, "if he dies before he has any issue," or "on a failure of issue," or "for want of issue," or "without living issue," have been adjudged again and again to import a general and indefinite failure of issue. *Vaughan v. Dickes*, 20 Pa. (8 Harris) 509, 514.

A gift in a will to a designated beneficiary, and, "if he die without issue," or "on failure of issue," or "for want of issue," or "without leaving issue," then to another, is to be construed as meaning an indefinite failure of issue, and therefore the first beneficiary takes an absolute estate. *Irre Miller's Estate*, 22 Atl. 1044, 145 Pa. 561; *Boehm v. Clarke*, 9 Ves. 580; *Goodrich v. Cornish*, 4 Mod. 256, 258; *Hertz v. Abrahams*, 36 S. E. 409, 413, 110 Ga. 707, 50 L. R. A. 361.

#### FOR WANT OF PROSECUTION.

A referee's report, reciting that, on the failure of the plaintiff to appear on the adjourned day of a hearing before him, he dismissed the complaint "for want of prosecution," means that he dismissed the case because the plaintiff did not proceed with the trial and close his case, under the circumstances stated in his report. *Morange v. Meigs*, 54 N. Y. 207, 209.

#### FOR WHOM IT MAY CONCERN.

See "Whom It May Concern."

#### FORAGE.

Under a statute exempting from execution "forage and provisions" on hand for home consumption, cotton seed suitable for feeding stock is exempt. *Stephens v. Hobbs*, 36 S. W. 287, 14 Tex. Civ. App. 148.

#### FORBEAR.

The word "forbear," when unqualified by terms of restriction, in reference to a debt,

in the popular sense, is equivalent to "wait," without any adjunct whatever, and has regard to a general forbearance. *Downing v. Funk* (Pa.) 5 Rawle, 69, 73.

### FORBEARANCE.

See "General Forbearance."

"'Forbearance,' in the legal sense of the word, is an engagement which ties up the hands of a creditor. It is an act of the creditor depriving himself by something obligatory of the power to sue." *Reynolds v. Ward* (N. Y.) 5 Wend. 501, 504.

"The forbearance of giving time for the payment of a debt is in substance a loan." *Diercks v. Kennedy*, 16 N. J. Eq. (1 C. E. Green) 210, 211 (citing *Spurrier v. Mayosa*, 1 Ves. 531; *Dewar v. Span*, 3 Term R. 425; *VanSchaick v. Edwards* (N. Y.) 2 Johns. Cas. 355).

The term "forbearance," as used in 1 Rev. St. p. 772, § 182, prohibiting a greater rate of interest than 7 per cent. for the loan or forbearance of any money, goods, or things in action, cannot be predicated of any other than a loan of money, actual or presumed, and means giving a further day when the time originally limited for the return of the loan is passed. It implies that the thing loaned has an established value, so that the lender, on its return, with the compensation fixed by law for the use and risk, may receive a certain profit. This is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true measure of the value of all other property. A fixed rate per cent. on money, therefore, in contemplation of law, is supposed to give to the lender a certain profit, because the thing loaned is of the same value at the end of the term, as at its commencement. A loan of goods is not within the statute, whatever may be reserved for their use. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 8 N. Y. (3 Comst.) 844, 854.

"Forbearance," as used in Act 1805, § 2, providing that no more than the rate of \$6 for the forbearance or giving day of payment of \$100 for one year should be taken, can be applied as well to an absolute sale as to a loan or use. *Henry v. Thompson* (Ala.) Minor, 209, 223.

### FORCE.

See "Actual Force"; "Artificial Force"; "Physical Force"; "Superior Force"; "Unnecessary Force"; "Armed Force"; "Land Forces"; "Full Force"; "Taking by Force"; "By Force of"; "In Force."

For extinguishing fire, see "Fire Force."

Force means the effect of power which cannot be resisted. Civ. Code La. 1900, art. 3556, subd. 14.

The word "forced," in an allegation that plaintiff was forced from a fire truck, while in motion, to the ground, and was thereby injured, means impelled by physical force acting on the body, and not fear of danger, however imminent, and therefore the allegation does not cover his act in jumping from the truck, caused by his fear of a collision. In *Rex v. Lloyd*, 1 Car. & P. 301, it is held that the words "did compel and force" must be taken to mean personal affirmative force. *Higgins v. City of Wilmington* (Del.) 51 Atl. 1, 2, 8 Pennewill, 856.

Force does not necessarily require the use of actual active physical force; any conduct which would result in bodily fear or terror being sufficient to constitute "force." *Armstrong v. Vicksburg, S. & P. R. Co.*, 16 South. 468, 474, 46 La. Ann. 1448.

Force is a constraining power, compulsion, strength directed to an end. Thus the act of a conductor in ejecting a passenger was a menace, and such an exhibition of a disposition to use physical strength to remove the passenger, so that he was thereby put in fear of such strength. The act constituted force and amounted to a trespass. *Watson v. Oswego St. Ry. Co.*, 28 N. Y. Supp. 84, 85, 7 Misc. Rep. 562.

A pleading alleging that a person committed an injurious act "violently and with great force" is equivalent to charging such person with the proposed wrong in the doing of the act. The word "violently" in this connection refers to outrage, unjust force, attack, or assault, and the word "force" in this connection refers to unlawful violence offered to persons or things. *Summers v. Tarney*, 24 N. E. 678, 123 Ind. 560.

In general, by force is understood unlawful violence; but acts may be forcible which are perpetrated by means of actual violence or threats of personal injury to another. *Bridgewater & U. Plank Road Co. v. Robbins* (N. Y.) 22 Barb. 662, 667.

"Force" is not necessarily direct violence. It may be produced by the employment of such material agencies or instruments as become effective by the co-operation of the forces of nature. *Forbell v. City of New York*, 58 N. E. 644, 646, 164 N. Y. 522, 51 L. R. A. 695, 79 Am. St. Rep. 666.

"Force" is synonymous with "ravish." *State v. Montgomery*, 45 N. W. 292, 293, 79 Iowa, 737 (quoting *Webst. Dict.*).

#### In burglary.

As used in an indictment charging that a person did by force in the nighttime break and enter a house, the word "force" means

violence used by such person to obtain entrance in the house, and any violence is sufficient. *Melton v. State*, 6 S. W. 303, 304, 24 Tex. App. 287.

The term "force" as used in Pen. Code, art. 704, defining burglary to be "entering a house by force at night with intent to commit a felony or theft therein," means actual force; but the slightest force is sufficient. The opening of a door which is partially open would be the exercise of such force. *Hamilton v. State*, 11 Tex. App. 116, 123.

#### In forcible entry and detainer.

The word "force," as used in a statute providing that no person shall make an entry into lands or tenements, except in cases where entry is allowed by law, and in such cases he shall not enter by force, but in a peaceable manner, means actual force, as contradistinguished from implied force. *Ft. Dearborn Lodge v. Klein*, 8 N. E. 272, 279, 115 Ill. 177, 56 Am. Rep. 133; *Smith v. Reeder*, 28 Pac. 890, 892, 21 Or. 541, 15 L. R. A. 172.

Under a like statute (Rev. St. 1891, c. 57, § 1), it was held that the word "force" meant no more than the term "vi et armis" does at common law; that is, with either actual or implied force. If one enters into the possession of another against the will of him whose possession is invaded, however quietly he may do so, his entry is forcible in legal contemplation. *Phelps v. Randolph*, 35 N. E. 243, 245, 147 Ill. 335 (citing *Croff v. Ballinger*, 18 Ill. 200, 202, 65 Am. Dec. 735).

Rev. St. p. 104, § 1, enacting that no person shall make any entry into lands or tenements except where entry is held by law, and that in such cases he shall not enter with force, but in a peaceable manner, means force with reference to some person, and not to the property. *Meader v. Stone*, 48 Mass. (7 Metc.) 147, 149.

In Civ. Code, § 1019, providing that any justice shall have power to inquire, as well against those who make unlawful and forcible entry into lands and tenements and detain the same, as against those who, having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same, etc., the word "force" is used in a very different sense from the construction placed upon it at common law. It simply means the refusal of a party unlawfully in possession of premises to which he has no right of possession to leave the same. *Estabrook v. Hateroth*, 34 N. W. 634, 635, 22 Neb. 281.

The word "force," as used in Code Civ. Proc. § 1019, should be construed in its ordinary sense, and is not of the same import as the word "unlawful." The exertion of force may or it may not be unlawful, and an

act may be unlawful, and no force, as the word is generally understood, be exerted. *Blaco v. Haller*, 1 N. W. 978, 9 Neb. 149.

#### In rape.

"By force," as used in Rev. St. c. 154, § 17, defining rape as ravishing and carnally knowing any female of the age of 10 years or more by force and against her will, is not synonymous with "violently." The term "by force," when applied to the acts of a man in illicit sexual intercourse with a female, has a peculiar and technical meaning. The definition nearest to the exact meaning of the word "force" is Webster's, that it is "violence, power exerted against will or consent." One signification of the active verb "to force" is "to ravish, to violate by force, as a female," and conveys to the mind ideas similar to those which are imparted by the words "by force." The adverb "violently" has a more general meaning ordinarily. If used by a man in application to acts of sexual intercourse, without any of the accompanying language indicating compulsion, it would hardly of necessity import a crime against the person of the female who was the subject of the acts. Worcester defines "force" as "strength, vigor, might, energy, power, violence," and "violently" as "with violence, forcibly, vehemently." According to Webster "force" means "strength, active power, vigor, might, momentum, violence," and "violently" is defined as "with force, forcibly, vehemently." *State v. Blake*, 39 Me. 322, 323.

Force within Pen. Code, art. 528, defining rape by force as the carnal knowledge of a woman obtained by force without her consent, is such force as might reasonably be supposed sufficient to overcome resistance, taking into consideration the strength of the parties and other circumstances in the case. *Walton v. State*, 15 S. W. 646, 647, 29 Tex. App. 163; *Sharp v. State*, 15 Tex. App. 171, 185.

As used in the Texas Code, defining rape, the word "force" does not refer to the mere muscular force necessarily exerted by the male to complete the act of copulation. *Baldwin v. State*, 15 Tex. App. 275, 276.

"Force," as used to describe an element of the crime of rape, includes intimidation. The offense of rape may be committed without the actual use of physical force or violence, and if the prosecuting witness was intimidated or put in fear by the accused or another, and thereby against her will induced to submit, the offense was complete. But an instruction that it would be sufficient "if she was intimidated into submission by the force of surrounding circumstances" is too general and indefinite, and liable to mislead the jury. *King v. Commonwealth (Ky.)* 20 S. W. 224, 225.

The word "force," as a necessary element in the crime of rape, is to be taken in its ordinary acceptation. It means common physical force, and fear of life or bodily harm, so that one is unable to make resistance, is equivalent to force. *Davis v. State*, 63 Ark. 470, 472, 39 S. W. 356.

#### In robbery.

The "taking by force," as given in Mr. Greenleaf's definition of robbery, which is the taking of property "from the person of another by force," and accompanied "by violence," in Mr. Bouvier's definition of the same term, means the same thing. While it requires the exercise of the muscle to pick up an article or to take from a pocket, this is not force sufficient to constitute robbery. It would be theft; but where there is resistance to the taking, and this resistance is overcome by force, it is a forcible taking, or a taking accompanied by violence, and constitutes robbery. It is not necessary that a blow should be struck, or the party be injured, to be a violent taking. *Williams v. Commonwealth (Ky.)* 50 S. W. 240.

Within the meaning of the statute punishing robbery by force, "force" means actual force exerted upon the person robbed. *Long v. State*, 12 Ga. 293, 315.

Force, in legal contemplation, does not always mean physical violence. Thus, in prosecutions for assault and battery, any touching of the person or clothing of another in anger constitutes a battery. In legal contemplation such touching for a hostile or wrongful purpose is the application of force. Larceny from the person can only be accomplished by the use of some degree of force, within the definition of force above given. There may be no actual violence. Certainly none is generally intended. But there might be some slight touching of the clothing, person, or belongings attached to the person of another, which, though intended to be so slight that it will be unnoticed, is nevertheless a hostile and wrongful touch, and amounts to legal force. *State v. Lewis*, 89 N. W. 143, 144, 113 Wis. 391.

#### FORCE AND ARMS.

See "Vi et Armis."

#### FORCE AND EFFECT.

A contract between two Americans, one of the provisions of which is: "It is understood that said English patent is in full force and effect; otherwise, said H. to be relieved from payment of \$1,000 in cash under this agreement"—meant that the patent should be of effect in the same sense that an American patent must be to obtain recognition in our courts. *Chemical Electric Light & Power Co. v. Howard*, 20 N. E. 92, 99, 148 Mass. 352, 2 L. R. A. 168.

#### FORCE PUMP.

"Force pump," as used in an application for a policy of fire insurance, stating that there was a force pump in the building with a river to feed it, does not include a hose by implication. A hose might be an exceedingly useful appendage in case of a fire, but buckets and other means could be used to extinguish a fire, where a supply is furnished within the building by a "force pump." *Pittsburg, V. & C. Ry. Co. v. Commonwealth*, 101 Pa. 192, 196.

#### FORCED HEIR.

Forced heirs are those which the donor cannot deprive of the portion of his estate reserved for them by law, except in cases where he has a just cause to disinherit them. *Civ. Code La.* 1900, art. 1495.

The term "forced heir" was used in the Spanish law to represent an heir "having by force of law a paramount right to his share of the succession." Children were forced heirs of their parents, and the latter, unless there were just causes for disinheriting the children, had not the capacity by donations inter vivos to dispose of any more than one-fifth of their property to strangers, though as among the children they had the power by gift or will to distribute an additional one-third of their estate to one or more of their children, excluding the others from their bounty. *Crain v. Crain*, 17 Tex. 80, 90.

What are termed "forced heirs" are nothing more than certain legal heirs, who by reason of their relationship to the deceased have reserved to them the right to claim as heirs, if they so elect, a certain portion of the property of the deceased, which he may have disposed of to their prejudice. *Miller v. Miller*, 29 South. 802, 804, 105 La. 257.

A forced heir is one who by force of law succeeds to the whole estate of a deceased, within such exceptions only as are specially provided for and regulated by law, and whose rights do not depend on the pleasure or will of the testator, but upon the law, independent of and adverse to that will. But forced heirship is not generally, among civilized nations, permitted to be coextensive with the whole estate. The disposition of a portion of the estate by testament is generally recognized, and to that extent the right of forced heirship is excluded. In the primitive ages of the common law, the testator, who had a wife and child, could bequeath only one-third of his estate. His wife and children were forced heirs of the other two-thirds. *Hagerty v. Hagerty's Ex'rs*, 12 Tex. 456, 457.

Hart. Dig. art. 3263, §§ 13, 15, providing that parents cannot disinherit their children,

unless for just and specified causes, to a greater extent than one-fourth of the estate, invests children with the quality of forced heirs and an absolute right to a portion of the estate of the deceased parent, independent of the intentions of the testator; and the provision in a will that all the property of the testator shall be kept good for the support of the family until the youngest child reaches the age of 12 years is an infringement under such statute on the rights of adult forced heirs. *Budd v. Fisher*, 17 Tex. 423, 426.

#### FORCED OUT.

In a license to a corporation reciting that it was to cease if the licensor was forced out of the company, the expression "forced out" should not be construed as meaning the legal expulsion of the licensor from membership in the corporation, but should be construed as referring to exclusion from the active and responsible management of the business of the corporation and from the beneficial enjoyment of the anticipated profits of the enterprise. *Havana Press Drill Co. v. Ashurst*, 35 N. E. 873, 879, 148 Ill. 115.

#### FORCED SALE.

Const. Kan. art. 15, § 9, providing that a homestead shall be exempt from forced sale under any process of law, should be construed to mean sales on execution or other process for the collection of the ordinary debts of the owner. *Hannon v. Sommer* (U. S.) 10 Fed. 601, 602.

The words "forced sale," in Const. art. 16, § 51, providing that the homestead of a family shall be protected from forced sale for the payment of debts, mean a sale made at the time and in the manner prescribed by law, in virtue of an execution issued on a judgment already rendered by a court of competent jurisdiction; or, in other words, a forced sale is one which is made under the process of the court and in the mode prescribed by law. *Sampson v. Williamson*, 6 Tex. 102, 110, 55 Am. Dec. 762; *Roots v. Robertson*, 55 S. W. 308, 309, 93 Tex. 365.

"Forced sale," as used in Const. art. 9, § 1, which provides that \$1,000 worth of personal property shall be exempted from forced sale by any process of law, means a sale against the will of the owner. It is not synonymous with "sale on execution," as the latter may be, and often is, voluntary in every respect. *Patterson v. Taylor*, 15 Fla. 386, 342.

"Forced sale," as used in Act 1860, § 1, providing that the homestead shall not be subject to forced sale on execution, or other legal process, is not synonymous with "sale on execution," etc.; for the latter may be,

and often is, voluntary in every respect. When the owner consents to a sale under execution or other legal process, the sale is not forced; but it is as voluntary, within the full import of the term, as it is when he directly effects the same and executes the conveyance. Its quality as being voluntary or forced depends, not on the mode of its execution, but on the presence or absence of the consent of the owner. Where the owner of the homestead consents to a sale under execution or other legal process, it is not a forced sale. It makes no difference, in respect to its being forced or voluntary, whether he consents directly to the sale or does the same indirectly by consenting to or doing those acts or things that necessarily or generally eventuate in a sale. *Peterson v. Hornblower*, 33 Cal. 266, 274.

Whether the sale is voluntary or forced depends, not upon the mode of its execution, but upon the presence or absence of the consent of the owner. *Karcher v. Gans*, 83 N. W. 431, 432, 13 S. D. 383, 79 Am. St. Rep. 893.

"Forced sale," as used in Const. Tex. 1868, providing that the homestead of a family is exempt from forced sale for debts, includes a forced dispossession in ejectment at the suit of a mortgagee of a homestead; for that is a sale under judicial process. The prohibition of the Constitution extends to any species of compulsory disposition of the homestead, whether denominated a sale or otherwise. *Lanahan v. Sears*, 102 U. S. 318, 321, 26 L. Ed. 180.

"Forced sale" and "judicial sale" are identical in Louisiana, and either term means a sale made under authority and process at law in any legal proceeding had contradictorily with the owner before any court of competent jurisdiction. Article 2616 of the Revised Civil Code of Louisiana says that sales made by authority of law are of two kinds: (1) Those which take place when the property of a debtor has been seized by order of the court to be sold for the purpose of paying the creditor; (2) those which are ordinary in matters of succession or partition. Thus a sale, though made by a sheriff and under order of a court, which was wholly voluntary, is not a forced or a judicial sale. *Woodward, Wight & Co. v. Dillworth* (U. S.) 75 Fed. 415, 418, 21 C. C. A. 417.

#### As auction sale.

The term "forced sale," as used in a statute requiring an assessor's certificate to state that the lands were assessed at the true cash value thereof, and not for the price it would sell for at forced or auction sale, is not equivalent to nor synonymous with "auction sale." A forced sale is not necessarily an auction sale, and an auction sale

is not necessarily a forced sale. *Dickison v. Reynolds*, 12 N. W. 24, 25, 48 Mich. 158.

#### Foreclosure or deed of trust sale.

"Forced sale," within the meaning of the homestead act, exempting the homestead from forced sale, includes a sale of the homestead by the decree of a court of equity upon the foreclosure of a mortgage as much as if the sale was under a fl. fa. *Wing v. Cropper*, 35 Ill. 256, 264; *Sampson v. Williamson*, 6 Tex. 102, 109, 55 Am. Dec. 762; *Hannon v. Sommer* (U. S.) 10 Fed. 601, 602.

The expression "forced sale," as used in a constitutional provision prohibiting the forced sale of a homestead, construed not to include a foreclosure sale of a homestead under a mortgage containing a waiver of the exemption. *Hart v. Sanderson's Adm'rs*, 18 Fla. 103, 115; *Patterson v. Taylor*, 15 Fla. 338, 342.

The phrase "forced sale," as used in the Constitution, exempting a homestead from forced sale, does not include a sale under a deed of trust or a mortgage foreclosure. *Moran v. Clark*, 4 S. E. 303, 314, 30 W. Va. 358, 8 Am. St. Rep. 66; *Peterson v. Hornblower*, 38 Cal. 266, 274; *Karcher v. Gans*, 83 N. W. 431, 432, 13 S. D. 383, 79 Am. St. Rep. 893.

Where a homestead act exempted the homestead from levy and forced sale under any process or order from any court in the state, such forced sale should be construed to mean a sale under judicial process, and therefore did not include a sale by a trustee under a trust deed. *Dawson v. Hayden*, 67 Ill. 52, 53; *Ely v. Eastwood*, 26 Ill. (16 Peck) 107, 115; *Jordon v. Peak*, 38 Tex. 429, 440.

#### Writ of possession.

As used in the act of 1851, relating to homestead exemption and protecting the homestead against a levy and forced sale, the phrase "forced sale" includes a writ of possession in ejectment. *Pardee v. Lindley*, 31 Ill. 174, 186, 83 Am. Dec. 219.

### FORCIBLE DETAINER.

Forcible detainer occurs where one who enters peaceably afterwards retains his possession by force. *Ladd v. Dubroca*, 45 Ala. 421, 427 (citing 1 Russ. Crimes, 310; *Bish. Cr. Law*, 477).

A forcible detainer arises where a person enters lawfully or peaceably and holds unlawfully by any of the means enumerated in the definition of forcible entry and detainer. *Shannon's Code Tenn.* 1896, § 5092.

Every person is guilty of a forcible detainer who (1) by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property,

whether the same was acquired peaceably or otherwise; or (2) who in the nighttime, or during the absence of the occupant of any real property, unlawfully enters thereon, and who, after demand is made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. *Rev. St. Utah* 1898, § 3574; 2 *Ballinger's Ann. Codes & St. Wash.* 1897, § 5526; *Code Civ. Proc. Cal.* 1903, § 1160.

A person shall be adjudged guilty of forcible detainer in the following cases: (1) Where a tenant at will or by sufferance refuses, after demand made in writing, to give possession to the landlord after the determination of his will; (2) where the tenant of a person who has made a forcible entry refuses to give possession, after demand as aforesaid, to the person upon whose possession the forcible entry was made; (3) where a person who has made a forcible entry upon the possession of one who acquired it by forcible entry refuses to give possession, on demand as aforesaid, to him upon whose possession the first forcible entry was made; (4) where the person who has made a forcible entry upon the possession of a tenant for a term refuses to deliver possession to the landlord, upon demand as aforesaid, after the term expires. If the term expire while a writ of forcible entry sued out by the tenant is pending, the landlord may, at his own cost and for his own benefit, prosecute it in the name of the tenant. *Rev. St. Tex.* 1895, art. 2521.

A forcible detainer, as defined by *Code Prac.* § 500, "is the refusal of a tenant to surrender to his landlord the land or tenement demised after the expiration of his term, or of a tenant at will after the determination of the will of the landlord." To maintain a proceeding of forcible detainer, the relation of landlord and tenant must therefore exist between the party charging detainer and the party charged therewith. *Goldsberry v. Bishop*, 63 Ky. (2 Duv.) 143, 144.

"Forcible detainer" is the violently keeping possession of lands and tenements with menaces, force and arms and without authority of law. *Code*, § 4525; *Harrell v. Holt*, 76 Ga. 25, 26.

The same process of violence or terror which will make an entry forcible will make a detainer forcible also, and whoever keeps in the house an unusual number of people or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of forcible detainer, though no attempt be made to re-enter. *People v. Rickert* (N. Y.) 8 Cow. 226.

Procuring the possession of premises by threat of arrest of the tenant occupying the same if he does not surrender them within two hours is a forcible detainer of the premises within the meaning of *Code Civ. Proc.* §

716, which defines forcible entry and detainer as peaceable entry on the land and the turning out by force, or frightening by threats or other circumstances of terror, the party or parties out of possession, and detaining and holding the same. *Wells v. Darby*, 34 Pac. 1092, 13 Mont. 504.

#### **Forcible entry distinguished.**

A forcible entry and a forcible detainer are distinct offenses, and, although both are charged in the same indictment, the defendants may be acquitted of one and convicted of the other. So if one is defectively set out, and the other well, he may be convicted on that which is well set out. There may be a forcible detainer, though the entry was peaceable. It is sufficient to constitute a forcible detainer that the party aggrieved was forcibly kept out of possession. *Commonwealth v. Rogers* (Pa.) 1 Serg. & R. 124, 125.

#### **FORCIBLE DETAINER (Action of).**

The action of forcible detainer is possessory merely, and does not involve the title to real estate, except to the extent that evidence of title may be incidentally shown to support the claim or right of possession. *Armour Packing Co. v. Howe*, 64 Pac. 42, 62 Kan. 587.

An action of forcible detainer is purely a proceeding at law, and does not and cannot involve the exercise of equitable jurisdiction. *Dysart v. Enslow*, 54 Pac. 550, 552, 7 Okl. 388.

#### **Action of forcible entry distinguished.**

The actions of forcible entry and forcible detainer, as provided for in the Arkansas system of practice, are separate and distinct. On forcible entry it is necessary to show that the defendant did actually enter into the lands or tenements of the plaintiff without the consent of the person having the possession in fact of the premises. In forcible detainer it must appear on the face of the warrant in some way that the relation of landlord and tenant exists or existed between the plaintiff and defendant, said to have been in possession, at the time of the entry. *Smith v. Lafferry*, 27 Ark. 46, 48.

#### **FORCIBLE ENTRY.**

Forcible entry is violently taking possession of lands and tenements, with menaces, force, and arms, and without authority of law. *Commonwealth v. Keeper of the Prison* (Pa.) 1 Ashm. 140, 145 (quoting 4 Bl. Comm. 147); *Harrell v. Holt*, 76 Ga. 25; *Griffin v. Griffin*, 42 S. E. 1005, 116 Ga. 754; Civ. Code Ga. § 4524; Pen. Code Ga. § 338.

Every person is guilty of a forcible entry who (1) by breaking open windows, doors,

or other parts of the house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstances of terror, enters upon or into any real property, or (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in actual possession. 2 *Ballinger's Ann. Codes & St. Wash.* 1897, § 5525; *Rev. St. Utah* 1898, § 3573; *Code Civ. Proc. Cal.* 1903, § 1159.

A forcible entry, or an entry where entry is not given by law, within the meaning of a chapter relating to forcible entry and detainer, is (1) an entry without the consent of the person having the actual possession; (2) as to a landlord, an entry upon the possession of his tenant at will or by sufferance, whether with or without the tenant's consent. *Rev. St. Tex.* 1895, art. 2520.

Every unlawful invasion upon the possession of another is in the eye of the law a forcible entry, and it must be an actual, and not a mere constructive, possession. Two persons cannot be in the actual possession of the same land at the same time, and wherever the unlawful entry of one necessarily dispossesses the other an indictment for a forcible entry may be maintained, and although the possession may have been surreptitiously obtained, if it is maintained by force, the entry will be considered forcible; otherwise, a person may be dispossessed of his cornfield, his orchard, his dwelling house, if an intruder should slyly creep in when he is about his ordinary business. It is not necessary that, to constitute forcible entry, it should be with a "multitude of people." *State v. Burt* (S. C.) 2 Tread. Const. 489.

Forcible entry is "violently taking possession of lands and tenements with menaces, force, and arms, and without authority of law." Pen. Code, § 388. In order to constitute the offense, the entry must be accompanied by some acts of actual violence or terror, directed toward the person in possession, and consequently breaking and entering an unoccupied house, in the absence of the person who had previously been in possession and control thereof, and who still claimed the right to the possession, is not indictable. *Lewis v. State*, 99 Ga. 692, 694, 26 S. E. 496, 59 Am. St. Rep. 255.

"A forcible entry is only such an entry as is made with a strong hand, with unusual weapons and an unusual number of servants or attendants, or with menace of life or limb; for an entry which only amounts in law to a trespass is not within the statutes. But an entry may be forcible, not only in respect of a violence usually done to the person of a man, but also in respect to any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling



house; and though a man enter peaceably, yet if he turn the party out of possession by personal threats or violence, this also amounts to a forcible entry, but not if he merely threatens to spoil the party's goods, or destroy his cattle, or do any injury which is not of a personal nature. There must be something of personal violence, or a tendency to or threat of personal violence, unless the entry be riotous. In all cases there must be something beyond a mere trespass on the property. The least is force done by breaking the door of a house, especially a dwelling house." *Willard v. Warren* (N. Y.) 17 Wend. 257, 261.

Viner defines "forcible entry" as being "if one or more persons come weaponed to a house or land and violently enter, or they offer violence to any possessed, or if they forcibly and furiously expel another out of his possession." *Commonwealth v. Keeper of the Prison* (Pa.) 1 Ashm. 140, 145 (quoting 13 Vin. Abr. 180).

A forcible entry is a violent taking by one of the lands and tenements occupied by and in possession of another, by means of threats and force, and without authority of law. One who enters upon and obtains possession of real estate under an order and judgment, the process of the court, cannot be said to have made a forcible entry thereon. *Frantz v. Saylor*, 71 Pac. 217, 12 Okl. 282.

Code Civ. Proc. § 1159, declares that every person is guilty of a forcible entry who, after entering peaceably on real property, turns out by force, threats, or menacing conduct the party in possession. *Kerr v. O'Keefe*, 71 Pac. 447, 449, 138 Cal. 415.

A forcible entry, under the statute of West Virginia, giving civil redress by summary proceedings in cases of forcible entry, is precisely what would constitute a forcible entry for which, at common law, a party might be punished criminally. It lies, therefore, when a party enters on land in the possession of another, and either by his acts or speech gives those who are in possession just cause to fear he will do them some bodily harm if they do not give way to him. *Franklin v. Geho*, 30 W. Va. 27, 35, 3 S. E. 168.

To enter upon premises in defiance of the occupant and with such a display of force as reasonably to deter him from maintaining his possession is forcible entry. That the aggressor remained in possession was admissible in evidence to show that he made his entry complete, though he was not charged with forcible detainer. *Lissner v. State*, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389.

"A forcible entry must be accompanied either with actual violence or with circum-

stances tending to excite terror and to intimidate the owner or his servants from maintaining his rights." *Smith v. Reeder*, 28 Pac. 890, 892, 21 Or. 541, 15 L. R. A. 172.

The breaking and entry of an occupied dwelling house during the temporary absence of the person entitled to possession will not form the basis of an action for forcible entry and detainer. *Griffin v. Griffin*, 42 S. E. 1005, 116 Ga. 754.

If a person having a possessory title to land enters by force and turns out a person who has a naked possession only, the latter cannot maintain trespass against the person so entering. If the entry in such case be with a strong hand or multitude of people, it is an offense for which the party entering must answer criminally for forcible entry. *Hyatt v. Wood*, 4 Johns. 150, 158, 4 Am. Dec. 258.

Forcible entry does not mean that the entry be made with strong hand or accompanied with acts of actual force or violence against person or property, and one who enters on pasture land during the temporary absence of the person in possession, drives off his cattle, and nails up the gates, is guilty of forcible entry. *Phelps v. Randolph*, 35 N. E. 243, 244, 147 Ill. 385.

Under St. 1866, p. 768, providing that "if any person shall with violence and a strong hand enter into or upon any lands or buildings, either by breaking open doors, windows, or other parts of the house, or by any kind of violence or circumstance of terror, \* \* \* such person shall be deemed guilty of forcible entry," etc., a breaking open of doors, windows, or other parts of a house constitutes a forcible entry as much as one effected by any kind of violence or circumstance of terror. Accordingly the earlier authorities, to the effect that forcible entry was not complete unless there was something of violence or menace directed toward the person in possession, or something in the conduct of the party making the entry calculated to excite terror in the mind of the other party, were not applicable in an action for forcible entry and detainer brought under the statute. *Brawley v. Risdon Iron Works*, 88 Cal. 676, 678.

Forcible entry is a misdemeanor as recognized by common law. *Ex parte Webb*, 51 Pac. 1027, 24 Nev. 238.

At the common law forcible entry was an offense and punishable as such. *Glenn v. Caldwell*, 74 Miss. 49, 53, 20 South. 152 (quoting *Webst. Dict.*).

Force either actually applied or justly to be feared from the conduct of the defendant is sufficient to constitute a forcible entry. *Frazier v. Hanlon*, 5 Cal. 156. "It will be sufficient if one submit upon or in conse-

quence of apparent inability to resist the force arrayed against him, without its being shown or inferred that he was under fear of personal injury." *Berry v. Williams*, 21 N. J. Law (1 Zab.) 423; *Hendrickson v. Hendrickson*, 12 N. J. Law (7 Halst.) 202. As was said in *Dickinson v. Maguire*, 9 Cal. 48, in reference to a forcible detainer: "If, when the possession of the premises is demanded of the party, he by word or act, look or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this will be sufficient." It is not necessary for the claimant to wait until actual violence is resorted to. *Wylie v. Waddell*, 52 Mo. App. 226; *Oakes v. Aldridge*, 48 Mo. App. 11. In *Seitz v. Miles*, 16 Mich. 456, 470, an entry by a sheriff under a void writ of restitution, which was made without physical force, was held to have been a forcible entry. The court said: "The complainant had the right to act upon the circumstances as they then appeared. \* \* \* The course of the defendant clearly indicated a design to exert, if necessary, all the power conferred by the writ, and the complainant yielded to such display of force." *Wegner v. Lubenow* (N. D.) 95 N. W. 442, 446.

An essential element of the offense of forcible entry, as defined by Code, § 1028, is that the "land and tenements or terms of years," must be not simply in the constructive, but in the actual, possession of the person whose possession is charged to have been interfered with. *State v. Bryant*, 103 N. C. 436, 437, 9 S. E. 1.

The Civil Code of Practice, in subsection 1 of section 452, defines a forcible entry as "an entry without the consent of the person having actual possession." None but those in actual possession when the forcible entry is made can maintain the warrant under the statute, and no question of title or right of possession can arise upon the trial of the issue. *Cuyler v. Estis*, 23 Ky. Law Rep. 1063, 1064, 64 S. W. 673, 674.

\* The high-handed invasion of the actual possession of another, he being present, constitutes the offense known as "forcible entry." *State v. Newbury*, 29 S. E. 367, 368, 122 N. C. 1077.

An instruction that forcible entry means any act that deprives the owner of his property, and need not amount to personal violence and such acts as to intimidate the owner, by means of which possession is relinquished, is erroneous, as it includes possession without force, and not against his objections. *Sheehy v. Flaherty*, 20 Pac. 687, 688, 8 Mont. 385.

#### FORCIBLE ENTRY AND DETAINER.

A forcible entry and detainer is violent taking and keeping possession by one of any

lands and tenements occupied by another, by means of threats, force, or arms, and without authority of law. *Alexander v. Griswold*, 17 N. Y. Supp. 522, 523.

A third person, who intrudes himself on land or enters after judgment against a former intruder, is guilty of "forcible entry and detainer." *State v. Gilbert* (S. C.) 2 Bay, 355, 357.

A forcible entry and detainer is declared by the Texas Constitution to consist in any one of three things: (1) Where any person shall make an entry into lands, tenements, or other real property, where entry is not given by law; (2) where any person shall make an entry by force into any lands, tenements, or other real property; and (3) where any person shall wilfully and without force hold over any tenements or real property after the termination of the time for which such lands, tenements, or other property were let to him, or after the term under which he claims has expired. *Cooper v. Marchbanks*, 22 Tex. 1, 8.

A forcible entry and detainer is violent taking and keeping possession by one of any lands and tenements occupied by another, by means of threats, force, or arms, and without authority of law. It is essentially an action to protect the actual possession of real estate against unlawful and forcible invasion, to remove occasion for acts of violence in defending such possession, and to punish breaches of peace committed in the entry upon or the detainer of real property. Under the law of New York the remedy is a civil one, the sole object of which is to regain a possession which has been invaded, and the only judgment which can be rendered in the civil action is that plaintiff have restitution of the premises. *Carter v. Anderson*, 16 Daly, 437, 438, 11 N. Y. Supp. 883.

A forcible entry and detainer arises where a person, by force or strong hand, or with weapons, or by breaking open the doors, windows, or other parts of the house, whether any person be in it or not, or by any kind of violence whatsoever, enters upon lands, tenements, or possessions in the occupation of another, and detains and holds the same; or by threatening to kill; maim, or beat the party in possession; or by such words, circumstances, or actions as have a natural tendency to excite fear or apprehension of danger; or by putting out of doors or carrying away the goods of the party in possession; or by entering peaceably and then turning or keeping the party out of possession by force or threats, or other circumstances of terror. *Shannon's Code Tenn.* 1896, § 5091.

Under a statute in express terms authorizing actions for forcible entry and detainer before justices of the peace, it is held that the term "forcible entry and detainer" sufficient-

ly alleges that the entry was with actual force, so that a complaint in such an action is not defective for failure to aver that the entry was "with a strong hand." In this connection the court says that it is necessary in an action for unlawful forcible entry and detainer to show that the entry was made with a greater degree of force than is necessary to constitute mere trespass. It must appear that actual force and violence was used, and that complainant was in the actual possession of the premises; but it need not appear that he resided thereon. *Jarvis v. Hamilton*, 16 Wis. 574, 577.

#### **Forcible trespass distinguished.**

The only distinction between "forcible trespass" and "forcible entry and detainer" is that the former is as to personal property and the latter as to realty. *State v. Lawson*, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844.

#### **Unlawful detainer distinguished.**

When an entry upon lands is unlawful, whether forcible or not, and the subsequent conduct is forcible and tortious, the offense committed is a forcible entry and detainer; but wherever the original entry is lawful, and the subsequent holding forcible and tortious, then the offense is an unlawful detainer only. *Pullen v. Roney*, 4 N. J. Law (1 Southard) 125, 131.

### **FORCIBLE ENTRY AND DETAINER (Action of).**

As civil action or case, see "Civil Action—Case—Suit—Etc."

The statute of forcible entry and detainer should be construed as taking away the previous common-law right of forcible entry by the owner, and such entry must be therefore held illegal in all forms of action. *Reeder v. Purdy*, 41 Ill. 279, 286.

Forcible entry and detainer is a summary remedy, depending entirely on statute, provided to enable a party on whose possession another has entered by force, or against whom a tenant forcibly holds over after the termination of the lease, to have immediate restitution of the possession, without the necessity of resorting to an action on the title. It puts no other matter in litigation than the right of possession, and the remedy does not extend to other matters of dispute between the parties. *Clark v. Snow*, 24 Tex. 242, 243.

An action of forcible entry and detainer is essentially a proceeding to protect the actual possession of real estate against unlawful and forcible invasion, to remove occasion for actual violence in defending such possession, and to punish breaches of the peace committed in the entry upon or the

detainer of real property. *Alexander v. Griswold*, 17 N. Y. Supp. 522, 523.

The action of forcible entry and detainer is a summary proceeding, and the question involved is the fact of possession alone, and not necessarily the right of possession. When brought by a landlord against a tenant, the only issue is, was defendant holding over after the termination or contrary to the terms of his lease? The proceedings are special and summary, and the Legislature has the right to dispose of the jurisdiction according to its own wisdom, and may confer it on a justice of the peace. *Herkimer v. Keeler*, 81 N. W. 178, 180, 109 Iowa, 680.

The action of forcible entry and detainer is possessory merely, and does not involve the title to real estate, except to the extent that evidence of title may be incidentally shown to support the claim of right of possession. *Armour Packing Co. v. Howe*, 64 Pac. 42, 62 Kan. 587 (citing *McClain v. Jones*, 60 Kan. 639, 640, 57 Pac. 500); *Wideman v. Taylor*, 65 Pac. 664, 665, 63 Kan. 884; *Clark v. Hutton*, 28 Tex. 123, 125, 126.

An action of forcible entry and detainer is one brought for the possession of land, dependent on the right of possession, such right being the only question which can be determined therein, and has nothing to do with the ultimate superiority of the title of the various contending parties. *Smith v. Ryan*, 20 Tex. 661, 665.

The action for forcible entry and detainer should be strictly confined to the right of possession, without regard to which party has the title to the land. If one holding title to the land should by himself or his agent with force and arms dispossess one in the peaceable possession, the action would lie. *Warren v. Kelly*, 17 Tex. 544, 551.

In an action of forcible entry or detainer the title is not in question. If the plaintiff shows himself in the peaceable possession of land and that he was forcibly dispossessed, it will be sufficient to entitle him to recover possession, and the defendant will not be permitted to set up title to defeat it. *People v. Leonard* (N. Y.) 11 Johns. 504, 509.

A proceeding of forcible entry is summary in character, involving alone the question of possession of property. Hence one who enters upon land in the actual possession of another without his consent may be removed by a writ of forcible entry and detainer, though the right of entry was in him, and an action instituted by him involving the title and right of possession be pending. *Young v. Young*, 58 S. W. 592, 594, 109 Ky. 123.

Forcible entry and detainer can only be maintained by one who was in actual possession of the premises at the time of the

injury committed, and cannot be brought by a landlord for the dispossession of his tenant. *Bennet v. Montgomery*, 8 N. J. Law (3 Halst.) 48; *Hays v. Porter*, 27 Tex. 92, 94.

In an action for forcible entry or detainer the justice is authorized by the statute to fine and imprison upon his own view and conviction of the force, but possession cannot be changed without the intervention of a jury; and if the justice awards possession on his own view he does an unauthorized act, which should be set aside by the Supreme Court on certiorari, and re-restitution ordered. *Clason v. Shotwell* (N. Y.) 12 Johns. 31, 43; *In re Shotwell* (N. Y.) 10 Johns. 304, 308.

Forcible entry and detainer at common law was a criminal or quasi criminal process, and was only allowed where the entry and detainer were with force—the strong hand. The Legislature has devised a process of the same name, but now purely civil in form and nature. *Eveleth v. Gill*, 54 Atl. 756, 757, 97 Me. 315.

In an action for wrongfully, unlawfully, and forcibly breaking and entering into real estate and ousting the possessor, the gravamen of the complaint is the forcible entry, and it cannot be considered as an action for the possession of lands and tenements, where the relation of landlord and tenant exists, or when such possession has been unlawfully obtained, as provided for in the Constitution of the state. *Peacock v. Leonard*, 8 Nev. 84, 88.

Rev. St. p. 345, § 2, provides that if any person should obtain possession of real property "by such words or actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors or carrying away the goods of the party in possession, or by entering peaceably and then driving out by force, or by any other circumstance of terror," he should be deemed guilty of forcible entry and detainer. Under this definition the right of action may be complete in the absence of all force. Every act which would have a tendency to excite fear, not of personal violence alone, but reasonable fear of a violent ouster of the goods of the person in possession, will enable the party dispossessed by such fear to recover possession in an action of forcible entry and detainer. *Harrow v. Baker* (Iowa) 2 G. Greene, 201, 203.

The force which is a necessary characteristic of the entry, sufficient to support an action for forcible entry and detainer, does not mean that the intruder should have done such acts with reference to the property as would render him liable to indictment for assault and battery. Thus, where D. had possession of a mill, and S. in D.'s casual absence, took possession of it, fully prepared with arms, and manifestly intend-

ing, if necessary, to use them in keeping his possession, and by the force thus arrayed caused D. to leave the premises and remain away, such acts constituted a forcible entry and detainer. *Holmes v. Holloway*, 21 Tex. 658.

In an action for forcible entry and detainer, under Rev. St. § 5237, before the plaintiff can recover, he must prove that the defendant holds the possession either by actual violence or such a show of force as is reasonably calculated to intimidate the plaintiff; the principal element in this character of action being the retention of possession by force. *Gipe v. Cummins*, 116 Ind. 511, 512, 19 N. E. 466, 467.

### FORCIBLE RESCUE.

A forcible rescue of a prisoner may be accomplished without the exercise of physical force, if by threats, menaces, or demonstrations an officer is compelled to yield thereto and to let his prisoner go. *State v. McLeod*, 53 Atl. 878, 879, 97 Me. 80.

### FORCIBLE TRESPASS.

Forcible entry and detainer distinguished, see "Forcible Entry and Detainer."

Forcible trespass is a high-handed invasion of the actual possession of another, he being present. There must be something done at the time of the entry which tends to a breach of the peace. *State v. Laney*, 87 N. C. 535, 537.

"To constitute the offense of forcible trespass, there must be such force used as to exceed a bare civil trespass." There must be an actual demonstration of force, as with arms or a multitude of attendants, so as to create or make imminent a breach of the peace. *State v. Lloyd*, 85 N. C. 573, 575; *State v. Covington*, 70 N. C. 71, 73. This demonstration of force is to be distinguished from mere words, which, however violent, cannot constitute a forcible trespass; and hence a trespass by one person on the actual possession of two, who were both on the spot, did not constitute a forcible trespass. *State v. Covington*, 70 N. C. 71, 73.

"Forcible trespass," says Pearson, C. J., in *State v. Sowls*, 61 N. C. 151, "is the taking by force of the personal property of another," to which Reade, J., in *State v. Pearman*, 61 N. C. 371, adds the words "in his presence." The offense is described with more particularity by Manly, J., in his charge to the jury, in this language: "It was not necessary to the offense that the individual whose rights are violated should oppose the seizure or taking away of his property by force, provided that he was overawed and prevented from so doing by a superior force and a disinclination to engage in a breach of the peace; nor was it necessary that he

should in express language forbid the trespass, provided that it was against his will. Whenever property is taken by superior force from the presence of one who is in peaceable possession, and contrary to the will of the possessor, the offense is consummated." *State v. Barefoot*, 89 N. C. 565, 567.

The offense of forcible trespass must be done with a strong hand, or "manu forti," which it is held implies greater force than is expressed by the phrase "vi et armis." Consequently it is held that a charge that the trespass was committed vi et armis is insufficient to charge a forcible trespass. *State v. Ray*, 32 N. C. 39, 40.

#### FORCIBLY.

The terms "forcibly" and "fraudulently," within a statute imposing a fine on persons forcibly and fraudulently passing a toll gate without paying legal toll, must be held to have been used in their ordinary sense, and to mean actual force or actual fraud, as distinguished from constructive force or fraud. *Bridgewater & U. Plank Road Co. v. Robins* (N. Y.) 22 Barb. 662, 667 (citing *Columbia Turnpike v. Woodworth*, 2 Calnes, 97).

"Forcibly passing," as used in the New Jersey statute imposing a penalty for forcibly passing the keeper of a turnpike gate, means the passing without payment of toll and without the consent and against the will of the keeper. It is not necessary that there should be resistance offered by the keeper or violence on the part of the person passing. *Camden, E. & M. Turnpike Co. v. Fowler*, 24 N. J. Law (4 Zab.) 205, 208.

The word "forcibly," as used in Act May 15, 1820, § 5, providing that, if any citizen of the United States shall "forcibly" confine or detain on board a ship any negro not held to service by the laws of either of the states or territories of the United States, with intent to make him a slave, such person shall be adjudged a pirate, does not require physical or manual force. Any act on the part of the person putting the negro in bodily fear and terror is equivalent to actual force. *United States v. Gordon* (U. S.) 25 Fed. Cas. 1364.

Forcibly doing an act is merely doing an act with force, so that an indictment that defendant did with force and arms violently and unlawfully resist, etc., is sufficient under a statute making it an offense to forcibly resist, even though "violently and unlawfully" may not be equivalent to "forcibly." *United States v. Bachelder* (U. S.) 24 Fed. Cas. 931, 932.

#### FORCIBLY RAVISHING.

2 Rev. St. § 22, subd. 2, defining rape as forcibly ravishing any woman of the age of

10 years or upwards, means having carnal knowledge of a woman by a man forcibly against her will, and does not include merely having carnal knowledge of a woman while deprived, by voluntary intoxication or otherwise, of all reason and volition, without her consent, and by such force only as is necessary to accomplish the act. *People v. Quin* (N. Y.) 50 Barb. 128, 131.

#### FORE AND AFT.

A "fore and aft tree" is a tree in a boundary line with chops on the sides indicating the direction of the line. *Belding v. Hebard* (U. S.) 103 Fed. 532, 537, 43 C. C. A. 296.

#### FORECLOSE.

Where the express stipulation in a mortgage was that the mortgagee would not institute any proceedings to foreclose the mortgage until the mortgagor and indorser of two of the notes had been sued to insolvency, the word "foreclose" should be construed in its popular significance; that is, to enforce by any form of legal proceeding. *Grandin v. Hurt*, 80 Ala. 116, 117.

When an attorney is employed to foreclose a mortgage, the common understanding is that this refers to the proceedings which culminate in the sale of the property, and the preparation and record of the papers evidencing that sale. If it should happen that another party buys at the sale, the authority to foreclose would fairly imply authority to receive the money from the purchaser; but if, as is usually the case, the property is bid in by the mortgagee, the agency of one employed to foreclose would have accomplished its object and terminated when the sale and proceedings were completed. *Williams v. Grundysen*, 53 Minn. 346, 349, 55 N. W. 557.

#### FORECLOSURE.

See "Strict Foreclosure"; "Statutory Foreclosure."

We familiarly say that a foreclosure invests the petitioner with the interest of the party foreclosed; but we thus describe a practical effect, rather than state what is absolutely true. All that is actually accomplished is the extinguishment of a right—the interposition of a perpetual legal bar against the party foreclosed. The decree only professes to close a door, which equity before had kept open; not to confer a right or pass a title. The only effect which a foreclosure has is to extinguish the mortgagor's personal right of redemption. *Goodman v. White*, 26 Conn. 317, 322.

A "foreclosure," in the original acceptance of the term, was nothing but a legal proceeding to extinguish the equity of redemption. *Arrington v. Liscom*, 84 Cal. 365, 376, 94 Am. Dec. 722.

A foreclosure is any proceeding by which the mortgagor's equity of redemption in the property is cut off beyond possibility of recall. 2 Bl. Comm. 159. The word "foreclosure" is undoubtedly used in the sense of this definition in Gen. St. § 3010, reading, "The foreclosure of a mortgage shall be a bar to any further action upon the mortgage debt, note, or obligation, unless the person or persons who are liable for the payment thereof are made parties to such foreclosure." *Appeal of Ansonia Bank*, 18 Atl. 1030, 1031, 58 Conn. 257.

A "foreclosure" is defined by Bouvier to be "a proceeding in chancery by which the mortgagor's right of redemption of the mortgaged property is barred forever. This takes place when the mortgagor has forfeited his estate by nonpayment of the money due on the mortgage at the time appointed, but still retains the equity of redemption. In such case the mortgagee may file a bill calling on the mortgagor, in a court of equity, to redeem his estate presently, or in default thereof, to be forever barred from any right of redemption." In this state a judgment foreclosing a mortgage, as commonly expressed, does not divest title or confer possession. *Springfield Fire & Marine Ins. Co. v. Phillips*, 16 Ky. Law Rep. 390, 394.

A foreclosure is that proceeding which cuts off the mortgagor's equity of redemption in the property mortgaged, and the meaning of the term is not affected by the kind of property which is the subject of the mortgage. *Appeal of Ansonia Nat. Bank*, 18 Atl. 1030, 1032, 58 Conn. 257.

Foreclosure being an application of the land to the payment of the debt, an action for the foreclosing recovery of the estate cannot be maintained until the debt is due. *Clough v. Rowe*, 3 Atl. 314, 315, 63 N. H. 562.

A bill of foreclosure is an action which takes away the equity of redemption only, and the title of the mortgagee cannot be, and is not, investigated. *Palmer's Adm'r v. Mead*, 7 Conn. 149, 152.

A policy of insurance which forbade alienation of the property insured, and contained this clause, "The commencement of foreclosure proceedings or the levying of an execution shall be deemed an alienation of the property," referred to the ordinary proceedings for the foreclosure of a mortgage upon real estate, and not to exceptional proceedings allowed by special statutes, differing in different localities. Hence it would not include proceedings to enforce a me-

chanic's lien under the provisions of New York statutes. *Colt v. Phoenix Fire Ins. Co.*, 54 N. Y. 595, 597.

Foreclosure is the appropriate remedy in equity for default in payment of money secured by mortgage. *Dows v. Chicago & S. W. Ry. Co. (U. S.)* 7 Fed. Cas. 1012, 1016.

Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the nonpayment of demands for which the mortgage stands as security, and, when the decree is had, and the property sold to satisfy it, the mortgagee has obtained all he contracted for. *Williams v. Wilson*, 70 Pac. 1031, 1032, 42 Or. 299, 95 Am. St. Rep. 745.

The remedy by *scire facias* accomplishes precisely the same thing as foreclosure. They both seek the same end, namely, the conversion of the mortgaged premises into money, and the extinguishment of the equity of redemption. The latter is called "equitable foreclosure," and the former may be called "legal foreclosure," because they are in effect the same. *Van Vranken v. Roberts*, 29 Atl. 1044, 1046, 7 Del. Ch. 16.

The use of the term "foreclosure of real estate," in an act entitled "An act to regulate the foreclosure of real estate," is somewhat indefinite, but suggests, if it does not clearly express, the general subject of the act, and is suggestive of sales by execution as well as sales under mortgages, both of which are authorized by such act. *Gillitt v. McCarthy*, 34 Minn. 318, 319, 25 N. W. 637.

#### As an action or suit.

See "Action"; "Civil Action—Case—Suit—Etc."; "Proceedings"; "Special Case"; "Suit—Suited."

#### Entry and possession.

By the statute of Massachusetts, the entry and continued possession for three years of the mortgagee constitutes a foreclosure of the mortgage. Such a foreclosure operates as a set-off of so much only of the debt as equals the value of the property. If such foreclosure was an absolute purchase or election to take the property in full satisfaction of the debt, it would be found in many instances to work great injustice, and the security in many cases would be worthless. *Hatch v. White (U. S.)* 11 Fed. Cas. 810.

#### Execution of sheriff's certificate.

A foreclosure sale is not complete until the sheriff's certificate is executed, acknowledged, and recorded. In the absence of the certificate, no title passes by the foreclosure proceedings. The word "foreclosure" means a sale completed and consummated by the execution and recording of the sheriff's certificate. *Lindgren v. Lindgren*, 75 N. W.

1034, 1036, 73 Minn. 90; *Laroque v. Chapel*, 65 N. W. 941, 942, 63 Minn. 517; *Goldtree v. McAlister* (Cal.) 23 Pac. 207, 210.

#### Expiration of time for redemption.

In Gen. St. 1878, c. 81, § 24, allowing a mortgagor, within one year after foreclosure, to recover three times the amount of certain overcharges, and for which the property was sold, unless such overplus has been paid to the mortgagor or his assignee, the word "foreclosure" means the proceeding resulting in and including the sale in fact—the striking off of the property by the sheriff—and not the expiration of the time of redemption, in the sense of a foreclosure completed and effected so as to pass the title to the purchaser. *Beal v. White*, 8 N. W. 829, 832, 28 Minn. 6.

#### Sale.

Strictly speaking, there can be no foreclosure of the mortgage until the mortgagor's interest is finally and actually barred. This would not be, at least, until the sale, and perhaps not until the confirmation of the sale. Consequently a provision in a note providing for an attorney's fee for foreclosure did not authorize a judgment for such a fee where the suit was settled before decree. *Jennings v. McKay*, 19 Kan. 120, 122.

A mortgage cannot be said to be foreclosed until the mortgagor's right of redemption is cut off. Anderson's Dictionary defines "foreclosure" as follows: "(1) Specifically, the extinguishment of the mortgagor's equity of redemption beyond possibility to recall. A mortgage is foreclosed in the sense that no one has the right to redeem it, or call the mortgagee to account under it. In no sense can the term be applied to a mortgage until sale of the property has been effected." *Goldtree v. McAlister* (Cal.) 23 Pac. 207, 210.

The term "foreclosure" has acquired a modern significance corresponding with the changes in the proceedings. Instead of being effected by the judgment itself, it is effected by the sale under the judgment. Therefore the provision in the judgment of foreclosure that the defendant and all persons claiming or to claim under him be forever barred and foreclosed of and from all equity of redemption and claim in and to the mortgaged premises becomes meaningless and redundant. *Sichler v. Look*, 29 Pac. 220, 222, 93 Cal. 600.

In Laws 1871, c. 52, § 1, providing that a mortgage containing a power of sale may be foreclosed within ten years after the maturity of such mortgage, the word "foreclosed" is to be taken in its popular sense, and the term is not applicable until a sale of the property has been effected, and a publication of the notice of sale is not sufficient.

*Duncan v. Cobb*, 21 N. W. 714, 715, 32 Minn. 460.

#### Sale under power of sale.

Bouvier defines a "foreclosure" to be a proceeding in chancery by which the mortgagor's right of redemption of the mortgaged premises is barred or closed forever. This was the meaning of the word as used in the ancient law of strict foreclosure, and when the sale under decree took its place, and a time was fixed for redemption, it was also called a foreclosure, for the right to redeem was equally barred or closed forever. But the term has a wider meaning still in our law of mortgages. Thus Perry on Trusts says: "These powers of sale in mortgage deeds do not change their character as mortgages, but the powers of sale are super-added to mortgages. It is a cumulative power of foreclosure, and, if the mortgagee does not choose to exercise the power, he may foreclose the mortgage by any of the other methods provided by law." And Jones on Mortgages lays down the rule that generally a power of sale does not affect the right to foreclose in equity, either by a strict foreclosure or by a judicial sale, or to foreclose in any way provided by statute for the ordinary foreclosure of mortgages, as by entry and possession, or by suit at law. The power is merely a cumulative remedy. It is one species of foreclosure, but it does not exclude jurisdiction in equity. Hence the term "foreclosure and sale," as used in Comp. St. p. 161, § 371, providing that a mortgage of realty shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without foreclosure and sale, does not mean a sale under a judicial decree, so that a power of sale in a mortgage is valid. *First Nat. Bank of Butte v. Bell Silver & Copper Min. Co.*, 19 Pac. 403, 410, 8 Mont. 32.

#### As transfer.

See "Transfer."

#### FORECLOSURE DECREE.

As interlocutory decree, see "Interlocutory Decree or Judgment."

In order to defeat a mortgagor's equity of redemption, the mortgagee must file a bill in equity, in which he calls upon the mortgagor to repay the money, or be forever foreclosed of his equity of redemption. The court in due course passes a decree appointing a day for the money to be paid, and declaring that, if it is not paid at or before that time, the mortgagor's right of redemption shall be forever taken away. Upon the failure to pay at the designated time, the decree is made final and absolute. This is a decree of foreclosure, and it was the or-

dinary proceeding in behalf of mortgagees before the act of Assembly which authorizes courts of equity to decree that the property be sold. The decree for foreclosure has disappeared from our practice, being entirely superseded by the more convenient decree of sale, which is, however, sometimes, though inaccurately, called a "foreclosure decree." *Hanover Fire Ins. Co. v. Brown*, 25 Atl. 989, 991, 77 Md. 64, 39 Am. St. Rep. 383.

### FORECLOSURE SALE.

As forced sale, see "Forced Sale."  
As judicial sale, see "Judicial Sale."

A foreclosure sale is but a consummation of what was begun by the mortgage conveyance. *Johnson v. Cook*, 70 S. W. 526, 96 Mo. App. 442.

### FOREGOING.

"Foregoing," as used in Tariff Act Oct. 1, 1890, par. 560, which exempts from duty, spices, vegetables, seeds, aromatics, and seeds of morbid growth, weeds, wood used expressly for dyeing, or any of the foregoing which are not edible, and are in a crude state, etc., refers to all the articles in the paragraph before enumerated. In *re Cruikshank* (U. S.) 54 Fed. 676, 677.

Where an assessment began with an alphabetical list of persons assessed, by name—22 pages—and on the next page was written the assessor's affidavit, and on the back side of the same leaf was the assessment of a certain lot, and the affidavit referred to the foregoing assessment roll, the word "foregoing" did not apply to merely what preceded the affidavit, which would have been making the statement equivalent to saying the "foregoing part of the assessment roll," but the affidavit, by verifying the roll as a whole, includes the entire roll as it stood when the affidavit was made, though a minor part of the assessment extended further back than the page containing the affidavit. *Colman v. Shattuck* (N. Y.) 2 Hun, 497, 502.

Where in the body of a statement on motion for new trial certain exhibits are referred to as "Plaintiff's Exhibit No. \_\_\_\_\_" (giving the number), "See end of statement," a certificate of the judge at the end of the statement proper, and between it and the exhibits, that "the foregoing statement on motion for a new trial has been settled and allowed by me, and is correct," covers the exhibits as well as the body of the statement. The exhibits, being referred to in the body of the statement by number, and the statement that they are at the end, are properly included within the meaning of the word "foregoing." *Sharon v. Sharon*, 79 Cal. 633, 640, 22 Pac. 26, 28.

### FOREIGN.

In a general sense, "foreign" is applied to any person or thing belonging to another nation or country. We call an alien a foreigner because he is not of the country in which we reside. In a political sense we call every country foreign which is not within the jurisdiction of the same government. In this sense, Scotland, before the union, was foreign to England, and Canada and Mexico foreign to the United States. In the United States, all transatlantic countries are foreign to us, but this is not the only sense in which it is used. It is applied with equal propriety to an adjacent territory as to one more remote. Canada or Mexico is as much foreign to us as England or Spain, and it may be laid down as a general rule that, when used in relation to countries in a political sense, it refers to the jurisdiction or government of the country. For all national purposes embraced by the federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign and independent of each other; their Constitutions and forms of government being (though republican) altogether different, as are their laws and institutions. *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 56, 8 L. Ed. 25.

### FOREIGN ATTACHMENT.

A foreign attachment is a common-law remedy to compel an appearance in a personal action. *H. B. Claffin Co. v. Weiss*, 16 Pa. Co. Ct. R. 247, 251.

Foreign attachment is a proceeding in rem, by an attachment of a nonresident's goods, with the primary object of compelling an appearance to answer the plaintiff's suit. In the custom of London, where it originated, and in our early act of 1706, it is almost exclusively a proceeding in rem. *Longwell v. Hartwell*, 30 Atl. 495, 164 Pa. 533.

Foreign attachment is a peculiar process to compel the appearance of the nonresident debtor by distress and sale of the property attached, giving him full time to appear, even after judgment and execution, and contest the demand, and even disprove the debt, within a year and a day, after security given, without entering special bail. *Fitch v. Ross* (Pa.) 4 Serg. & R. 557, 563.

The object in foreign attachment is to compel an appearance, and, when that object is obtained, the property attached is discharged; and though the seizure of the officer holds the property, and may be said to place the same in custodia legis, yet such seizure does not constitute a lien such as is made by execution process, founded on a judgment which is absolute—dependent on



no contingency or condition. *Reynolds v. Howell* (Del.) 81 Atl. 875, 876, 1 Marv. 52.

A foreign attachment is a remedy for the recovery of debts or damages arising ex contractu. It does not lie for a demand founded in tort. *Boyer v. Bullard*, 102 Pa. 555, 557.

"Foreign attachment is not purely a proceeding in rem, but, under our statutes, it is the equivalent of a summons for commencement of a personal action. There is a seizure of the defendant's goods as a mode of compelling his appearance, and they limit the effect of all judgments in attachment, whether against the defendant or his garnishee, to such property as belongs to the defendant. The judgment concludes parties and privies, but not strangers. It is not true of a judgment in attachment that it authorizes the plaintiff to seize a third party's property for the defendant's debt. Proceedings by attachment are not in rem, but are rather proceedings against the interest of the defendant and those claiming under him in the thing attached." *Megee v. Beirne*, 39 Pa. (3 Wright) 50, 62.

"A foreign attachment, although perhaps not a proceeding strictly in rem, is in the first instance an action against the non-resident debtor's property. It is a process to compel an appearance, and, until an appearance is entered, is wholly ex parte. The judgment by default binds only the funds or goods attached. No execution lies against the defendant's person or other property. Nor is the object or design of the proceeding to provide a lien for security of the debt. It is to furnish a means for its satisfaction. The property attached is in most cases, perhaps, personal, and in many of a perishable quality. The garnishee is a mere stakeholder, whose interest is in equilibrio—an involuntary litigant, sometimes, so circumstanced with respect to the subject attached as to be unable to rid himself of it. Nor is the proceeding a bar to another suit for the same debt. Whether the thing attached prove commensurate to the plaintiff's claim, or not, he may, if opportunity offer at any time, desert the attachment, in its ex parte form, and proceed by personal action; and, if the claim be realized in that form of procedure, or satisfaction be otherwise received, the attachment, of course, falls." *Biddle v. Girard Nat. Bank*, 100 Pa. 349, 356.

#### FOREIGN BILL OF EXCHANGE.

The term "foreign bill of exchange" is purely technical, and borrowed from the English law. *Evans*, p. 2, states a foreign bill to be one which is drawn by a creditor in one kingdom on his debtor in another. *Lonsdale v. Brown* (U. S.) 15 Fed. Cas. 855.

Blackstone, speaking on this subject, says that bills of exchange are foreign when

they are drawn by a person residing abroad upon his correspondent in England, or vice versa; and inland when both the drawer and drawee reside in the kingdom. 2 Bl. 467. Another writer on the same subject says that foreign bills are those which pass from one country to another; inland, those which pass between persons residing in the same country. Citing Kyd. In further illustration of the subject, the same writer observes that in Italy, Germany, and France, where the trading cities, though included within the limits of an extended government, were in effect under the distinct jurisdiction of sovereignties independent of each other, bills passing between them are considered as foreign bills. Sovereignty or jurisdiction over the subject appears to be the criterion by which to determine the character of the instrument. Previous to the adoption of our present Constitution, the several states must have been considered separate and independent sovereignties. The old articles of confederation, ex vi termini, were nothing more than a league or treaty by which so many sovereign and independent states had agreed to act together for certain specific purposes; and although, under our present Constitution, they have assumed somewhat more of a consolidated form of government as to certain national objects, yet as to all objects of internal concern their individual sovereignty remains unimpaired. It would seem correct, therefore, to consider bills between the several states as foreign. They have all the characteristics of foreign bills. They are usually sent in sets. Exchange is allowed on them, and, unless a protest is to be received as evidence of nonacceptance, the difficulty of proving the fact would very much obstruct that kind of intercourse between the states. For, except the distance, it would not be less difficult to procure evidence of such a fact from New York than London. A bill of exchange drawn by a person in Charleston on a person in New York is a foreign bill. *Duncan v. Course* (S. C.) 1 Mill, Const. 100, 102. See, also, *Buckner v. Finley*, 27 U. S. (2 Pet.) 585, 589, 7 L. Ed. 528; *Gillespie v. Hannahan*, 4 McCord, 503, 507.

A foreign bill of exchange is a bill of exchange drawn by one person, residing out of the United States, upon a resident thereof, or by a resident of one state upon a resident of another. *Phoenix Bank v. Hussey*, 29 Mass. (12 Pick.) 483, 484.

A bill of exchange made by parties residing in the state, and dated at a place therein, although in fact drawn outside the state, is correctly designated as an inland, and not a foreign, bill of exchange. *Strawbridge v. Robinson*, 10 Ill. (5 Gilman) 470, 472, 50 Am. Dec. 420.

A bill of exchange drawn by a citizen of one state on a firm in another state, and pay-

able in the latter state, is a foreign bill of exchange. *Chenoweth v. Chamberlin*, 45 Ky. (6 B. Mon.) 60, 61, 43 Am. Dec. 145.

An inland bill of exchange is one drawn and payable within this state. All others are foreign. Rev. St. Utah 1898, § 1643; Rev. St. Okl. 1903, § 3685; Rev. Codes N. D. 1899, § 4946; Civ. Code S. D. 1903, § 2261; Rev. St. Wyo. 1899, § 2423.

An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Ann. Codes & St. Or. 1901, § 4531; Negotiable Instruments Law N. D. § 129; Rev. Codes N. D. 1899, § 1054.

### FOREIGN CITIZEN.

Const. U. S. art. 3, § 2, authorizing a foreign citizen to maintain suits in the federal courts, does not include Indians. *Karrahoov. Adams* (U. S.) 14 Fed. Cas. 134, 135.

### FOREIGN COMMERCE.

Commerce is defined as the interchange of goods, merchandise, or property of any kind; trade; traffic; used more especially of trade on a large scale, carried on by transportation of merchandise between different countries, or between different parts of the same country; distinguished as foreign commerce and internal commerce. *Master Granite & Bluestone Cutters' Ass'n of Philadelphia*, 23 Pa. Co. Ct. R. 517, 520.

"Foreign commerce" is the exchange of commodities with foreign states. *Commonwealth v. Housatonic R. Co.*, 9 N. E. 547, 551, 143 Mass. 264.

When a commodity has been committed to a common carrier to be transported for a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of foreign commerce attaches thereto. *Houston Direct Nav. Co. v. Insurance Co. of North America*, 32 S. W. 889, 890, 89 Tex. 1, 80 L. R. A. 713, 59 Am. St. Rep. 17.

Foreign commerce, which is exclusively to be regulated by the United States, as provided in the federal Constitution, includes the admission of citizens and subjects of foreign nations to our shores. *Chy Lung v. Freeman*, 92 U. S. 275, 280, 23 L. Ed. 550.

Steam tugs engaged in the business of towing vessels from the Chicago river into the harbor and lake, and in bringing vessels from the lake into the river, are engaged in foreign and interstate commerce, within the meaning of the clause of the United States Constitution which gives to Congress the power to regulate foreign and interstate commerce. *Harmon v. City of Chicago*, 13 Sup. Ct. 306, 310, 147 U. S. 396, 37 L. Ed. 216.

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The act of the Legislature of Louisiana approved March 6, 1869, providing that it shall be unlawful for any person other than the master and warden to make any survey of the hatches of seagoing vessels coming to New Orleans, or to make any survey of damaged goods coming on board such vessels, or to give certificates or orders for sale of such damaged goods at auction, is not an inspection law, but, rather, a regulation of foreign commerce, within the meaning of the constitutional provision giving Congress power over the regulation of such commerce. *Foster v. Master and Port Wardens of New Orleans*, 94 U. S. 246, 247, 24 L. Ed. 122.

### FOREIGN CORPORATION.

As inhabitant, see "Inhabitancy—Inhabitant."

The term "foreign corporation," when used in a statute of a state, means a corporation not created by the laws of such state. In re Grand Lodge A. O. U. W., 1 Atl. 582, 584, 110 Pa. 613.

The term "foreign corporation," as used in Act March 14, 1853, providing that the plaintiff may have an attachment where the defendant or one of the several defendants is a foreign corporation or is a nonresident of the county, was not used in the same sense as the term "nonresident," so as to mean merely a corporation which might be without the jurisdiction of the court in the sense that a nonresident of the county was out of the jurisdiction, but meant a corporation created and existing without the state, and would not include a corporation created by the laws, and located within the state. *Boley v. Ohio Life Ins. & Trust Co.*, 12 Ohio St. 139, 143.

The term "foreign corporation" includes not only corporations organized in foreign states or countries, but also associations in foreign countries having the attributes of corporations, though, by statute of the state where they are organized, it is specially provided that they shall not be considered as corporations. *Liverpool Ins. Co. v. Massachusetts*, 77 U. S. (10 Wall.) 566, 573, 19 L. Ed. 1029.

A foreign corporation is one created by the laws of some other state or country. *Sand. & H. Dig. Ark. 1893*, § 7214.

The term "foreign corporation," as used in the chapter relating thereto, shall mean a corporation, association, or organization which has been established, organized, or chartered under the laws of another state or of a foreign country. Rev. Laws Mass. 1902, p. 1216, c. 126, § 1.

In the chapter relating to insurance, "foreign," when used without limitation, in

cludes all those formed by authority of any other state or government. Rev. Laws Mass. 1902, p. 1120, c. 118, § 1; Shannon's Code Tenn. 1896, § 3274; Civ. Code Ala. 1896, § 2576.

The word "foreign," when used in the chapter relating to insurance companies, means companies not incorporated by this state. Rev. St. Me. 1883, p. 459, c. 49, § 86.

The word "foreign," whenever used in any law of the commonwealth relating to insurance, used without limitation, includes all those incorporated or formed by authority of any other state or government. Ky. St. 1903, § 751.

The word "domestic," when applied to a corporation, company, or copartnership, shall mean organized under the laws of this state; and the word "foreign," when so applied, shall mean not organized under the laws of this state. V. S. 1894, 4164.

#### **Incorporations by United States.**

Act June 7, 1879, declaring that hereafter no foreign corporation, except certain companies, shall maintain an office within the state without first having obtained a license, means a corporation set up or created by a foreign government. The general government, in its relation to that of the several states, cannot be considered a foreign government, in the ordinary acceptance of that term; hence a corporation created by the government of the United States cannot with propriety be called a "foreign corporation," and the term, as implied in the act, is not used to contradistinguish corporations created directly by state authority from all others. Commonwealth v. Texas & P. R. Co., 98 Pa. 90, 93, 100.

In a statute making foreign corporations liable to attachment, the term meant such corporations as were formed under the laws of another government than that of a state which enacted the law, as well as those formed under the laws of another state or country, and would therefore include national banking corporations, though they are clearly not foreign corporations, within the common import of those terms. Bowen v. First Nat. Bank (N. Y.) 34 How. Prac. 408, 411.

Under the definitions of foreign corporations as given in Rev. St. 1876, p. 373, as those not incorporated or organized in the state, and in 2 Rev. St. 1876, p. 281, as corporations created by or under the laws of any other state, government, or country, a corporation incorporated by act of Congress is a foreign corporation. Daly v. National Life Ins. Co., 64 Ind. 1, 6.

A national bank is a foreign corporation, within the meaning of that term in section 227 of the Code of Procedure, so that its property is liable to attachment in an action against it to the same extent as that of all

foreign corporations generally. Cooke v. State Nat. Bank (N. Y.) 3 Abb. Prac. (N. S.) 339.

#### **FOREIGN COUNTRY.**

In construing the clause of the tariff act of July 24, 1897, c. 11, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626], declaring that certain duties shall be collected on all articles imported from foreign countries, Mr. Justice Brown, in the first Insular Case, quotes Mr. Chief Justice Marshall's definition of a "foreign country" as being one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States; and, after an extended examination of the judicial and political precedents, he holds that the island of Porto Rico, after its cession to the United States by the treaty with Spain which was proclaimed at Washington, April 11, 1899, was no longer a foreign country, within the meaning of the statute, though it had not been formally embraced by Congress within the customs union of the states. De Lima v. Bidwell, 21 Sup. Ct. 743, 746, 182 U. S. 1, 45 L. Ed. 1041 (citing The Eliza [U. S.] 8 Fed. Cas. 455; Taber v. United States [U. S.] 23 Fed. Cas. 611; The Adventure [U. S.] 1 Fed. Cas. 202).

The term "foreign" is used in various senses. Thus the different states are usually held to be foreign to each other, except as concerns international relations. Sister state judgments are for most purposes foreign judgments, and generally, for all purposes other than those specifically mentioned in the Constitution, our states are foreign to each other. Porto Rico is therefore a foreign country. Goetze v. United States (U. S.) 103 Fed. 72, 83.

#### **FOREIGN COURT.**

So far as the federal district courts within the state "derive their existence and jurisdiction from the Constitution and laws of the United States, they may be considered foreign, in a limited sense; but, in the exercise of their jurisdiction in the administration of justice, they may properly be considered as domestic courts. It is unquestionably true that courts of the United States, though held within this state, derive their existence and jurisdiction from the Constitution and laws of the United States, and not from the Constitution and laws of the state. Still, in the exercise of their jurisdiction, they administer the laws of the state; their juries are citizens of the state; the offices of their clerks are within the state. The judgments or decrees of these courts held within the states have never, so far as I am advised, been treated and held by our state courts as foreign judgments. Our state courts recognize and enforce the liens of the judgments of these courts when asked to do so. The judgments of foreign courts do not

constitute liens on land within this state. The jurisdiction of the Circuit and District Courts of the United States held within this state, as a general rule, is local, and does not extend beyond the limits of the state. There may be some exceptions to this rule, but, if there are any, there are very few. In many cases they exercise jurisdiction over the same subjects as our state courts in actions real and personal, as well as in some cases of crimes. Greenleaf, in his first volume upon Evidence (section 490), says the reciprocal relations between the national government and the several states are not foreign, but domestic. Hence the courts of the United States take judicial notice of all public laws of the respective states whenever they are called upon to consider and apply them." It is held that judgments of the United States District Court within the state are not judgments of a foreign court, within the provisions of the Code in reference to proof thereof by attested copy. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 416.

Under the thirteenth article of the Constitution of Iowa, judicial proceedings, claims, and rights in the territorial courts were continued on the organization of the state, as though no change had taken place in the government; and independent of the Constitution, *ex necessitate rei*, the territorial courts and the state courts were bound together. Proceedings commenced in the former were conducted to final judgment in the latter. The records of the state court were generally entered in the same books and preserved in the same office, under the charge and keeping of the same clerks, and were alike subject to the inspection of the citizens. Accordingly the territorial courts must be considered as domestic rather than foreign, and their records given of the same effect as the records of the state courts. *Wright v. Marsh* (Iowa) 2 G. Greene, 94, 100.

#### FOREIGN DEALER.

Act May 24, 1887 (P. L. 185), entitled "An act to provide for licensing and taxing foreign dealers in merchandise," has no application to the case of a resident of the state dealing in merchandise of foreign manufacture. The word "foreign" qualifies "dealer," and the language is "foreign dealers," not "dealers in foreign merchandise." *Sansford Borough v. Brode*, 7 Pa. Co. Ct. R. 221, 223.

#### FOREIGN EXECUTORS AND ADMINISTRATORS.

Foreign administrator as personal representative, see "Personal Representative."

"Foreign executors and administrators," as used in a statute entitled "an act to au-

thorize foreign executors and administrators with the will annexed to convey real estate in pursuance of power contained in the will," means executors and administrators in other of the states and territories of the United States, and not executors and administrators of other nations. The word "foreign" is frequently used as the opposite of "domestic." *Calloway v. Cooley*, 32 Pac. 372, 375, 50 Kan. 743.

By the phrase "foreign executor" the courts never meant the mere nonresidence of the individual holding the office, but the foreign origin of the representative character. That is the sole product of the foreign law, and, depending upon it for existence, cannot pass beyond the jurisdiction of the origin. *Flandrow v. Hammond*, 43 N. Y. Supp. 143, 13 App. Div. 325. It is not the residence of the executor out of the state which makes him a foreign executor, but the creation of his official character under and by force of a law foreign to our own. *Hopper v. Hopper*, 125 N. Y. 400, 403, 26 N. E. 457, 12 L. R. A. 237.

#### FOREIGN FACTOR.

A foreign factor is one who resides in a different state or country than his principal. *Ruffner v. Hewitt*, 7 W. Va. 585, 604, 606.

#### FOREIGN FISHING.

"Foreign fishing," as used in the Revised Laws, fixing a duty on the products of foreign fishing, does not include the oil from whales captured by an American vessel and extracted by its crew, though it is afterward owned and brought in port by persons in a foreign service. *United States v. Burdett* (U. S.) 24 Fed. Cas. 1300.

#### FOREIGN GOODS, WARES, AND MERCHANDISE.

"Foreign goods, wares, and merchandise," as used in Act March 28, 1799, declaring that no person licensed as a peddler shall sell any "foreign goods, wares, and merchandise" in any part or place of Philadelphia and vicinity, means all goods not the growth, product, or manufacture of the state. Appeal of *Brinton*, 18 Atl. 1092, 1094, 132 Pa. 69.

The act of April 16, 1840, imposing a penalty for the hawking or peddling of foreign goods in that state, does not apply to the peddling of candy made in the state of New York. The word "foreign," as there used, does not include goods made in the United States, but refers to those of a foreign country. *Hart v. Willetts*, 62 Pa. (12 P. F. Smith) 15, 16.

**FOREIGN GOVERNMENT.**

"We do not regard the government of the United States as a foreign government. It is true, it is a government independent of the state government, moving in a different sphere from that of the state government, and with a different class of powers, distinct, but not identical, and, operating upon and within the circle of its powers, supreme over the same constituents." *Gilmer v. Lime Point*, 18 Cal. 229, 255.

The civilized tribes of Indians in the Indian Territory, while under the general supervision and control of the United States, have local governments of their own; and, besides the principal and subordinate chiefs, they have councils which correspond in many respects to the Legislatures of the states. They also have simple codes of laws, and courts to enforce them. These local governments come within the meaning of foreign governments, as used in Rev. St. art. 2250. "Foreign" signifies that which belongs to another; that which is strange. Every nation is foreign to all the rest, and the several states of the American Union are foreign to each other, with respect to their municipal laws. *Cowell v. State*, 16 Tex. App. 57, 61.

**FOREIGN JUDGMENT.**

Judgments of the federal District and Circuit Courts, rendered within a state, are not considered, in reference to that state, as foreign judgments. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 417.

A judgment of one state is a foreign judgment in another state. *Karns v. Kunkle*, 2 Minn. 313, 317 (Gil. 268, 272).

A judgment of a court of record in another state is not to be regarded as what is technically called in common law a "foreign judgment"—the mere *prima facie* evidence of a debt. But it has such faith and credit as in the state where rendered, and is, as there, deemed conclusive evidence of a debt. And hence it follows that the statute for the limitation of actions on contracts has no application to a foreign judgment. *Gulick v. Loder*, 13 N. J. Law (1 J. S. Green) 68, 70, 23 Am. Dec. 711.

**FOREIGN KINGDOM.**

A foreign kingdom is defined as one under the dominion of a foreign prince, so that Ireland or any other place subject to the crown of England cannot be called foreign, though to some purposes they are distinct from the realm of England. *King v. Parks* (N. Y.) 19 Johns. 375, 377.

**FOREIGN LAWS.**

A law is foreign when it is enacted by a sovereignty politically distinct and terri-

torially separate from that which gives force and sanction to the *lex fori*. It is, therefore, *ex vi termini*, foreign, outside the territorial limits of the sovereignty which forms its source, and ceases to have any validity *ex proprio vigore*. 2 Story, Conf. Laws (8th Ed.) § 20. It is a principle of universal application, recognized in all civilized states, that the statutes of one state have, *ex proprio vigore*, no force or effect in another. *People v. Martin*, 76 N. Y. Supp. 953, 955, 38 Misc. Rep. 67 (citing *Marshall v. Sherman*, 42 N. E. 419, 148 N. Y. 9, 34 L. R. A. 757, 51 Am. St. Rep. 654).

The statute laws of the other states of the Union are foreign laws, within the meaning of the rule that ignorance of the law of a foreign government is ignorance of fact. *Bank of Chillicothe v. Dodge* (N. Y.) 8 Barb. 233, 238.

British statutes, since the charter to William Penn, are, as to Pennsylvania, foreign laws. *Jones v. Maffet* (Pa.) 5 Serg. & R. 523, 532.

Under a Code provision that foreign laws and judgments must be authenticated under the court seals of their respective states, it is held that the term "foreign" is applicable not only to countries outside of the United States, but also to different states within the United States, so far as their relation to each other is concerned. *Seaboard Air Line Ry. Co. v. Phillips*, 43 S. E. 494, 496, 117 Ga. 98.

**FOREIGN MARKETS.**

The term "foreign markets," in Act April 21, 1759, in reference to the exportation of bad lumber to foreign markets, means markets outside the state. "A country governed by the same King would not, strictly speaking, be a foreign country; and yet, without doubt, an exportation to the British West India Islands must have been considered within the provision of the act, because the principal markets for staves, etc., were in those islands, and yet they were subject to the same King as Pennsylvania. Construing the word 'foreign' with greater latitude, it might extend to all countries beyond sea, without considering whether subject to the same sovereign or not; and, carrying its signification to its utmost extent, it might include all countries and governments other than the province of Pennsylvania, wherever situate." *Shuster v. Ash* (Pa.) 11 Serg. & R. 90, 91.

**FOREIGN MINISTER.**

A foreign minister is a minister who comes from another jurisdiction or government. *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 56, 8 L. Ed. 25.

**FOREIGN MISSIONS.**

A testator devised a portion of his estate to the home and foreign missions of the Baptist Church, and it was contended that this bequest was too indefinite to be valid; but it was held that at the time of the execution of the will, and for many years before that time, there existed a distinct and well-defined branch of endeavor, known among Baptists as "home missions." This included in its area of church work the whole of the United States and its territories. Another branch, equally well known and established, was called "foreign missions." This included all foreign parts outside of the United States. Irrespective of their acceptance among Baptists, "home missions" and "foreign missions" are, in common parlance, in all churches, to have substantially the same meaning. *Bruere v. Cook*, 52 Atl. 1001, 1004, 63 N. J. Eq. 624.

**FOREIGN NATION OR STATE.**

The different states of the United States are foreign to each other. *Gillespie v. Hanahan* (S. C.) 4 McCord, 503, 507.

The several states of the Union are, as to their local governments and municipal regulations, distinct from each other; but, as regards their national concerns and exterior relations, they compose but one government. *King v. Park* (N. Y.) 19 Johns. 875, 877.

The term "foreign nations," as used in a statement of the rule that the laws of foreign nations should be proved in a certain manner, should be construed to mean all nations and states other than that in which the action is brought; and hence one state of the Union is foreign to another, in the sense of that rule. *Allen v. Watson* (S. C.) 2 Hill, 319, 320.

Within the rule that the courts of one country cannot take judicial notice of the laws of another state or country, the respective states of the United States are, in relation to each other in this particular, to be considered as foreign nations. *Brackett v. Norton*, 4 Conn. 517, 521, 10 Am. Dec. 179. *Contra*, *Owings v. Hull*, 84 U. S. (9 Pet.) 607, 625, 9 L. Ed. 246.

The term "foreign states," as used in Const. U. S. art. 3, § 2, providing that the judicial power of the United States extends to controversies between a state, or citizens thereof, and foreign states, citizens or subjects, cannot be construed to include the Cherokee Indian Nation, though the Cherokees are not a state of the Union. In general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other.

But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions, which exist nowhere else. The Indian Territory is admitted to compose a part of the United States. They are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed on our own citizens. They acknowledge themselves to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility. *Cherokee Nation v. Georgia*, 30 U. S. (5 Pet.) 1, 15, 8 L. Ed. 25.

**FOREIGN NAVIGATION.**

Ships are engaged in foreign navigation when passing to or from a foreign country, and in domestic navigation when passing from place to place within the United States. *Rev. St. Okl.* 1903, § 4186; *Rev. Codes N. D.* 1899, § 8470; *Civ. Code S. D.* 1903, § 387.

**FOREIGN PATENT.**

*Rev. St. U. S.* § 4887 [U. S. Comp. St. 1901, p. 8382], which provides that every patent for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, evidently uses the term of the foreign patent to define the term of the domestic patent, since Congress could not have intended to grant a patent for an indefinite term or for an uncertain and undefined duration, which would be the case if its duration could not be ascertained by referring to the foreign patent, or were to depend on any events occurring subsequently to the issue of the foreign patent. *Henry v. Providence Tool Co.*, 3 Ban. & A. 501 (cited in *Paillard v. Bruno*, 29 Fed. 864, 865).

In order to constitute a foreign patent, within the meaning of *Rev. St. U. S.* § 4887 [U. S. Comp. St. 1901, p. 8382], which will limit the term of a subsequent American patent, it is not essential that the foreign grant shall be the equivalent of a patent granted by the United States, either as to the length of the term, or the breadth of the exclusive rights secured to the grantee; but it is sufficient if such exclusive privilege as amounts to a substantial monopoly is granted for some definite term, according to the laws of a certain country. *Atlas Glass Co. v. Si-*

monds Mfg. Co., 102 Fed. 643, 647, 42 C. C. A. 554.

### FOREIGN PAUPERS.

St. 1837, c. 237, § 3, providing that a certain fund shall be appropriated for the support of foreign paupers, means all those persons coming within the general provisions of the poor laws, as persons standing in need of relief, who are incapable of supporting themselves, who have no parents or other kindred liable by law for their support, and who have no legal settlement in any state, town, or district in the commonwealth. Opinion of the Justices, 42 Mass. (1 Metc.) 572, 573.

### FOREIGN PLACE.

Act July 6, 1812, c. 129, providing that, if any vessel owned in whole or in part by a citizen of the United States shall depart from any port of the United States for any foreign port or place without giving a certain bond, the vessel and cargo shall be forfeited, means a port within the sovereignty of a foreign nation. The Eliza (U. S.) 8 Fed. Cas. 455, 456.

The term "foreign place," within the meaning of the embargo act, making it unlawful to import into the United States goods, wares, and merchandise of British growth and manufacture, from any foreign port or place whatever, does not include the ocean; and therefore the act of American sailors in taking possession on the ocean of an English ship and cargo captured by the French, and bringing it into an American port, is not in violation of the statute. The Adventure (U. S.) 1 Fed. Cas. 202.

### FOREIGN PLEA.

A "foreign plea" may be defined to be where the question is made between the same parties in another case, or between the creditor and a third party bound to pay the same debt, and generally where by the pleadings the question of satisfaction by the arrest under the ca. sa. comes in collaterally. Mazyck & Bell v. Coll (S. C.) 3 Rich. Law, 235, 237.

### FOREIGN PORT.

In Act July 6, 1812, c. 129, providing that, if any vessel owned in whole or in part by a citizen of the United States shall depart from any port of the United States for any foreign port or place without giving a certain bond, the vessel and cargo shall be forfeited, a "foreign port" means a port within the sovereignty of a foreign nation. The Eliza (U. S.) 8 Fed. Cas. 455, 456.

"Foreign port or place," as used in 2 N. B. L. 381, 382, giving justices' courts in New

York jurisdiction of all actions for assault and battery committed by any master or commander of a ship in the merchant service, or any officer, seaman, or mariner in any foreign port or place, means, *ex vi termini*, a port or place without the United States. King v. Parks (N. Y.) 19 Johns. 375, 376.

The term "foreign port," in the federal statute prohibiting the importation of goods from foreign ports, was construed to mean a port within the dominions of a foreign sovereign, and without the dominions of the United States, and was held to include the port of Castine, though within the territory of the United States, during the time of its occupation by the conquest of the enemy, as during such time the territory passed under the temporary allegiance and sovereignty of the enemy, and the sovereignty of the United States was during the same period suspended, and the laws of the United States could no longer be rightfully enforced therein. United States v. Haywood (U. S.) 28 Fed. Cas. 240, 246.

### As port in another state.

A foreign port, within the meaning of the rule that the master of a vessel may bind the owner while in a foreign port for repairs and supplies, includes ports in states other than those of the state where the vessel belongs. The Lulu, 77 U. S. (10 Wall.) 192, 200, 19 L. Ed. 906; The Lulu (U. S.) 15 Fed. Cas. 1107, 1108; The Kalorama, 77 U. S. (10 Wall.) 204, 212, 19 L. Ed. 941; The General Smith, 17 U. S. (4 Wheat.) 438, 443, 4 L. Ed. 609; Burke v. The M. P. Rich (U. S.) 4 Fed. Cas. 741, 743; The Nestor (U. S.) 18 Fed. Cas. 9. Thus Jersey City, when considered in reference to a New York vessel, is a foreign port. The Sarah J. Weed (U. S.) 21 Fed. Cas. 458. And Charleston, S. C., is a foreign port to New York. The William & Emmeline (U. S.) 29 Fed. Cas. 1288; Burke v. The M. P. Rich (U. S.) 4 Fed. Cas. 741, 744; Leddo v. Hughes, 15 Ill. (5 Peck) 41, 44; Stearns v. Doe, 78 Mass. (12 Gray) 482, 485, 74 Am. Dec. 608; Negus v. Simpson, 99 Mass. 388, 393.

A foreign port, in the sense of the maritime law, is one without the state where the vessel belongs and her owner resides. The Canada (U. S.) 7 Fed. 119, 124.

The term "foreign port," within the rule that the master of a vessel may hypothecate for supplies while in foreign ports, includes all ports in every state in which the owner does not reside, or in which he has no agent; and therefore a vessel belonging to the port of Richmond may be hypothecated in New York, if the owner has no agent at the latter port. Selden v. Hendricksen (U. S.) 21 Fed. Cas. 1029.

A "foreign port or place," under the statute, means a port or place exclusively within the sovereignty of a foreign nation. *Bigley v. New York & P. R. S. S. Co.* (U. S.) 105 Fed. 74, 76 (citing *The Eliza* [U. S.] 8 Fed. Cas. 455).

A "foreign port," as used in a statute relative to assignments or hypothecations of vessels at sea or in foreign ports, does not include the ports of a sister state. *Cole v. White*, 28 Wend. 511, 517.

**As determined by presence of owner of vessel.**

"Foreign port," within the meaning of the rule of law that, for repairs done or supplies furnished to a maritime vessel in a foreign port, the law will, if there be no special contract, imply a lien on the vessel, means any port where the vessel happens to be, the owner being elsewhere. It is the presence of the owner in the port which determines the question whether the port is foreign or is a home port; the home port, in this sense, meaning not necessarily the vessel's chartered home or the place of the domicile, but any port or place where the owner should happen to be with the vessel. *Case v. Woolley*, 36 Ky. (6 Dana) 17, 27, 32 Am. Dec. 54 (citing *St. Jago de Cuba*, 22 U. S. [9 Wheat.] 409, 417, 6 L. Ed. 122).

**Port on Great Lakes.**

"Foreign port," as used in Acts 1790, § 5, prescribing the kind of contract to be entered into between a master and mariner of a vessel bound to a port in any other than an adjoining state, or to any foreign port, does not include a tug engaging in towing vessels between Lake Erie and Lake Huron. *The John Martin* (U. S.) 13 Fed. Cas. 694, 696.

**Porto Rico.**

The primary and ordinary meaning of the term "foreign" is belonging to or relating to another sovereignty or dominion, as in the expressions "foreign law," "foreign commerce," "foreign minister," "foreign territory." In this sense of the word, it is evident that Porto Rico, since the cession of the land by Spain to the United States, is not a foreign port, as it is subject solely to the sovereignty and dominion of this country. The term "foreign" is familiarly used, also, in a more restricted sense in our interstate law, in such phrases as "foreign corporation," "foreign divorce," "foreign assignment," "foreign judgment," etc.; but the word, even in this use of it, still retains its primary significance, and refers to the independent jurisdiction and authority of the several states over the subject-matter referred to. In the same sense, vessels belonging to citizens of another state are often termed "foreign vessels," and are treated

as such in the federal courts in the application of the maritime law as respects maritime liens; and, conversely, supplies furnished in a different state from that of her owner's residence (i. e., not in the home port) are treated as supplied in a foreign port. This designation of ports of other states as foreign ports originated in colonial times, when the colonial governments were independent of each other, and the law has remained unchanged in that regard between the states since the Union, under the Constitution. *Bigley v. New York & P. R. S. S. Co.* (U. S.) 105 Fed. 74, 76.

**FOREIGN RAPE OIL.**

A mixture of hemp and rape oil is not foreign refined rape oil, within the meaning of a contract of sale by sample of such an article. *Nichol v. Godts*, 10 Exch. 191, 193.

**FOREIGN SHIP.**

See "Foreign Vessel."

**FOREIGN SUBJECT.**

Const. U. S. art. 3, § 2, authorizing foreign subjects to maintain actions in the federal courts, does not include Indians. *Karrahoo v. Adams* (U. S.) 14 Fed. Cas. 134.

**FOREIGN TERRITORY.**

Territory of the United States which by conquest and military occupation is in possession of a public enemy is to be regarded as foreign territory, within the meaning of the revenue laws, and therefore goods brought into such territory are not subject to United States duties. *United States v. Rice*, 17 U. S. (4 Wheat.) 248, 253, 4 L. Ed. 562.

**FOREIGN TICKET.**

What is denominated a foreign ticket for transportation on a railroad is a ticket purchased beyond the limits of the state, and from the agents of some connecting railway in another state. *Humphries v. Illinois Cent. R. Co.*, 12 South. 155, 156, 70 Miss. 456.

**FOREIGN TRADE.**

The term "foreign trade," in Rev. St. U. S. §§ 2513-2514, which provide that certain materials necessary for the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade may be imported in bond, and that, on proof of the use of such materials for such purpose, no duties shall be paid thereon, means the carrying trade between the United States and foreign ports, and does not include trade exclusively between foreign ports. Thus the exemption does not apply to a merchant vessel built



in the United States for the Japanese government, and employed by the latter for the services between Japanese ports, and not documented as an American vessel. *Russell v. United States* (U. S.) 21 Fed. Cas. 65.

The term "foreign trade," in 17 Stat. 238, authorizing the importation in bond of certain materials for use in the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, and the use thereof free of duty, is used in a sense broader than its literal meaning, as it expressly includes trade between Atlantic and Pacific ports of the United States. The term has the same meaning in a subsequent provision in the act providing that all articles of foreign production needed for the repair of American vessels engaged exclusively in foreign trade may be drawn from bonded warehouses, free of duty, under such regulations as the Secretary of the Treasury may prescribe. *United States v. Patten* (U. S.) 27 Fed. Cas. 460.

#### FOREIGN VESSEL.

A ship in a port of the state or territory to which it belongs is called a "domestic ship." In another port it is called a "foreign ship." Rev. St. Okl. 1903, § 4167; Rev. Codes N. D. 1899, § 3471; Civ. Code S. D. 1903, § 388.

A ship in a port other than a port of the state to which it belongs is called a "foreign ship." Civ. Code Cal. 1903, § 963.

"Foreign vessel," as the term is used in the rule of the maritime law that a person furnishing supplies to a foreign vessel is entitled to a lien on the vessel, includes a vessel of the United States "in a port of any one of the United States other than that to which she belongs." *The St. Lawrence* (U. S.) 21 Fed. Cas. 185.

In the embargo act of 1808, authorizing the forfeiture of any foreign ship or vessel which shall take on board any specie, or any goods, wares or merchandise, other than the provisions and sea stores necessary for the voyage, a foreign vessel is "a vessel navigating under the flag of a foreign power, and not a vessel owned in whole or part by foreigners domiciled in the United States." *The Sally* (U. S.) 21 Fed. Cas. 242.

Embargo Act Jan. 9, 1808, § 5, declaring that if any foreign ship or vessel take on board any specie, goods, wares, or merchandise other than the provisions and sea stores necessary for the voyage, such ship or vessel, and the specie and cargo on board, shall be wholly forfeited, should be construed to mean any vessel clearing out of a port of the

United States as a foreign vessel, notwithstanding it was owned by a citizen of the United States. *The Good Catharine v. United States*, 11 U. S. (7 Cranch) 349, 3 L. Ed. 367.

#### Ownership as affecting.

The term as used in Act March 1, 1817, 3 Stat. 351, declaring that "after the 30th day of September next no goods," etc., "shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, and manufacture," etc., does not include a vessel built in Canada and owned in the United States. It includes only those which are built and owned in a foreign country. *The Mary Merritt* (U. S.) 16 Fed. Cas. 997, 998.

Whether a vessel is foreign or domestic, within the rule giving maritime lien for supplies, etc., furnished a foreign vessel, depends upon the residence of her owner, and not upon her enrollment, where the two are different. *The Albany* (U. S.) 1 Fed. Cas. 288.

An omission in the registry and enrollment of an American vessel does not make her a foreign vessel. *Fox v. Paine* (U. S.) 9 Fed. Cas. 642.

#### FOREIGN VOYAGE.

Within the meaning of Coasting and Fishing Act Feb. 18, 1793, c. 8 (1 Stat. 308), forbidding vessels of the United States licensed for the fisheries to proceed upon a foreign voyage, a foreign voyage is a voyage where the vessel departs from the United States for a foreign port with an intent there to engage in trade, and without an intent to seek employment in the fisheries. *The Three Brothers* (U. S.) 23 Fed. Cas. 1162. A fishing vessel which merely touches at a foreign port for the purpose of obtaining supplies is not engaged in a foreign voyage, within the meaning of such section. *The Ocean Spray* (U. S.) 18 Fed. Cas. 558, 559.

"Foreign voyage," as used in Acts 1803, c. 62 (2 Story's Laws, 883; 2 Stat. 203, c. 9), providing that, before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs a list, etc., does not include a whaling voyage. A "foreign voyage" means, in the language of trade and commerce, a voyage to some port or place within the territory of a foreign nation. The terminus of a voyage determines its character. If it be within the limits of foreign jurisdiction, it is a foreign voyage, and not otherwise. Therefore whaling voyages, or voyages in the bank or other cod fisheries, are not foreign.

voyages, although in such a voyage the vessel may sometimes touch at a foreign port, because the ocean is deemed a common highway to all nations, and foreign to none, and such voyages are emphatically voyages on the ocean. *Taber v. United States* (U. S.) 23 Fed. Cas. 611.

### FOREIGN WATERS.

"Foreign waters," as the term is used in Rev. St. U. S. § 4370 [U. S. Comp. St. 1901, p. 2983], which excepts from the penalty therein imposed against foreign tugboats towing vessels of the United States, in cases where the towing is in whole or in part within or upon foreign waters, means waters belonging to another nation or country—belonging to or subject to another jurisdiction—and the term would include the waters in the Straits of Juan de Fuca, which are north of the boundary line between the United States and Great Britain, though the treaty of June 15, 1846, secures to each nation the right of free navigation over all the waters of the straits. *The Pilot* (U. S.) 50 Fed. 437, 439, 1 C. C. A. 523 (reversing 48 Fed. 319).

### FOREIGN WILL.

Laws 1830, c. 320, relating to the proof of foreign wills, means such wills as could only be proved abroad, because the witnesses reside abroad. *Isham v. Gibbons* (N. Y.) 1 Bradf. Sur. 69, 76 (cited and approved in *Russell v. Hartt*, 87 N. Y. 19, 24).

### FOREIGNER.

"Foreigners," as used by a testator in founding a school for 150 boys born or for the most part brought up in the town or parish of T., and directing that, if that number could not be filled up, the want should be supplied with the children of foreigners, and those foreigners only to be admitted with the assent and allowance of such 10 householders of the town as should be most in the subsidy books, meant children who had not been born, or for the most part brought up, in the town or parish of T. *Attorney General v. Earl of Devon*, 15 Sim. 198, 207.

"Foreigner," as used in Act Md. Dec. 19, 1791, § 6, providing that any foreigner may, by deed or will, take and hold lands within the territory of Columbia, cannot be construed to mean a person born in a foreign country, who has become a citizen of the United States, for he is no longer a foreigner. *Spratt v. Spratt*, 26 U. S. (1 Pet.) 343, 349, 7 L. Ed. 171.

In Spain foreigners are divided into two classes—the domiciliated and the transient—and there is an important difference between the rights, duties, and obligations of the

two classes. There are various modes by which a foreigner may become or be regarded as domiciliated—as, for instance, by naturalization; by being born in the kingdom; by being converted there to the holy Catholic faith; by establishing a domicile, obtaining the right of residence in some settlement, marrying a native woman, and domiciliating himself in the kingdom; and among other modes of domiciliating himself is that of attaching himself to the soil by purchasing and acquiring real property and possession. The domiciliated foreigner is regarded as a subject, and, as such, he must take the oath of allegiance; renouncing foreign protection and any relation or civil subjection to his own country. He is in the condition of a native citizen, and is, as a general rule, entitled to the same rights, and to the like charges and obligations. A transient foreigner is defined to be one who visits the country without the intention to remain, and his rights, especially with reference to real property, are not so easily comprehended. He is exempted from some of the charges to which the domiciliated foreigner, in the capacity of a citizen, is subjected, but he labors under the most onerous restrictions. He cannot sell goods by retail, nor engage in the exercise of any liberal art or mechanical employment. He cannot employ himself as a banker, shopkeeper, carpenter, wigmaker, tailor, shoemaker, architect, painter, or surgeon, veterinary or otherwise, nor even act as a servant to a Spanish subject, without express license from the King. But a foreigner of the transient class may sell goods by wholesale, or act as a factor, charged with certain affairs, or in the prosecution of suits in relation to these and other matters. *Yates v. Iams*, 10 Tex. 168, 169.

### FOREMAN.

See "Mine Foreman."

"The word 'foreman' is generally understood to mean a laborer with power to superintend the labor of those working with him." *Baldwin v. St. Louis, K. & N. Ry. Co.*, 25 N. W. 918, 920, 68 Iowa, 37.

A foreman is ordinarily a fellow workman. A chief engineer, who had general charge of the engine room and freezing department of an ice and refrigerating company, in which capacity he gave orders to the men in that department, and had authority to engage men for short jobs in the manager's absence, is merely the foreman of that room or department. *Prevost v. Citizens' Ice & Refrigerating Co.*, 40 Atl. 88, 89, 185 Pa. 617, 64 Am. St. Rep. 659.

A "foreman" is one who takes the lead in the work, and may or may not have authority over his fellow workmen; and because he takes the lead, and points out the

work to be done, it does not necessarily follow that he stands in the place of the master. *Ohio River & C. Ry. Co. v. Edwards* (Tenn.) 76 S. W. 897, 901; *Allen v. Goodwin*, 21 S. W. 760, 761, 92 Tenn. 385.

The term "foreman" does not imply, *ex vi termini*, that it was the duty of the person so designated, or that he had the power, simply as foreman of a gang of laborers, to employ the laborers, or any of them, over whom he acted as foreman. *Bonnell v. State*, 64 Ind. 498, 504.

**As laborer or operative.**

See "Laborer"; "Operative."

**Manager synonymous.**

See "Manager."

**FOREMAN GRAND JURY.**

Where an indictment is indorsed: "A true bill. [Signed] H. C. Gill, Foreman Grand Jury"—it is sufficiently indicated that Gill was foreman of the grand jury. The preposition "of," in designating the title, is not necessary, but is implied. *State v. Smith*, 38 La. Ann. 301, 303.

**FORESEEN.**

See "Reasonably Foreseen."

Contemplate distinguished, see "Contemplate."

A statute providing that the tenant of an estate shall not be entitled to abatement for accidents, etc., if it is stipulated in the contract that the tenant shall run all the chances of foreseen and unforeseen accidents, means those which could have been foreseen as likely to happen. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 973, 120 U. S. 707, 30 L. Ed. 776.

**FORESIGHT.**

See "All Possible Care, Skill, or Foresight."

**FOREST.**

The term "forest," as used in an act relating to forest fires, shall not be held to include an area of timber land or brush land of less than 50 acres in extent, unless such said area shall, by proximity to other timber land, be liable to convey fire to an area of brush land or timber land containing at least 50 acres. *P. & L. Dig. Laws 1897, Pa. vol. 3, col. 327, § 16.*

**FOREST PRODUCTS.**

Under Pub. Act 1885, No. 153, requiring forest products to be assessed wherever they

may be, such property as logs, lumber, timber, poles, ties, etc., are included, but not standing and growing timber. *Fletcher v. Alcona Tp.*, 40 N. W. 36, 88, 72 Mich. 18.

**FORESTALLING.**

"Forestalling," as the term was used in the common law, meant the buying or contracting for any merchandise or victual on the way to market, or persuading persons from bringing their goods or provisions to market, so as to make the market dearer to the fair trader. *Barton v. Morris* (Pa.) 10 Phila. 360, 361.

**FOREVER.**

See "Children Forever."

The use of "forever" in a will devising tenements forever, indicates that the testatrix had in mind a permanent estate. *McNally v. McNally*, 49 Atl. 699, 700, 23 R. I. 180.

The word "forever," in Code Prac. art. 243, prescribing the oath in attachment suits, and which requires the creditor to show that his debtor is on the eve of leaving the state forever, etc., is equivalent to the word "permanently," in article 244, enumerating the cases of attachment, one of which is that the debtor is about leaving the state permanently; and therefore an affidavit which states that the debtor is about to leave the state permanently is sufficient. *Sawyer v. Arnold*, 1 La. Ann. 315, 316.

A deed conveying all the "trees and timber standing and growing on the described close forever," includes not only the trees and timber growing at the date of the conveyance, but which might thereafter be growing on the close. *Clap v. Draper*, 4 Mass. 266, 267, 3 Am. Dec. 215.

"Forever," as used in a deed conveying certain land in consideration of a certain rent for the term of 107 years, and after the expiration of such term, which was 121 years from the time of the first entry of the land, the full yearly value of the land with its improvements should be fairly estimated, and a moiety of what it exceeds the last-mentioned rent should be added thereto and become a new rent, to be paid "forever," and in like manner the like proceeding should be renewed at the expiration of every like term of 121 years forever after, implies a perpetuity. *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262, 264.

The word "forever" in a deed reciting that the grantor for himself, his heirs and assigns, covenanted, promised, and agreed that the house on the lot adjoining should be forever thereafter restricted from having any building or part of a building attached to

said message thereon erected of a greater height than 10 feet from the surface of the yard, is not one appropriate to the limited existence of a house or other building, but to the durability of land. The expression, if intended only to restrict while the then house stood, is scarcely less awkward than, if intended to restrict only during the life of the first grantee, the grantor had said, "and during the life of the grantor and the grantor and his assigns should be forever thereafter restricted." The word "forever" is emphatically expressive of a continuance beyond the duration of a life or the existence of an artificial structure. *Landell v. Hamilton*, 34 Atl. 663, 665, 175 Pa. 327, 84 L. R. A. 227.

#### As creating estate in fee simple.

In a will the term "forever" is not technical, and though in some positions it has due effect in the formation of a fee simple, its influence is regulated by its connection. In *Whiting v. Wilkins*, 1 Bulst. 219, the devise was to one and his younger son forever, and after his decease the remainder to his heir male forever; and in *Baker v. Wall*, 1 Ld. Raym. 185, the devise was to an eldest son, to him and his heirs male, forever, and in *Nanfan v. Legh*, 7 Taunt. 85, the words were to his son "J. and to his heirs lawfully begotten forever"—yet in these cases the words did not prevent or impede the creation of an estate tail. *Ewan v. Cox*, 9 N. J. Law (4 Halst.) 10, 14.

When added to a devise of lands, the word "forever" is sufficient to create an estate of inheritance. *Hitch v. Patten* (Del.) 16 Atl. 558, 559, 561, 8 Houst. 384, 2 L. R. A. 724.

"Forever," as used in a deed of conveyance, conveying land to a certain person forever, is not equivalent to "heirs and assigns," and will not impart inheritable qualities to the estate. *Dennis v. Wilson*, 107 Mass. 591, 593.

The terms "forever and absolutely" in a devise of a testator's house to his wife characterize the quality of the estate which the testator devised, and merely show an intention to give an absolute fee, as distinguished, for instance, from a life estate, or from some other qualified fee, and cannot be held to devise something which the testator had no right to give. Therefore such a provision is not inconsistent with the widow's right of dower, for the reason that the testator had no control over the dower, and could not dispose of that by will any more than he could have disposed of a right of a mortgagee of the property. *Fenton v. Fenton*, 71 N. Y. Supp. 1083, 1088, 85 Misc. Rep. 479.

#### As until changed by law.

In Act Jan. 24, 1855, authorizing the relocation of the county seat of Keokuk county,

and providing for an election for the purpose of determining the place of the county seat, and that "whichever place shall receive the greatest number of votes cast at said election shall be and remain forever afterwards the county seat of said county," "forever" should be construed to mean that the place selected as the county seat under that law should remain the county seat until changed by law, and not that the location of the county seat under that law would have the effect of locating it forever, and that the location thereof was not subject to change, since the right to remove county seats is an attribute of the lawmaking power, and, notwithstanding the Legislature in never so strong language provided against any subsequent legislation on that subject, the General Assembly might at any time provide for a new vote to be taken for the relocation. *Casey v. Harned*, 5 Iowa (5 Clarke) 1, 2, 12, 14.

## FORFEIT—FORFEITURE.

See "Continuing Cause of Forfeiture."

Action for, see "Action for Penalty or Forfeiture."

"The primary use of the word 'forfeit' is to lose, and this is also its legal meaning. To forfeit a sum of money means to lose the right to it in favor of another party." *Eakin v. Scott*, 7 S. W. 777, 779, 70 Tex. 442; *Wright v. Dobie*, 8 Tex. Civ. App. 194, 22 S. W. 66, 67.

Forfeit is that which is forfeited or lost by neglect of duty; or, in other words, a fine, a mulct, a penalty. *State v. Baltimore & O. R. Co. (Md.)* 12 Gill & J. 399, 432, 38 Am. Dec. 319.

Bacon, in his Abridgment, says: "The omission or neglect of a duty which a party binds himself to perform, or to the performance of which he is enjoined by the law, is on a breach thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined." *Beard v. Smith*, 22 Ky. (6 T. B. Mon.) 430, 443, 444.

Forfeiture means the loss of something as a penalty for doing or omitting to do a certain required act. *Cassell v. Crothers*, 44 Atl. 446, 447, 193 Pa. 359; *Hudson v. Shepard*, 90 Ill. App. 628, 628.

"A forfeiture is a penalty by which one loses his rights and interest in his property." *Gosselink v. Campbell*, 4 Iowa (4 Clarke) 296, 300.

Forfeiture is a comprehensive word to express results which flow from a failure to comply with a law. *McCulloch v. Murphy* (U. S.) 125 Fed. 147, 150.

Forfeiture is a deprivation or destruction of a right in consequence of a nonper-

formance of some obligation or condition. *Webster v. Dwelling House Ins. Co.*, 42 N. E. 546, 547, 53 Ohio St. 558, 30 L. R. A. 719, 53 Am. St. Rep. 658.

Forfeiture is defined by Blackstone to be a loss of goods as a compensation for an offense and an injury to the person to whom they are forfeited, as well as a punishment for a misdemeanor; and penalties, whose benefit is given to the party aggrieved, include equally with forfeiture the idea of both compensation and punishment. *Merchants' Bank of Newhaven v. Bliss*, 24 N. Y. Super. Ct. (1 Rob.) 291, 403, 21 How. Prac. 385, 370.

Forfeiture "is defined to be a punishment annexed by law to some illegal act or negligence in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they become vested in the party injured as a recompense, which he alone, or the public together with himself, hath sustained." This definition necessarily implies that there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. *Wiseman v. McNulty*, 25 Cal. 230, 237.

Forfeiture is a divestiture of property without compensation in consequence of a default or offense. *Union Glass Co. v. First Nat. Bank*, 10 Pa. Co. Ct. R. 565, 572.

Forfeitures are of different kinds. A forfeiture may be generally defined to be the loss of what belongs to a person in consequence of some fault, misconduct, or transgression of law. In the connection in which the term "forfeitures" is used in Const. art. 8, declaring that moneys arising "from all forfeitures which may accrue" shall constitute a part of the common school fund of the state, it evidently means the loss of a certain sum of money as the consequence of violating the provision of some statute, or of the refusal to comply with some requirement of law. *State v. Marion County Com'rs*, 85 Ind. 499, 493.

The meaning of the word "forfeit" has to be determined by the connection in which it is used. When used in civil proceedings and in connection with the enforcement of civil rights, it contemplates an ordinary civil judgment which need not even be penal in its character; but, when used in a criminal law to denote a punishment for a statutory crime, the meaning of the word is equivalent to "fine." *Ex parte Alexander*, 39 Mo. App. 108, 109.

Forfeiture is not favored in the law, and the provisions upon which it is based must be strictly construed. *Town of Mt. Morris v. King*, 28 N. Y. Supp. 281, 284, 77 Hun, 18.

The word "forfeited," as used in Rev. St. c. 17, § 3, providing for the forfeiture of

a lease because of the unlawful sale of intoxicating liquor, has the same meaning and effect which the common law gave to such expressions in leases. The construction of provisions for forfeiture of a lease for non-performance of conditions by the lessee is that the lease is voidable only at the election of the lessor, and is not rendered absolutely void, though it is provided that it shall be null and void in case of such breach. *Small v. Clark*, 54 Atl. 758, 760, 97 Me. 304.

Forfeiture relates to something done or omitted by which one's rights are lost. There can be no forfeiture of a contract that has no existence. Forfeiture assumes a pre-existing valid contract or obligation. Forfeiture not being favored in the law, any inconsistent acts or dealings by the party claiming forfeiture may be regarded as a waiver thereof. *Roblee v. Masonic Life Ass'n*, 77 N. Y. Supp. 1098, 1100, 88 Misc. Rep. 481.

#### As annul.

The word "forfeit" may be used in annulling a sale of a lot in the St. Louis Commons in pursuance of a statute authorizing such annulment, as the word "annul" is not a technical word, and the annulling of a lease is nothing more than causing a forfeiture of it. *Woodson v. Skinner*, 22 Mo. 13, 24.

#### As incident to attainder.

As an incident consequent on an attainder for treason or felony forfeiture was a part of the punishment of a crime, and was of Saxon origin, by which the goods and chattels, lands and tenements, of the attainted felon were forfeited to the king; the former absolutely on conviction, and the latter perpetually, or during the life of the offender, on sentence being pronounced. *Avery v. Everett*, 18 N. E. 148, 150, 110 N. Y. 317, 1 L. R. A. 284, 6 Am. St. Rep. 368.

#### As claim.

See "Claim."

#### As deliver or yield up.

In Gen. Laws 1889, c. 200, § 4, relating to mechanics' liens, and providing that, if the vendee of land sold on an executory contract shall forfeit or surrender such contract, the vendor shall be deemed the owner within the meaning of the act, the word "forfeit," used as it is in connection with "surrender," which undoubtedly means "yielded," "rendered," or "delivered up," must be given its common and general definition, viz., "lost by omission or negligence or misconduct," instead of the restricted meaning ordinarily expressed by the word "forfeitable." *Nolander v. Burns*, 50 N. W. 1016, 1017, 48 Minn. 13.

#### Deprivation of office.

"Forfeiture," as used in Const. art. 5, § 8, giving the district court jurisdiction

to hear all suits on behalf of the state to recover forfeitures, should be construed to mean a right which once existed and has been lost, and therefore not to include an information in the nature of a quo warranto to try the title to an office on the ground of the disqualification of the incumbent, since it is not claimed in such proceeding that a right to office has been lost, but rather that it never existed. "Forfeiture is where a person loses some property, right, privilege, or benefit in consequence of having done or omitted to do a certain act." *State v. De Gress*, 11 S. W. 1029, 72 Tex. 242 (quoting *Rap. L. Law Dict.* 535).

#### As disability incurred.

The word "forfeited," as used in Rev. St. § 1281 [U. S. Comp. St. 1901, p. 912], providing that the retained pay of a soldier shall not be paid until his discharge, and shall be forfeited unless he serves honestly and faithfully to the date of discharge, is not used in a technical sense of a punishment after judgment, but in a sense of a disability incurred by the nonperformance of a contract. A similar meaning is attached to the word when used in connection with the claim of a mariner for his wages. By his contract after shipment the seaman also bargains for honest and faithful service and obedience to the lawful command of the master or other officer of his vessel, and in case of desertion or gross misconduct it is the constant practice of courts of admiralty to forfeit the whole or part of his wages, irrespective of the actual damage suffered by the owner or master of the vessel. *United States v. Kingsley*, 11 Sup. Ct. 286, 287, 138 U. S. 87, 34 L. Ed. 896.

#### As equivalent to fine.

When imposed as a punishment for a statutory offense, there is no substantial difference between a fine and a forfeiture. A fine is a pecuniary punishment for an offense, and a pecuniary punishment called a "forfeiture" is equivalent to the same pecuniary punishment called a "fine." *State v. McConnell*, 46 Atl. 458, 459, 70 N. H. 158.

"Forfeited," as used in Gen. St. c. 47, art. 2, § 1, providing that the offender shall forfeit and pay the sum of \$100, to be recovered by indictment, should be construed as synonymous with the word "fined." *Commonwealth v. Avery*, 77 Ky. (14 Bush) 625, 638, 29 Am. Rep. 429.

#### Judgment on as affecting.

A forfeiture is a loss, but the fact that the court has rendered judgment against the surety on a bail bond for a forfeiture of the same does not render the forfeiture any less a forfeiture, so that the Governor, under his power to remit a forfeiture, has power to remit a judgment for a forfeiture.

*Harbin v. State*, 48 N. W. 210, 211, 78 Iowa, 263.

#### As penalty or liquidated damages.

The term "forfeiture" imports a penalty. It has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract or an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury and compensation, it is not taken as such by courts of justice, who leave it to be enforced, where this can be done, in its real character, to wit, that of a penalty. *Van Buren v. Digges*, 52 U. S. (11 How.) 461, 477, 13 L. Ed. 771.

Forfeiture is the loss of some right, estate, office, or effects by an offense, etc., and is the equivalent of penalty, so that deprivation of office is a penalty. *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 458, 119 Mo. 383, 41 Am. St. Rep. 668.

The word "forfeit," when used in a contract, does not necessarily import penalty. Whether it does or not depends upon the circumstances in which it is used. *Chaude v. Shepard*, 25 N. E. 358, 359, 122 N. Y. 397.

"Forfeit," as used in the proviso in the fifth section of Act 1835, c. 395, declaring that, if the Baltimore & Ohio Railroad Company should not locate the said road in the manner provided in the act, they should forfeit one million dollars to the state of Maryland, implied penalty, and hence, though the proviso was assented to by the company, there was no contract, but a case of penalty, subject as to its enforcement to the will and pleasure of the Legislature. *State v. Baltimore & O. R. Co. (Md.)* 12 Gill & J. 399, 432, 38 Am. Dec. 319.

"Forfeit," as used in a contract whereby A. agreed to sell and convey a farm to B., and acknowledging the receipt of \$500 on account of the purchase money, and further agreeing that, in case he failed to convey the property as agreed, he should return the purchase money and forfeit the \$500, means to pay, and is in the nature of a penalty, A. being liable for the full amount of \$500 in case of failure to comply with the terms of the agreement. *Mathews v. Sharp*, 99 Pa. 560, 564 (citing *Streeper v. Williams*, 48 Pa. 450).

"Forfeit," as used in a contract by the owners of a steamer for the carriage of staves, which stipulated, "We agree to forfeit \$1,000 if we fail to carry out this contract," should be construed to provide for a penalty, and not for liquidated damages; "forfeit" being used as synonymous with

"penalty." *Taylor v. The Marcella* (U. S.) 23 Fed. Cas. 782, 783.

In a contract in which a party agreed that a certain amount should act as a forfeiture in the event of the abandonment of a certain trade, the word "forfeiture" is not synonymous with "penalty," though the two words may be used to mean the same thing, for a forfeiture is usually a penalty, though a penalty is not necessarily a forfeiture. *Eakin v. Scott*, 7 S. W. 777, 779, 70 Tex. 442. See, also, *Wright v. Doby*, 22 S. W. 66, 3 Tex. Civ. App. 194.

The word "penalty" and the word "forfeiture," as used in statutes, are generally used synonymously. In 16 Enc. Pl. & Pr. pp. 231, 232, it is said: "A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for breach of its provisions, and not by way of fine for a statutory crime or misdemeanor, and with reference to penal actions the word 'penalty' means a forfeiture inflicted by a penal statute." *Butler v. Butler*, 62 S. C. 165, 40 S. E. 138, 142.

"Forfeiture," as used in a contract to erect a monument over a grave agreeing to complete it within a certain time under forfeiture of a stated amount for each day beyond the stated time for completion, is synonymous with the word "penalty." *Muldoon v. Lynch*, 6 Pac. 417; 418, 66 Cal. 536.

Under an act requiring a person licensed to sell liquor to give a bond with sureties conditioned that he shall faithfully fulfill all the duties relating to the business, and shall pay all fines or forfeitures that may be recovered against him, it is held that a bond conditioned that the licensee shall pay all penalties is a substantial compliance with the act; the words "penalties" and "forfeitures" being synonyms, each signifying, in the sense in which it is used, a liability to pay a certain sum of money. *Crawley v. Commonwealth*, 16 Atl. 416, 417, 123 Pa. 275.

The words "forfeiture" and "penalty," as used in a statute providing that an action on a liability created by statute other than a forfeiture or penalty should be barred within six years, are not synonymous, but are used in contrast. A penalty in its original and legal sense meant a penal punishment, and was inflicted by, or in the right of, the public. A forfeiture is more comprehensive in its signification, and generally accrues to individuals. *Hawkins v. Iron Valley Furnace Co.*, 40 Ohio St. 507, 514.

"Forfeiture" and "penalty," as used in Pol. Code, pt. 3, tit. 9, enacting that fines, forfeitures, and penalties incurred by a violation of any of the provisions of such title, must be paid into the treasury for the use of the county, mean the same thing. The two words seem to mean the same thing when

said of money, in which sense it imports a requirement to pay the sum mentioned as a mulct for a defraud or wrong. *People v. Reis*, 18 Pac. 309, 312, 76 Cal. 269.

The word "forfeiture," as used with reference to imprisonment for the doing of unlawful acts, includes any penalty in money or goods imposed by statute for the unlawful doing of an act prohibited. *City of Oshkosh v. Schwartz*, 13 N. W. 552, 555, 55 Wis. 483.

"Penalty" is defined in *Burrill's Law Dictionary* as a "pecuniary punishment, or sum of money imposed by statute to be paid as a punishment for the commission of a certain offense"; and a similar definition of it is given by *Bouvier*. "Forfeiture" is defined by *Blackstone* to be a loss of goods as a compensation for an offense and injury to the person to whom they are forfeited, as well as a punishment of a misdemeanor, and the penalties, whose benefit is given to a party aggrieved, include equally with forfeitures the idea of both such compensation and punishment. The fact of such gift to the injured party does not make a penalty less one; nor would its extension to the whole value of the interest affected, instead of being limited to a fixed sum. *Merchants' Bank of New Haven v. Bliss* (N. Y.) 21 How. Prac. 365, 370.

Where a contract for the sale and delivery of ice provided that the parties should forfeit one dollar for each ton of ice unaccepted or undelivered, the provision was to be regarded as a penalty for a forfeiture, and not as stipulated damages. *Kemp v. Knickerbocker Ice Co.* (N. Y.) 51 How. Prac. 31, 39.

The word "forfeiture," as used in Rev. St. U. S. §§ 5197, 5198 [U. S. Comp. St. 1901, p. 3493], relating to forfeiture of interest on the taking of usury by national banks, is to be liberally construed to effect the object Congress had in view in enacting it. *Ordway v. Central Nat. Bank of Baltimore*, 47 Md. 217, 28 Am. Rep. 455. In *Brown's Ex'rs v. National State Bank*, 1 C. C. A. 62, 48 Fed. 271, it was said: "The legislative intent, we think, was to utterly destroy the interest-bearing capacity of the instrument." And in *Bletz v. National Bank*, 87 Pa. 87, 30 Am. Rep. 343, in speaking of the term, it was said: "It will be noticed that the word 'forfeiture' is used, yet the uniform practice has treated this not as a pure penalty, but as a defense which may be set up to the recovery of interest." *Citizens' Nat. Bank v. Donnell*, 72 S. W. 925, 932, 172 Mo. 384.

St. 1875, c. 99, § 15, provides that whoever shall sell or give intoxicating liquor to any minor shall forfeit \$100 for each offense, to be recovered by the parent or

guardian of the minor in an action of tort. Section 9 of such chapter provides that every person licensed to sell liquor shall give a bond with sufficient sureties, conditioned for the payment of costs, damages, and fines incurred by violation of the provisions of this act. Held, that the word "forfeit" should be construed in the sense of fixed or liquidated damages, which may be recovered in an action of tort by the person injured for any violation of the act; and that a surety on the liquor dealer's bond is liable for a violation by the dealer of section 15. *Day v. Frank*, 127 Mass. 497, 498.

"Forfeit and pay," as used in a contract for the building of a street railway in plaintiff town, by which defendants, in default of its construction within a certain time, agreed to forfeit and pay a certain sum, should be construed to mean an agreement to pay liquidated damages, and not a penalty. *Nilsson v. Town of Jonesboro*, 20 S. W. 1093, 1095, 57 Ark. 168.

#### As punishment.

"Forfeiture," as used in Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], providing that the repeal of any statute shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability, is synonymous with the word "punishment," and the statute applies to crimes and punishments therefor. *United States v. Reisinger*, 9 Sup. Ct. 99, 101, 128 U. S. 398, 32 L. Ed. 480.

"Penalty," "liability," and "forfeiture" are synonymous with "punishment" in connection with crimes of the highest grade. *Featherstone v. People*, 62 N. E. 684, 687, 194 Ill. 325 (citing *United States v. Reisinger*, 128 U. S. 398, 9 Sup. Ct. 99, 32 L. Ed. 480).

A penalty or forfeiture is either a punishment or something nearly approaching to it, and in the nature of a punishment, imposed as a consequence of the violation of some law of the municipal regulation. *Taylor v. Matchell* (Miss.) 1 How. 596, 599.

"Penalty," "liability," and "forfeiture" are synonymous with "punishment" in connection with crimes of the highest grade. The punishment or penalty is fixed by the law defining and inhibiting the criminal act. *Featherstone v. People*, 62 N. E. 684-687, 194 Ill. 325.

Rev. St. § 13 [U. S. Comp. St. 1901, p. 6], relating to punishments of a crime, and providing that the repeal of any statute shall not have the effect to release or extinguish any "penalty, forfeiture, or liability" under the statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force, for the purpose of sustaining any proper action or prosecution for the enforcement of

such "penalty, forfeiture or liability," include all forms of punishment for crime. The words are intended to cover every form of punishment to which a man subjects himself by violating the common laws of the country. *United States v. Ulrich* (U. S.) 28 Fed. Cas. 328, 329.

#### Recovery on forfeited bail bond.

Act June 22, 1874, c. 391, 18 Stat. 186 [U. S. Comp. St. 1901, p. 2018], allowing compensation to informers out of "fines, penalties, or forfeitures" inflicted, does not include sums recovered on forfeited bail bonds. In re *Brittingham* (U. S.) 5 Fed. 191.

#### Revocation of license.

The term "forfeiture," when applied to a license, may be properly used to designate an absolute or indefinite revocation of the license, and, where a board of pilot commissioners have no right to forfeit the license of a pilot, they cannot revoke such license absolutely or indefinitely. *Morris v. Board of Pilot Com'rs*, 30 Atl. 667, 669, 7 Del. Ch. 136.

#### As self-executory.

The provision of Rev. St. art. 4278, that, if any railway corporation organized under that title should not within a certain time begin the construction of its road, etc., such corporation should "forfeit its corporate existence, and its power shall cease," etc., is self-executing, and the failure to fulfill the condition will work a forfeiture of the corporate existence without any proceedings for that purpose. *Bywaters v. Paris & G. N. Ry. Co.*, 73 Tex. 624, 11 S. W. 856; *Galveston, H. & S. A. Ry. Co. v. State*, 17 S. W. 67, 71, 81 Tex. 572.

The charter of a railroad company provided that, if the company shall not within five years commence the construction of its road, and within thirteen years complete and put it in operation, then the corporation shall cease, and the act be void. By a subsequent act it was provided that, in case the company shall fail to comply with the provisions of the first act, its charter shall thereby be forfeited. By such enactment the Legislature did not undertake to declare forfeiture, but only to prescribe the consequences to follow their certain acts or omissions. Whether such acts and omissions had in fact occurred the Legislature did not assume or desire to determine. Whether they had occurred or not was left to be determined on proof to be adduced in a proper proceeding to be instituted for the purpose of contesting the question of forfeiture. It is beyond question that unless the Legislature undertakes to declare a forfeiture upon facts that have already occurred, it pertains to the judicial department of the government to determine whether such forfeiture has been



incurred; that the act of the Legislature only prescribed the elements which shall operate as a forfeiture. Whether such elements exist or not is an open question, which the party against whom they are alleged has a right to contest before a judicial tribunal. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1, 56.

"Forfeiture," as the term is used in Act Cong. July 18, 1866, § 24, 14 Stat. 184, declaring that, if any certificate of registry to any vessel shall be knowingly and fraudulently obtained, etc., such vessel shall be liable to forfeiture, means an absolute forfeiture, which vests the property in the United States when the fraud is committed. The section cannot be construed to mean that the property does not vest until seizure, the only contingency being that the government may not choose to prosecute, or may not discover the liability. *The Mary Celeste* (U. S.) 16 Fed. Cas. 968, 969.

Rev. St. § 4189 [U. S. Comp. St. 1901, p. 2836], declaring that for the commission of a certain act a vessel shall be liable to forfeiture, does not mean that by the commission of the act shall be affected a present absolute forfeiture, but only that it shall be given a right to have the vessel declared forfeited on due process of law, and that the property in the same shall remain in the owner until seizure and condemnation. *The Kate Heron* (U. S.) 14 Fed. Cas. 139.

"Forfeiture," as used in Act March 9, 1878, providing that lands granted to Duluth, D. & I. R. Co. by Act March 9, 1875, shall, in case of forfeiture by said company, be transferred to the D. & W. R. R. Co., means a forfeiture such as must be asserted by judicial proceedings on the part of the state. It does not refer to a forfeiture which will take effect immediately upon the breach of the condition, though the word is sometimes used in that sense. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 47 N. W. 464, 465, 45 Minn. 104.

A cause for forfeiture is not itself forfeiture. No wrongful act by a corporation renders its charter void, or creates any forfeiture, without proceeding by which such forfeiture shall be established. *Farrington v. Putnam*, 37 Atl. 652, 656, 90 Me. 405, 38 L. R. A. 339.

#### **Stipulation to pay attorney's fee.**

A stipulation in a note to pay in default of payment at maturity 10 per cent. on the face of the note for attorney's fee for collection is as much a penalty or a forfeiture as if it had been called by that name in the note. *Rixey v. Pearre*, 15 S. E. 498, 500, 89 Va. 113.

#### **As subject to forfeiture.**

"Shall forfeit," as used in Act Cong. March 31, 1868, 15 Stat. 59, declaring that a

distiller shall forfeit the distillery and distilling apparatus used by him without license means "shall subject to forfeiture." *United States v. Distillery at Spring Valley* (U. S.) 25 Fed. Cas. 864.

The provision in Rev. St. art. 4280, that on failure of any railroad company to file its annual report it "shall forfeit its charter," was intended to prescribe merely a ground of forfeiture which the state could enforce should it so elect by a proceeding in the court of justice. And under the same principle a provision in a railroad charter that, if the railroad should not be built within a certain time "the charter" should "be forfeited," was not self-executing, and, until the forfeiture had been judicially declared in proceedings for that purpose, the company was still in existence. *Galveston, H. & S. A. Ry. Co. v. State*, 17 S. W. 67, 71, 81 Tex. 572.

#### **As transfer of title or right.**

In an action to recover for liens for supplies furnished to a vessel forfeited to the United States for a legal sealing, before the "forfeiture," it was said that, in the case of forfeiture the decree of the court acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress. *Gelston v. Hoyt*, 16 U. S. (3 Wheat.) 246, 318. A forfeiture necessarily divests every existing right, whether of title or other interest in the thing forfeited. *The Louis Olsen* (U. S.) 74 Fed. 246, 247.

In *United States v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, it was said that, when a statute enacts that upon the commission of a certain act specific property used in connection with that act shall be "forfeited," the forfeiture takes effect immediately on the commission of the act, and constitutes a statutory transfer of the right to the United States at the time the offense was committed. *Pilcher v. Faircloth*, 33 South. 545, 546, 135 Ala. 311.

#### **As applied to mining claims.**

A "forfeiture," as applied to mining claims held by location merely, takes place by operation of law, without regard to the intention of the appropriation, whenever he neglects to preserve his right by complying with the conditions imposed by law; that is, to make the required annual expenditure upon the claim within the time allowed. *McKay v. McDougall*, 64 Pac. 669, 670, 25 Mont. 258, 87 Am. St. Rep. 395.

"Forfeiture," as used in mining customs and codes, means the loss of a right to mine a particular piece of ground by neglect or failure to comply with the rules and regula-

tions of the bar or diggings in which the ground is situated, and which prescribe the acts which must be done to continue and keep alive the right to mine after it has once been acquired. It is entirely distinct from abandonment, and involves no question of intent, but rests entirely on the mining rules and regulations, and involves only the question, whether, in point of fact, those rules and regulations have been observed by the party seeking to maintain or perpetuate his right, regardless of what his intentions might have been. *St. John v. Kidd*, 26 Cal. 263, 271.

#### As applied to mortgages.

The word "forfeiture," still so often used in reference to mortgages, is no longer the expression of any principle, as it once was. There is now no forfeiture of a mortgaged estate. The mortgagor's rights may be foreclosed by a sentence in the courts or by a sale had in the manner prescribed by the statute law, if he has himself in the contract given authority thus to sell; but, until foreclosure, his estate the day after a default is exactly what it was the day before. *Kortright v. Cady*, 21 N. Y. 343, 365, 78 Am. Dec. 145.

Code, § 2013, providing that the attornment of a tenant to a stranger is void unless made to a mortgagee "after the mortgage has been forfeited," means after the rights existing under the mortgage have been lost—*forfeited*—"that is, after the right of possession of the mortgagor is cut off under the statute; that is, after time for redemption from the sale has expired." *Mills v. Heaton*, 2 N. W. 1112, 1113, 52 Iowa, 215.

#### As applied to policies of insurance.

While it is often said that a nonpayment of a life insurance premium "works a forfeiture" of the policy, it is not strictly correct. In reality, if the assured drops his policy, it absolutely lapses. The insurance has no existence except from year to year on the payment of the annual premiums. *Mutual Life Ins. Co. v. Girard Life Ins., Annuity & Trust Co.*, 100 Pa. 172, 180.

The clause of a contract providing for the sale of a life insurance policy in case of nonperformance of the stipulation for the payment of interest on the loans made on the policy by the company making the whole debt due, etc., if not a "forfeiture" in the strict technical sense, certainly has that similitude, and should be treated accordingly. *Union Cent. Life Ins. Co. v. Caldwell*, 58 S. W. 355, 362, 68 Ark. 505.

#### As applied to taxation.

The word "forfeiture," properly understood, has no application to taxation. Lands are not forfeited by the nonpayment of

taxes. The state, by such omission, acquires no title to them. Taxes, like a judgment of a court of record, are a mere lien upon the land, to be enforced in both instances by a sale; and the title passes, and can pass, by such sale alone. *Miami County Com'rs v. Wanzoppeche*, 3 Kan. 364, 365.

The statute makes it the duty of those who may be seised for life of any lands to list the same and pay the tax, and upon their failure so to do it declares that there estate shall be forfeited—in other words, that it shall terminate; and the person having the remainder or reversion may enter. Where the tenant for life fails to pay the tax, and the land is sold for such nonpayment, the interest of the tenant is forfeited, not by the sale of the lands, but by his neglect or refusal to pay the tax. The fact that the land has been sold is evidence of the failure to pay, and when this failure is established the interest of the tenant is ended. Therefore the life tenant, having no interest in the land at the time of the sale, has no right to redeem from the sale. *McMillan's Lessees v. Robbins*, 5 Ohio (5 Ham.) 28, 31, 33.

## FORGE.

A lease restricting the lessee from using the premises for the purpose of a forge for the manufacturing of iron means an establishment or mechanical contrivance by which iron is made or manufactured from the ore. A forge manufactures or makes malleable iron direct from the ore, but a blacksmith's forge does not manufacture iron, but from iron itself manufactures machines or instruments of use. *Rogers v. Danforth*, 9 N. J. Eq. (1 Stockt.) 289, 293.

#### Furnace distinguished.

The difference between a forge and a furnace, so far as the ordinary use of those words in connection with actual work is concerned, is this: A furnace is used to melt ores in making metals, or to melt metals in working them, while a forge is used to heat metals to hammer them into a desired form, and not to melt them. *City of Boston v. Sarni*, 56 N. E. 607, 175 Mass. 357.

A forge consists essentially of its wheels, hammers, drum beams, furnaces, and belts. *Huston v. Springer* (Pa.) 2 Rawle, 97, 101.

## FORGE (In Criminal Law).

The word "forged" means to make in the likeness of something else. *State v. McKenzie*, 42 Me. 392, 394 (quoting *Webst. Dict.*).

The word "forge," as used in an information alleging that the defendant did "make

and forge," is equivalent to "falsely make and forge." "The Century Dictionary thus defines the word 'forge': 'To fabricate by false imitation; specifically, in law, to make a false instrument in similitude of an instrument by which one person could be obligated to another for the purpose of fraud and deceit.' The words 'forge,' 'forger,' and 'forgery,' when used in law, have no honest meaning, but imply fraudulent deceit." *People v. Mitchell*, 28 Pac. 597, 598, 92 Cal. 590.

"The term 'forge' in law indicates a fraudulent purpose in making the paper." *Haskins v. Ralston*, 37 N. W. 45, 47, 69 Mich. 63, 13 Am. St. Rep. 376.

The expression "forged," as used in the chapter of the Penal Code defining and punishing forgery, includes false making, counterfeiting, and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature of a party or witness, and the placing or connecting together, with intent to defraud, different parts of several genuine instruments. Pen. Code N. Y. 1903, § 520. Gen. St. Minn. 1894, § 6701. Hence, under an indictment charging that defendant, with intent to defraud, did then and there feloniously forge a certain promissory note, the word "forge" does not state a mere legal conclusion, but sufficiently charges the offense. *State v. Greenwood*, 78 N. W. 1042, 1043, 76 Minn. 211, 77 Am. St. Rep. 632.

When a note or instrument is spoken of as forged it is understood to be a counterfeited one, and this understanding is in conformity with the definitions given to the two words by our best lexicographers. *Mann v. People* (N. Y.) 15 Hun, 155, 165; *State v. Willson*, 9 N. W. 28, 29, 28 Minn. 52.

Forgery is a statutory offense, and the charge against the accused must be found within the terms of the statute. But, where an information alleges specific acts constituting an offense under Pen. Code, § 476, imposing a penalty on every person who makes, with intent to defraud, a fictitious bill, purporting to be the act of a person who has no existence, the use of the words "forge" or "forgery" will not make the charge one under section 470, defining forgery. *People v. Eppinger*, 38 Pac. 538, 105 Cal. 36.

The use of the word "forged" in a publication charging plaintiff with having forged sentiments and words for W., which he never uttered, is not used in such a manner as to import crime. "It is applied to sentiments and words, and means no more than if the plaintiff had stated that S. had uttered certain sentiments and words, and that this statement of the plaintiff was false. It does not charge that the defendant knew them to be false." The use of such language is

not libelous, as it neither charges a crime upon plaintiff, blackens his character, nor exposes him to public hatred, contempt, or ridicule. *Cramer v. Noonan*, 4 Wis. 231, 238.

#### FORGED BILL.

A forged bill is one to which the signatures of the officers of the bank by which it purports to have been issued are forged or otherwise falsely affixed. It may be a legitimate or an illegitimate impression from a genuine plate, or it may be an impression from a counterfeit plate. *Kirby v. State*, 1 Ohio St. 185, 187.

#### FORGED TRADE-MARK.

The phrases "forged trade-mark" and "counterfeited trade-mark," or their equivalents, as used in provisions in the Penal Code punishing the forging and counterfeiting of trade-marks, include every alteration or imitation of any trade-mark so resembling the original as to be likely to deceive. Rev. St. Utah 1898, § 4484.

#### FORGER.

A statement that a person is a forger is not slander actionable per se, where such word is coupled with a charge of some specific act which of itself does not constitute forgery. *Barnes v. Crawford*, 20 S. E. 386, 387, 115 N. C. 76.

#### FORGERY.

Forgery is the fraudulent making or altering of any writing to the prejudice of another man's rights. In re Cross (U. S.) 43 Fed. 517, 520 (citing 4 Bl. Comm. 247); *United States v. Long* (U. S.) 30 Fed. 678, 679; *Van Horne v. State*, 5 Ark. (5 Pike) 349; *Commonwealth v. Wilson*, 12 S. W. 264, 265, 89 Ky. 157, 25 Am. St. Rep. 528; *Moore v. Commonwealth*, 18 S. W. 833, 92 Ky. 630; *Colorado Loan & Trust Co. v. Grand Valley Canal Co.*, 32 Pac. 178, 181, 3 Colo. App. 63; *Franklin Fire Ins. Co. v. Bradford*, 50 Atl. 286, 287, 201 Pa. 32, 55 L. R. A. 408, 88 Am. St. Rep. 770; *Commonwealth v. Sankey*, 22 Pa. (10 Harris) 390, 395, 60 Am. Dec. 91; *People v. Cady* (N. Y.) 6 Hill, 490, 491; *People v. Shall* (N. Y.) 9 Cow. 778, 782; *People v. Harrison* (N. Y.) 8 Barb. 560, 563; *People v. Fitch* (N. Y.) 1 Wend. 198, 200, 19 Am. Dec. 477; *Baldwin v. Weed* (N. Y.) 17 Wend. 224, 229; *State v. Wheeler*, 25 Pac. 394, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119; *State v. Gavigan*, 13 Pac. 554, 556, 36 Kan. 322; *State v. Wooderd*, 20 Iowa, 541, 547; *Luttrell v. State*, 1 S. W. 886, 887, 85 Tenn. (1 Pickle) 232, 4 Am. St. Rep. 760; *State v. Corley*, 63 Tenn. (4 Baxt.) 410, 411; *Foute v. State*, 83 Tenn. (15

Lea) 712, 717; Jones v. State, 50 Ala. 161, 163; Thurber v. Eastern Building & Loan Ass'n, 24 S. E. 730, 118 N. C. 129; State v. Murphy, 17 R. I. 698, 702, 24 Atl. 473, 474, 16 L. R. A. 550; State v. Poindexter, 23 W. Va. 805, 809; Bell v. Cafferty, 21 Ind. 411, 416, 417.

Forgery, at common law, denotes a false making, which includes every alteration of or addition to a true instrument; a making male animo of any written instrument for the purpose of fraud or deceit. United States v. Watkins (U. S.) 28 Fed. Cas. 419, 445 (citing East, P. C. 852); State v. Calvin (Ga.) R. M. Charit. 151, 172. See, also, State v. McKiernan, 30 Pac. 831, 832, 17 Nev. 224; Commonwealth v. Ayer, 57 Mass. (3 Cush.) 150, 152; Thompson v. State, 49 Ala. 16, 18; People v. Warner, 62 N. W. 405, 406, 104 Mich. 337; State v. Phelps, 11 Vt. 116, 120, 34 Am. Dec. 672; Commonwealth v. Baldwin, 77 Mass. (11 Gray) 197, 199, 71 Am. Dec. 703; Marden v. Dorthy, 54 N. E. 726, 730, 160 N. Y. 39, 46 L. R. A. 694; United States v. Cameron, 13 N. W. 561, 564, 3 Dak. 132; State v. Shurtliff, 18 Me. (6 Shep.) 368, 370; State v. Fitzsimmons, 80 Mo. 236, 242; Randolph v. State, 91 N. W. 356, 357, 65 Neb. 520.

Forgery is the fraudulent falsifying of an instrument to another's prejudice. State v. Poindexter, 23 W. Va. 805, 809 (citing 1 Whart. Cr. Law [8th Ed.] § 635).

Forgery is the falsely making a note or other instrument with intent to defraud. Hill v. State, 9 Tenn. (1 Yerg.) 76, 77, 24 Am. Dec. 441; State v. Flanders, 38 N. H. 324, 335.

Forgery is the fraudulent making of any written instrument which is calculated to deceive persons of ordinary observation, for the purpose of perpetrating a fraud. Richie v. Commonwealth, 70 S. W. 629, 630, 24 Ky. Law Rep. 1077.

Forgery, at common law, is an offense in falsely and fraudulently making or altering any matter of record, or any other authentic matter of a public nature. 1 Hawk. P. C. c. 21, § 1; Kerr v. Force (U. S.) 14 Fed. Cas. 386, 403; United States v. Wentworth (U. S.) 11 Fed. 52, 55.

Forgery at common law belongs to that class of misdemeanors called "cheats," but, owing to the serious wrongs and frauds thereby perpetrated, it became distinguished in time by a particular name and a special punishment. Ex parte Hibbs (U. S.) 26 Fed. 421, 432.

"Every person who, with intent to defraud another, falsely makes, forges, or counterfeits any \* \* \* deed, \* \* \* or counterfeits or forges the seal or handwriting of another, or utters, publishes, passes,

or attempt to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters \* \* \* with intent to prejudice any person, is guilty of forgery." Pen. Code, § 470; People v. Chretien, 70 Pac. 305, 306, 137 Cal. 450; People v. Layslon, 41 Pac. 480, 108 Cal. 440; People v. Terrill, 59 Pac. 836, 837, 127 Cal. 99.

Every person who shall falsely make, utter, forge, or counterfeit any record, promissory note, etc., or shall counterfeit or forge the seal or handwriting of another with intent to damage or defraud any person, shall be deemed guilty of forgery. Gen. St. § 775; Cohen v. People, 3 Pac. 385, 386, 7 Colo. 274.

Forgery is the making or altering of certain written instruments therein set out at length, including checks, drafts, bills of exchange, and promissory notes, with intent to damage or defraud some person, either natural or artificial; and also the uttering, publishing, or passing any of the said false instruments knowing the same to be false, forged, or counterfeited, with a like intent to defraud. Rev. St. § 924; Santolini v. State, 42 Pac. 748, 6 Wyo. 110, 71 Am. St. Rep. 906.

Forgery is forging, with intent to defraud, an instrument or writing being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to have been created, increased, discharged or diminished. Pen. Code, § 511; People v. Hertz, 71 N. Y. Supp. 489, 491, 35 Misc. Rep. 177.

Forgery is the making without lawful authority, and with intent to injure or defraud, any false instrument in writing purporting to be the act of another in such manner that the false instrument so made would, if the same were true, have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever; or it is the alteration of an instrument in writing then already in existence, by whomsoever made, in such manner that the alteration would, if it had been legally made, have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever. Pen. Code, arts. 431, 432; Johnson v. State, 9 Tex. App. 249, 251.

In order to constitute forgery, there must be the making of a false instrument for the purpose of creating another's liability with fraudulent intent to injure him. But such instrument may be made in various ways. It may be done by creating the instrument entirely by adding to or taking away from it some part of its terms, or by procuring the signature of a person to an instrument which he had no intention of sign-

ing. *Longwell v. Day*, 1 Mich. N. P. 286, 290.

The crime of forgery is committed, first, when one falsely makes, alters, or counterfeits an instrument with intent to defraud another; and, second, if one utters, publishes, or passes as true and genuine any forged or counterfeited matters or papers knowing the same to be false, forged, and counterfeited, with intent to injure another; and, third, if a person attempts to pass such a false and fraudulent instrument. *People v. Compton*, 56 Pac. 44, 47, 123 Cal. 403.

Under 2 Rev. St. p. 673, enacting that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged, or diminished, or by which any rights or property whatever shall be or purport to be transferred, conveyed, discharged, diminished, or in any manner affected, shall be guilty of forgery," forgery may be committed either by entirely falsely making an instrument described by the statute or by making a material alteration, erasure, or insertion in or addition to a true instrument, although but in a letter or figure, or by misapplying a genuine signature, as by writing over it, in whole or in part, an instrument for which it was never intended. *People v. Graham* (N. Y.) 1 Sheld. 151, 155.

Rev. St. § 5418 [U. S. Comp. St. 1901, p. 3666], providing that if any person shall "falsely make, alter, forge, or counterfeit" any writing for the purpose of defrauding the United States, or cause the same to be so made, or assist in so doing, etc., defines the offense of forgery, and not that of perjury. *United States v. Wentworth & O'Neil* (U. S.) 11 Fed. 52, 55.

#### Alteration, erasure, or addition.

Forgery is the false making of a paper. But it need not be the entire fabrication thereof. Any addition to a genuine paper, or any alteration of it in an essential particular, so as to give it a different meaning, is a forgery. *United States v. Osgood* (U. S.) 27 Fed. Cas. 362, 363.

It is forgery to fraudulently alter any part of an instrument when the alteration is capable of working injury to another. Thus it is forgery to alter the dates, names, or any other material parts of an instrument when the alteration gives it a new operation. It is no defense to a forgery committed by alterations in an instrument that there was no special attempt to conceal such alterations, and that they were plain to be seen; the rule being that if a signed writing, which is forged, be intended to be taken as true,

and might be so taken by ordinary persons, it is sufficient. *Rohr v. State*, 38 Atl. 673, 674, 60 N. J. Law, 576; *Commonwealth v. Hide*, 23 S. W. 195, 196, 94 Ky. 517; *Murphy v. State*, 23 South. 719, 118 Ala. 137.

Forgery may consist in making and issuing, with fraudulent intent, etc., a paper or writing, false or forged, either in its entirety or in some significant or important portion or part of it. Thus the changing of the figure "1" to "5," so as to make the number "107" read "507," is sufficient to constitute forgery. *State v. Wingard*, 5 South. 54, 55, 40 La. Ann. 733.

Forgery is the false making of an instrument. The illegal making may be an original fabrication, or it may be by merely changing a thing already made into another thing. Hence, though every forgery does not include an altering, yet every altering includes a forgery. In either case there must be a thing—an instrument—known to the law, and to which it gives legal effect when the act is completed. If the prisoner alter a note, it must still be a note or some other legal instrument. *Haynes v. State*, 15 Ohio St. 455, 457.

2 Rev. St. p. 673, enacts that every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be the act of another by which any pecuniary demand or obligation shall be or purport to be created, increased, discharged, or diminished, or by which any rights shall be or purport to be transferred, conveyed, discharged, or diminished, shall be guilty of forgery. Held, that forgery may be committed under the statute either by the entire false making of an instrument or by making a material alteration or insertion in or addition to the true instrument, although but in a letter or figure, or by misapplying a genuine signature; as, by writing over it an instrument for which it was never intended. *People v. Graham* (N. Y.) 6 Parker, Cr. R. 135, 139.

The holder of certain county warrants brought suit thereon, and recovered judgment against the county, filing the warrants with the justice. The warrants were indorsed payable specially to such holder or order, and when judgment was recovered the agent of the holder wrote across the face the word "Judgment," with the date thereof. The defendant obtained possession of such warrants, erased such indorsement and writing across the face, and then negotiated and sold the warrants, and was indicted for having forged the same. It was assigned as error that the offense charged was not "forgery," but rather the obtaining money by false pretense or token. Forgery, as defined in the Code, "is the fraudulent making or altering of any writing to the prejudice of another's rights." This is the common-law

definition of the offense, and would cover any form of the crime recognized by that law which treated forgery as a common-law cheat, or attempt to cheat. Any alteration of a written instrument whereby its legal effect is varied will constitute the offense, and the indictment may, in such case, regard the offense as a forgery of the entire instrument, for in law it is such. And the erasure of the indorsement on the back of the warrants constituted forgery of the warrant. *Garner v. State*, 73 Tenn. (5 Lea) 213, 217, 218.

By Gen. St. 1894, § 6701, it is provided that the expressions "forge," "forgery," and "forging," as used in that chapter, include forgery in the second degree, false making, counterfeiting, and the alteration, erasure, or obliteration of a genuine instrument in whole or in part. *State v. Greenwood*, 78 N. W. 1042, 1043, 76 Minn. 211, 77 Am. St. Rep. 632.

The severing of an indorsement from a note and leaving the note entire is not a forgery, within the meaning of the statute for the punishment of high crimes and misdemeanors; but it is a misdemeanor at common law. *State v. McLern* (Vt.) 1 Aikens, 811, 812.

#### Capability of effecting fraud.

To constitute forgery, the instrument must be such that it may have the tendency to carry out the fraudulent intent. *Barnum v. State*, 15 Ohio, 717, 722, 45 Am. Dec. 601.

An instrument apparently capable of effecting a fraud is an essential element in the crime. *State v. Wheeler*, 25 Pac. 394, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119; *People v. Munroe*, 35 Pac. 326, 327, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323.

To constitute the offense there must be a possibility of some person being defrauded by the injury. *State v. Gavigan*, 13 Pac. 554, 556, 36 Kan. 322; *People v. Turner*, 45 Pac. 331, 113 Cal. 278.

In a forged instrument it is not necessary that there should be such resemblance to the signature forged as to mislead one acquainted therewith. It is sufficient if there be an intent to deceive and the possibility of deceiving another who may not know the genuine signature. *State v. Gryder*, 44 La. Ann. 962, 11 South. 573, 574, 32 Am. St. Rep. 358.

#### Existence of genuine instrument.

It cannot be maintained that there can be no forgery unless there is a previously existing genuine instrument identical with that forged; and it is no defense to an indictment for forging the notes of a certain bank that the bank never issued genuine bills of the denomination of those described in the indictment. *State v. Fitzsimmons*, 30 Mo. 236, 242.

#### False making.

The false making of some instrument in writing is an essential element in the crime. *State v. Wheeler*, 25 Pac. 394, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119; *People v. Munroe*, 35 Pac. 326, 327, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323; *State v. Ford*, 38 La. Ann. 797, 798.

The word "forged" in an indictment for forgery necessarily implies that the writing was falsely made, and hence the omission of the word "falsely" is not essential to the validity of the indictment. *State v. McKlerman*, 30 Pac. 831, 832, 17 Nev. 224.

In the definitions of forgery it will be noticed that the leading descriptive words are "false making" or "altering," so that the definition in our Code, "every person who, with intent to defraud another, falsely makes, alters," etc., any of the written instruments enumerated, is essentially the same. *People v. Bendit*, 43 Pac. 901, 902, 111 Cal. 274, 31 L. R. A. 831, 52 Am. St. Rep. 186.

It is not every making or altering of a record or instrument such as are enumerated in the statute as the subjects of forgery that constitutes that crime; it is only where the making or altering brings into existence a false record or instrument. Thus, where defendant, as part owner of a vessel, paid a claim against it, and the receipt was made out in the name of the vessel, but stated specifically that it was in payment of that particular claim, the insertion by the defendant of his name after that of the vessel did not amount to a forgery. *State v. Dorrance*, 53 N. W. 281, 282, 86 Iowa, 428.

The term "falsely," as applied to the making of a writing which will constitute a forgery, does not refer to the facts stated in the writing, but implies that the writing is false, not genuine, fictitious, and is used without regard to the truth or falsehood of the statements it contains. If a man should make a statement in writing, and represent and assert that such statement was true, when in fact he was in error, either by mistake or designedly for the purpose of defrauding, such representations would not constitute forgery. Hence, where a statute provides that "if any person shall falsely make or counterfeit, or fraudulently alter . . . any writing whatever purporting to contain evidence of the existence or discharge of any debt, contract, or promise, with intent that any person may be defrauded, he shall be punished," etc., an indictment would not lie for a false charge entered in a man's own book of accounts. *State v. Young*, 46 N. H. 266, 267, 269, 270, 83 Am. Dec. 212.

#### False statements with genuine signature.

Lord Coke says that an offender may be guilty of the false making of an instrument

although he signed and executed it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine or authentic, when it is false and deceptive. *Commonwealth v. Wilson*, 12 S. W. 264, 265, 89 Ky. 157, 25 Am. St. Rep. 528.

If a writing set forth in an indictment is the genuine act of the person signing it, however false may be the statements contained in it, it cannot be said to be falsely made within the definition of forgery. *United States v. Cameron*, 13 N. W. 561, 564, 3 Dak. 132; *Ex parte Hibbs* (U. S.) 26 Fed. 421, 432.

Where the signature to an instrument is genuine, but the body of it is false, the signing of the name without knowledge of its falsity cannot cure it and make it a true and valid instrument in the hands of any one. *McGinn v. Tobey*, 28 N. W. 818, 820, 62 Mich. 252, 4 Am. St. Rep. 848.

In order to constitute the offense of forgery it is not necessary that the signature of the instrument be false. If it is so altered that it is not the instrument signed by the maker, and if this be fraudulently and falsely done, it is forgery. Accordingly, where a person wrote his name on a blank piece of paper for the purpose of identification, and afterwards, without his knowledge, a promissory note was written over such signature, the instrument was a forgery, and a bona fide purchaser for value, without notice, could not recover thereon. *Caulkins v. Whisler*, 29 Iowa, 496, 498, 4 Am. Rep. 236.

A justice of the peace who makes up a bill of costs against the county in a fictitious case and sells it to a third party, who presents it for payment to the county, is guilty of forgery. *Luttrell v. State*, 1 S. W. 886, 887, 85 Tenn. (1 Pickle) 232, 4 Am. St. Rep. 760.

**As a felony.**

See "Felony."

**Fraudulent intent.**

To constitute the offense of forgery it is essential that there be an intent to defraud. *Colorado Loan & Trust Co. v. Grand Valley Canal Co.*, 32 Pac. 178, 181, 3 Colo. App. 63; *State v. Gavigan*, 13 Pac. 554, 556, 36 Kan. 322; *Barnum v. State*, 15 Ohio, 717, 721, 45 Am. Dec. 601; *People v. Munroe*, 35 Pac. 326, 327, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323; *State v. Wheeler*, 25 Pac. 394, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119; *State v. Ford*, 38 La. Ann. 797, 798.

Fraud and deceit are essential elements of the crime. *People v. Turner*, 45 Pac. 331, 113 Cal. 278; *Commonwealth v. Chandler* (Mass.) *Thacher*, Cr. Cas. 187, 188.

The Century Dictionary describes the crime as the "act of fabricating or producing falsely; the making of a thing in imitation of another thing with a view to deceive, mislead, or defraud." In criminal law it denotes a false making of the instrument with criminal intent, for purposes of fraud and deceit; the false making of an instrument which purports to be that which it is not, as distinguished from an instrument which purports to be what it really is, but contains false statements. And where one makes and utters a false instrument which is an imitation, and not what it purports to be, and which, if genuine, upon its face creates a liability, and this with a design to cheat and defraud, it constitutes a forgery. *People v. Filkin*, 82 N. Y. Supp. 15, 20, 83 App. Div. 589.

However it may have been defined, yet all the text-writers, as well as the decisions, hold that the false making or the material alteration or the falsifying of the instruments which is to the prejudice of another's rights must have been done with an intent to defraud, and, if this intent be absent at the time of the altering, etc., the crime has not been committed. *State v. Poindexter*, 23 W. Va. 805, 809.

The gist of the crime of forgery at common law is fraud. The crime does not consist in making a false instrument or false signature to an instrument in the similitude of another's writing. Such similitude is only to be presumed to have been intended as the means of accomplishing fraud, and, as used, is evidence of the intent to defraud. No man has a right to use the name of another without his consent, either in print or writing, as a signature to an effective instrument or as a trade-mark. Whether such unauthorized use of another's name as a signature is forgery depends upon the intent with which it was used. *People v. Rhoner* (N. Y.) 4 Parker, Cr. R. 166, 172.

A material element essential to constitute forgery is a design to affect the rights of another. Says East, 5 P. C. 854, "the deceitful and fraudulent intent appears to be the essence of this offense." Says Hawkins, P. C. vol. 1, p. 345, "the nature of forgery does not seem so much to consist in counterfeiting a man's hand and seal, but in endeavoring to give an appearance of truth to a mere deceit and falsity." The language of our act makes the intent to prejudice, injure, damage, or defraud the material element of the crime of forgery. *State v. Redstrake*, 39 N. J. Law (10 Vroom) 365, 368.

It is said in Bacon's Abridgment, tit. "Forgery," that the notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, but in the endeavoring to give the appearance of truth to a mere deceit and falsity, and either to impose that

on the world as the solemn act of another which he is not a party to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which it ought not to have. *People v. Graham* (N. Y.) 6 Parker, Cr. R. 135, 139.

The essential element of forgery consists in the intent, when making the signature or procuring it to be made, to pass it off fraudulently as the signature of another party than the one who actually makes it. If this intent thus to impersonate another exists, the instrument is still a forgery even if the name affixed is the same name as that borne by the party who signs it. *Hocker v. State*, 30 S. W. 783, 784, 34 Tex. Cr. R. 359, 53 Am. St. Rep. 716.

The rule is well established that the mere making, innocently and without authority, of any form of instrument which would constitute forgery if made with fraudulent intent is not forgery in the eyes of the law until such intent appears by conduct which shows or implies fraudulent purpose or use. In *re Count de Toulouse Lautrec* (U. S.) 102 Fed. 878, 881, 43 C. C. A. 42.

Under Pen. Code, § 470, the criminality of the defendant depends upon his mental condition at the time he committed the offense charged. If he was unable or incapable of forming such intent, he cannot be guilty. *People v. Blake*, 4 Pac. 1, 4, 65 Cal. 275.

The chief ingredients of the crime of forgery, which is a misdemeanor at common law, are fraud and the intent to deceive by imposing upon the world that as the act of another to which he has never consented. *Von Mumm v. Frash* (U. S.) 56 Fed. 830, 836.

The essence of the crime is contained in the union of the two elements that the instrument is a fiction and that it is a fiction prepared for a fraudulent purpose. *State v. Flanders*, 38 N. H. 324, 335.

The principal criminal element in forgery consists in the fraudulent purpose, and evidence of such circumstances as have a bearing on the question of fraud is pertinent, and the proofs of fraud must be substantially the same in criminal and civil cases. *People v. Marion*, 29 Mich. 81, 87.

If a man falsely, fraudulently or unlawfully alter a note so as materially to change its terms, the criminal intent is necessarily inferred, and he is in law guilty of forgery. *Kerr v. Force* (U. S.) 14 Fed. Cas. 386, 403.

#### Imitation of genuine.

To sign the name of another without authority is forgery whenever any similitude is attempted. To constitute the offense there must be some attempt made to imitate a

genuine instrument, and the writing falsely made must purport to be the writing of another, and hence it is no forgery for one to falsely make a paper which purports to be signed by him as agent, when in fact he has no authority. Where one signed the name of a number of drawers to a note, not attempting an imitation of their signatures, and signed an addendum to the note that he was their authorized agent, there was no forgery. *State v. Taylor*, 16 South. 190, 46 La. Ann. 1332, 25 L. R. A. 591, 49 Am. St. Rep. 351.

Forgery is the attempted imitation of another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that of the doer thereof, who claims and insists by and in the act itself that he is authorized to obligate the individual whom he is assuming to obligate precisely as he undertakes to do. *Mann v. People* (N. Y.) 15 Hun, 155, 165, 166.

#### Instrument signed under false representations.

At common law the question as to whether it was forgery to procure a genuine signature to an instrument by means of false representations as to its contents gave rise to conflicting decisions. The text-writers upon criminal law from Coke to Barber were of the opinion that the fabrication and false making of a written instrument, as well as the fraudulent insertion, alteration, or erasure in a material part, whereby a new operation was given to it, would amount to forgery, even though it were afterwards executed by a person ignorant of the deceit. 3 Co. Inst. 170; 1 Hawk. P. C. c. 21, § 2; 2 East, P. C. c. 19, § 2; 2 Russ. Crimes, c. 32, § 1, p. 319; 2 Deac. Cr. Law, 1402; 1 Barb. Cr. Law, 114. In *Reg. v. Collins*, 2 Moody & R. 461, Baron Rolfe refused to follow this rule, and to the same effect is *Reg. v. Chadwick*, Id. 545. These cases have been followed by the more modern writers. In *Hill v. State* (Tenn.) 1 Yerg. 76, 24 Am. Dec. 441, it was held that the writing of a note for a person, inserting a larger sum than the real amount due, and falsely and fraudulently reading it over to him with the latter amount, is not forgery. The term "forgery," as used in our statute, now includes falsely making as well as counterfeiting and alteration. *People v. Underhill*, 26 N. Y. Supp. 1030, 1033, 75 Hun, 329.

The making, in view of the rule that it must be done with fraudulent intent, does not consist alone of the manual operation of putting the instrument into form as the apparent obligation or act of another, and the authorities establish numerous instances where forgery is found apart from the manual making or signing, as in the fraudulent procurement and use of a signature or writ



ing as an obligation when it is not so intended or understood by the maker. In re Count de Toulouse Lautrec (U. S.) 102 Fed. 878, 881, 43 C. C. A. 42.

Where a person wrote a promissory note for \$141.28, and fraudulently read it to another, who could not read, as a note for \$41.28, and procured him to sign it as the maker, there was no forgery. Commonwealth v. Sankey, 22 Pa. (10 Harris) 390, 395, 60 Am. Dec. 91.

Where the owner of property was induced by artifice to sign her name to a paper without any knowledge that it was a deed, and where she had no intention of conveying the property, and the deed was never delivered, nor acknowledged, but a genuine certificate of acknowledgment was in some way obtained, and the deed recorded, and where the grantee, who had no knowledge of the deed, was induced by artifice to sign papers, which proved to be a mortgage on the property, the whole transaction was a forgery. Marden v. Dorthy, 54 N. E. 726, 730, 160 N. Y. 39, 46 L. R. A. 694.

#### Kind of instrument.

The offense of "forgery" extends to every writing used for the purpose of authentication, as in the case of a will, by which a testator signifies his intention as to the disposition of his property or of a certificate by which an officer or other authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender. The crime is not confined to the falsification of the mere writing. It plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated or the quality or genuineness of any article is warranted; and consequently where a party may be deceived and defrauded from having been by false signs induced to give credit where none was due. Thus a person who printed and sold theater tickets of a theatrical company of which he claimed to be the agent is guilty of forgery. Benson v. McMahon, 8 Sup. Ct. 1240, 1245, 127 U. S. 457, 32 L. Ed. 234.

The first question to be determined in considering whether a forgery has been committed is the legal signification of the term "writing" which appears in these definitions. To say that any writing may be the subject of a forgery, disconnected from the effect which this writing is to produce upon others, is simply an absurdity, and therefore the definitions restrict the meaning of the word, and define the various writings the fraudulent making or alteration of which will amount to forgery. To make or alter a writing which either at common law or by statute was the subject of forgery, with intent to defraud another, or to the prejudice of an-

other man's right, or which, if genuine, would operate as the foundation of another's liability or the evidence of his right, is forgery. Therefore for a clerk or bookkeeper to alter figures in journal entries so as to conceal his defalcation or abstraction of his employer's funds in his charge, is forgery. Commonwealth v. Biles (Pa.) 3 Phila. 350, 351. See, also, In re Tully (U. S.) 20 Fed. 812, 814.

By the common law it was not forgery to make and publish as true a false and forged impression of a seal, but it was high treason in a subject of England to counterfeit the King's great seal. 2 Bl. Comm. 83, 247. But under 2 Rev. St. p. 671, § 24, the forging or counterfeiting the great seal of the state, or the seal of any public officers, or the seal of a court of record, or of a body corporate, is adjudged to be "forgery in the second degree." Fadner v. People, 2 N. Y. Cr. R. 553, 555, 38 Hun, 240, 243.

#### Legal efficacy of instrument.

Greenleaf says: "It (forgery) may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or the evidence of his right." In re Tully (U. S.) 20 Fed. 812, 814; Commonwealth v. Biles (Pa.) 3 Phila. 350, 351; Shannon v. State, 10 N. E. 87, 109 Ind. 407; Territory v. De Lena, 41 Pac. 618, 3 Okl. 573.

Forgery at common law is the false making or material altering with intent to defraud of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. State v. Hendry, 59 N. E. 1041, 1043, 156 Ind. 392, 54 L. R. A. 794; Luttrell v. State, 1 S. W. 888, 887, 85 Tenn. (1 Pickle) 232, 4 Am. St. Rep. 760; Commonwealth v. Wilson, 12 S. W. 264, 265, 89 Ky. 157, 25 Am. St. Rep. 528; Moore v. Commonwealth, 18 S. W. 833, 92 Ky. 630; Colson v. Commonwealth, 61 S. W. 46, 110 Ky. 233; Dallas v. Commonwealth, 19 Ky. Law Rep. 289, 290, 40 S. W. 456; State v. Murphy, 14 South. 920, 922, 46 La. Ann. 415; Dixon v. State, 1 South. 69, 70, 81 Ala. 61; Smith v. State, 10 South. 894, 897, 29 Fla. 408; Colorado Loan & Trust Co. v. Grand Valley Canal Co., 32 Pac. 178, 181, 3 Colo. App. 63; John v. State, 23 Wis. 504, 505; State v. Mott, 16 Minn. 472, 473 (Gil. 424, 425), 10 Am. Rep. 152; State v. Greenwood, 78 N. W. 1042, 1043, 76 Minn. 211, 77 Am. St. Rep. 632; State v. Pierce, 8 Iowa, 231, 235; State v. Thompson, 19 Iowa, 299; State v. Johnson, 26 Iowa, 407, 413, 96 Am. Dec. 158; State v. Sherwood, 58 N. W. 911, 912, 90 Iowa, 550, 48 Am. St. Rep. 461; Barnes v. Crawford, 20 S. E. 386, 387, 115 N. C. 76; Rembert v. State, 53 Ala. 467, 468, 25 Am. Rep. 639; Murphy v. State, 23 South. 719, 118 Ala. 137; Hickson v. State, 86 N. W. 509, 510, 61 Neb. 763, 54 L. R. A. 327; State v. Dorrance, 53 N. W. 281, 282, 86 Iowa, 428; State v. Wheeler, 25 Pac. 394, 20 Or. 192, 10

L. R. A. 779, 23 Am. St. Rep. 119; *People v. Bendit*, 43 Pac. 901, 902, 111 Cal. 274, 31 L. R. A. 831, 52 Am. St. Rep. 186; *McGinn v. Tobey*, 28 N. W. 818, 820, 62 Mich. 252, 4 Am. St. Rep. 848; *In re Count de Toulouse Lautrec* (U. S.) 102 Fed. 878, 881, 43 C. C. A. 42; *State v. Young*, 48 N. H. 266, 267, 88 Am. Dec. 212; *Commonwealth v. Scott* (Pa.) 3 O. P. Rep. 98, 100; *State v. Poindexter*, 23 W. Va. 805, 809; *Rex v. Taylor*, 2 East, P. C. 852, 853; *Hotchkiss v. English* (N. Y.) 4 Hun, 369, 373. This definition is very similar to, and in no respect in conflict with, that given by the Texas statute (Pasch. Dig. art. 2094). *Howell v. State*, 37 Tex. 591, 592.

To constitute forgery the instrument forged must be such a one that, if it were true, it would create, increase, diminish, discharge or defeat a pecuniary obligation, or would transfer, or in some manner affect, property. Pen. Code, 431; *Anderson v. State*, 20 Tex. App. 595, 596.

"The principal point of consideration is that the instrument must either appear on its face to be, or be in fact, one which, if true, would possess some legal validity; or, in other words, must be legally capable of effecting a fraud." *Murphy v. State*, 23 South. 719, 118 Ala. 187; *Rembert v. State*, 53 Ala. 467, 468, 25 Am. Rep. 629; *Colson v. Commonwealth*, 61 S. W. 46, 110 Ky. 233; *Barnes v. Crawford*, 20 S. E. 886, 887, 115 N. C. 76; *Gordon v. Commonwealth*, 41 S. E. 746, 747, 100 Va. 825.

It is the essence of the crime that there should be a false making of an instrument apparently genuine. *Dallas v. Commonwealth*, 19 Ky. Law Rep. 289, 290, 40 S. W. 456.

Forgery at common law has been defined as the false making of an instrument which purports on its face to be good and valid for the purpose for which it was created, with a design to defraud any person or persons. *Commonwealth v. Biles* (Pa.) 3 Phila. 350, 351.

At common law, forgery is defined the making of a false document with intent to defraud, and the offense may be said to be complete when any person falsely makes any of the writings enumerated in the statute with intent to deceive in such a manner as to expose any person to loss or risk of loss. Whether the party can be guilty of forgery does not consist in determining whether the instrument forged, if genuine, would be of any force or effect. A draft falsely made is no less a forgery because the drawee has no funds, and is under no obligation to pay for the draft had it been genuine. A deed falsely made by a grantor after he had conveyed all the interest in the land is no less a forgery because, if genuine, it would convey no title. *People v. Van Alstine*, 23 N. W. 594,

595, 57 Mich. 69. There is no question that a writing which is nudum pactum is not a subject of forgery, but a contract, which, if genuine, would be void as against public policy, may be the subject of forgery. *People v. Munroe*, 35 Pac. 326, 327, 100 Cal. 664, 24 L. R. A. 33, 38 Am. St. Rep. 323.

An instrument void or invalid upon its face, which cannot be made good by averment, will not support charge of forgery. *Territory v. Delana*, 41 Pac. 618, 622, 3 Okl. 573; *Costley v. State*, 14 Tex. Ct. App. 156, 160; *Anderson v. State*, 20 Tex. App. 595-597; *John v. State*, 23 Wis. 504, 505. The general rule, however, that, if the instrument is void on its face, it is not the subject of forgery, must be taken with this limitation: when the instrument does not appear to have any legal validity, yet where extrinsic facts appear by which the holder of the paper might be enabled to defraud another, then the offense is complete. *Rembert v. State*, 53 Ala. 467, 468, 25 Am. Rep. 639.

Under Hill's Ann. Code, § 1808, defining forgery as the false making or altering of any promissory note, etc., or altering and publishing the same as true and genuine with intent to injure and defraud any one, the altering and publishing as genuine of a false and forged note, though apparently barred by the statute of limitations, is a forgery. *State v. Dunn*, 23 Or. 562, 564, 32 Pac. 621, 622, 37 Am. St. Rep. 704.

The forgery of a note payable to a national bank for the purpose of deceiving the examiner appointed under the national banking laws does not come within Rev. St. § 5418 [U. S. Comp. St. 1901, p. 8666], making it penal to forge any instrument with the intent to defraud the United States, or to present it at the office of an officer of the United States with such intent; the object of the statute being to protect the government from forgeries, which the forgery mentioned could not effect. *Cross v. North Carolina*, 10 Sup. Ct. 47, 49, 132 U. S. 181, 33 L. Ed. 287.

A note which, though made on Sunday, might have been valid if delivered during the week, is the subject of forgery, for it thus is apparently of legal efficacy. *State v. Sherwood*, 58 N. W. 911, 912, 90 Iowa, 550, 48 Am. St. Rep. 461.

Since the assignment by a public school teacher of salary not earned is void, the false making of such an instrument does not constitute forgery, but if the instrument containing such intended assignment contains likewise a guaranty of payment of the sum assigned, and a provision that, if the sum is not collected by a certain time, it will be paid by the assignee, it is valid in part, and so subject of forgery. *People v. Munroe* (Cal.) 33 Pac. 776, 778. Hence it is held that, to support an indictment for uttering and

publishing a forged promissory note, it is not necessary that there should be a revenue stamp upon such note, though the law provides that a note not so stamped shall be void, and of no effect. *State v. Mott*, 16 Minn. 472, 473 (Gil. 424, 425), 10 Am. Rep. 152. Thus to sign without authority the name of a candidate for a public office to a statement as to his future legislative action if elected is not forgery. *Barnes v. Crawford*, 20 S. E. 386, 387, 115 N. C. 76.

It is not necessary, to constitute forgery, that the receipt alleged to have been forged should in fact discharge or defeat the obligation. It will be the subject of forgery if its tendency is such. *Fonville v. State*, 17 Tex. App. 368, 382.

Ordinarily, the writing or instrument which may be the subject of forgery must be, or purport to be, the act of another, or it must be at the time the property of another, or be some writing or instrument under which others have acquired some rights or have in some way become liable, and where these rights or liabilities have sought to be affected or changed by the alteration without their consent. *State v. Young*, 46 N. H. 266, 267, 88 Am. Dec. 212.

Originally the crime of forgery was punished when some sealed instrument—a bond, deed, or will—was made or altered. Afterwards it was extended to cover every kind of pecuniary obligation. It never did embrace any idle writing not obligatory on any one. An action of slander will not lie for saying that the plaintiff forged a person's name to a recommendation of a certain medicine, as the thing charged was not an indictable crime, and no special damage was proved. It could scarcely be pretended that a person could be indicted and convicted for putting the name of another to a mere newspaper article; and, to render the words actionable, the charge must be of some indictable offense involving moral turpitude. *Miller v. Rittinger (Pa.)* 2 Pears. 351, 352.

#### **Necessity of actual injury.**

It is not essential that any person shall be actually injured, but there must be an intent to deceive. *Commonwealth v. Chandler (Mass.)* Thatcher, Cr. Cas. 187, 188, 189; *People v. Turner*, 45 Pac. 331, 113 Cal. 278.

An instruction that the jury must be satisfied from the evidence that the person whose name was forged to an order would have paid the order had it been genuine, before they could convict the defendant, was properly refused. *State v. Ford*, 38 La. Ann. 797, 798.

#### **Person to be defrauded.**

In order to find the intent to defraud a particular person, it is not necessary that

there should be evidence to show that the accused had that particular person in contemplation at the time of the forgery. It is sufficient that the forgery should have the effect of defrauding him. And one may be guilty of forgery if he fraudulently signs his name, although it is identical with the name of the person who should have signed. *United States v. Long (U. S.)* 30 Fed. 678, 679.

#### **Purport to be act of another.**

Forgery is the false making or uttering or alteration of a written instrument purporting to be the act of some other person, which it is not. *United States v. Cameron*, 13 N. W. 561, 564, 3 Dak. 132.

The instrument must purport to be the act of another, and it must allege a name or person whose act it purports to be. *Anderson v. State*, 20 Tex. App. 595, 596.

Forgery may be the making of a false writing purporting to be that of another; it may be the alteration in some material particular of a genuine instrument; it may be the addition of some material provision of an instrument otherwise genuine; it may be the appending of a genuine signature of another to an instrument for which it was not intended. The false writing may purport to be the instrument of a person or firm existing, or of a fictitious person or firm. As a general rule, however, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact not having reference to the person by whom the instrument is executed will not constitute the crime. It is not the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery. 1 Hawk. c. 70, § 5. And so where one in the presence of the payee signs to a note the name of the firm of which he is known not to be a member, representing, however, that he has authority to sign such name, which, in fact, he has not, such false pretense will not constitute the signing of the note a forgery. *Commonwealth v. Baldwin*, 77 Mass. (11 Gray) 197, 199, 71 Am. Dec. 703.

According to the ordinary and proper meaning of the word "forgery" "as applied to a note or other instrument in writing, we always understand one that is counterfeit and not genuine; an instrument by which some one has attempted to imitate another's personal act, and by means of such imitation to cheat and defraud, and not the doing of something in the name of another which does not profess to be the other's personal act, but that of the doer thereof, who claims by the act itself to be authorized to obligate the individual

for whom he assumes to act." *State v. Willson*, 9 N. W. 23, 29, 28 Minn. 52.

Forgery necessarily implies that a writing be made which shall bear and purport to be something which it is not in fact, or that a writing be so changed or altered that it shall not be or purport to be that which it was designed to be. A writing or instrument which may be the subject of forgery must generally be or purport to be the act of another, or it must at the time be the property of another, or it must be some writing or instrument under which others have acquired some rights or have become liable in a certain way, and which rights and liabilities are sought to be affected or changed by the alteration without their consent. *State v. Young*, 46 N. H. 266, 267, 88 Am. Dec. 212.

**Signing fictitious name.**

Forgery may be committed by the false making of a written instrument in the name of a fictitious person. *Thompson v. State*, 49 Ala. 16, 18; *State v. Wheeler*, 25 Pac. 394, 395, 20 Or. 192, 10 L. R. A. 779, 23 Am. St. Rep. 119; *People v. Warner*, 62 N. W. 405, 406, 104 Mich. 337; *People v. Van Alstine*, 23 N. W. 594, 595, 57 Mich. 69; *Adkins v. State*, 56 S. W. 63, 64, 41 Tex. Cr. R. 577; *Hocker v. State*, 30 S. W. 783, 784, 34 Tex. Cr. R. 359, 53 Am. St. Rep. 716; *Randolph v. State*, 91 N. W. 356, 357, 65 Neb. 520.

**Similarity of names.**

A man may be guilty of forgery by making a false deed or instrument in his own name if the note is placed upon the instrument with the fraudulent intent of throwing the onus of the obligation upon another, and of making the writing purport to be the writing of another. A man who forges another name cannot excuse himself upon the ground that the name happened to be identical with his own. *People v. Rushing*, 62 Pac. 742, 743, 130 Cal. 449, 80 Am. St. Rep. 141. See, also, *United States v. Long* (U. S.) 30 Fed. 678, 679; *Hocker v. State*, 30 S. W. 783, 784, 34 Tex. Cr. R. 359, 53 Am. St. Rep. 716.

**Truth of matters as affecting.**

On the trial of a defendant indicted for the forgery of a deposition he offered to show on the cross-examination of a witness for the state that the facts stated in the deposition were true, and insisted that the truth of such fact was admissible as having a tendency to show that he was not influenced by fraudulent intentions in placing the name of the witness, who knew the truth of the statements therein contained, to the forged deposition. But it may be remarked, in reference to this argument, that it often happens that a litigating party may rely on certain facts known to exist by one who can be a witness, which, standing alone, might

establish the issue on his part; but these facts might be essentially qualified, or entirely controlled, by others equally within the knowledge of the witness, or which might be affected in the same manner by other testimony; and hence a motive to manufacture testimony without the knowledge of the other party, and thereby escape the effects of a cross-examination of his own witness, and the direct evidence of those who might be called to testify in court, or give their depositions in behalf of his adversary. *State v. Kimball*, 50 Me. 409, 415, 416.

**Unsigned paper.**

Forgery cannot happen in the case of an unsigned paper. *State v. Imboden*, 57 S. W. 536, 537, 157 Mo. 83 (citing *Whart. Cr. Law* [10th Ed.] § 698). See, also, *Anderson v. State*, 20 Tex. App. 595, 596.

**Uttering forged papers.**

"Forgery," as used in the treaty between the United States and Austria-Hungary, includes the crime of uttering forged papers. The term "forgery," as used in the treaty, so far as our government is concerned, should have its common-law definition, which includes forgery of commercial paper. In *re Adutt* (U. S.) 55 Fed. 376.

Forgery is one offense, and uttering a forged instrument as genuine, knowing it to be forged, is another and distinct crime. The party might be convicted of either without being guilty of the other. *Ball v. State*, 2 S. W. 462, 465, 48 Ark. 94.

**FORGERY IN THE SECOND DEGREE.**

By Gen. St. 1894, § 6692, forgery in the second degree is defined as follows: A person is guilty of forgery in the second degree who, with intent to defraud, forges an instrument in writing being or purporting to be the act of another. *State v. Greenwood*, 78 N. W. 1042, 1043, 76 Minn. 211, 77 Am. St. Rep. 632.

Forgery is defined by Pen. Code, § 511, as follows: "A person is guilty of a forgery in the second degree who, with intent to defraud, forges a judgment roll, judgment order, or decree of any court." *People v. Oishei*, 45 N. Y. Supp. 49, 51, 20 Misc. Rep. 163.

**FORGERY IN THE THIRD DEGREE.**

Section 128 of the act relating to crimes and punishment provides that every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit any instrument or writing being or purporting to be the act of another, by which any pecuniary demand shall be or purport to be transferred, created, increased, discharged,

conveyed, or dismissed, or by which any right, rights, or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased, or in any manner affected, the falsely making, altering, forging, or counterfeiting of which is not heretofore declared to be a forgery in another degree, shall on conviction be adjudged guilty of forgery in the third degree. *State v. Lee*, 4 Pac. 653, 655, 32 Kan. 380.

#### FORGERY IN THE FOURTH DEGREE.

Every person who shall sell, exchange, or deliver, or offer to sell, exchange, or deliver, for any consideration, any falsely altered, forged, or counterfeited instrument or writing the forgery of which is declared to be a forgery, knowing the same to be false, altered, forged, or counterfeited, with intention to have the same uttered or passed, shall on conviction be adjudged guilty of forgery in the fourth degree. *State v. Lee*, 4 Pac. 653, 655, 32 Kan. 380.

#### FORGETFULNESS.

Failure to remember, entire forgetfulness to act as duty or interest requires, is so closely allied to laches or negligence that it is difficult, if not impossible, to distinguish between them. Indeed, forgetfulness is defined as negligence, careless omission; so that, where a party has neglected to appeal by reason of his forgetfulness, it was caused by his own neglect, within the meaning of the statute. *Nye v. Sochor*, 65 N. W. 854, 856, 92 Wis. 40, 53 Am. St. Rep. 896.

#### FORGIVENESS.

Forgiveness implies a knowledge of the offense to be forgiven. *Gosser v. Gosser*, 38 Atl. 1014, 1015, 183 Pa. 499.

#### FORK.

A small branch may acquire the name of "fork." Names thus acquired usually have some adjective which completes their designation. The expression "the fork" denotes in common acceptation the greatest, and those inferior in kind are expressed by some additional adjective. *Kendrick v. Dallum*, 1 Tenn. (1 Overt.) 489, 493.

#### FORM.

See "Amendment of Form"; "Analogous Forms"; "Due Form"; "Matter of Form"; "Ordinary Form"; "Solemn Form."

Any form, see "Any."

A form is a shape around which an article is molded, woven, or wrapped. North-

wood v. Dalzell, *Gilmore & Leighton Co.* (U. S.) 100 Fed. 98, 99, 40 C. C. A. 295.

To lower the street and relay the pavement in the same form and of the same dimensions, but on a different level, is not to change "the form of the pavement," within the meaning of 12 Geo. III, c. 38, § 15, providing that no person should alter the form of any pavement made by virtue of the act without the consent of the commissioners. *Regina v. Eastern Counties Ry. Co.*, 2 Q. B. 569, 578.

Gen. Laws, c. 220, § 1, providing that the probate courts may prescribe the "form" of bonds to be given by executors, relates to the question whether the bond should be a joint bond or several bonds by each. *Chamberlain v. Anthony*, 43 Atl. 648, 21 R. I. 331.

Lord Coke says that there are two manner of forms—forma verbalis, and forma legalis. Forma verbalis stands on the letters and syllables of the act; forma legalis is forma essentialis, and stands on the substance of the thing to be done and on the sense of the statute. *Smith v. Allen*, 1 N. J. Eq. (Saxt.) 43, 50, 21 Am. Dec. 33.

Rev. St. § 954 [U. S. Comp. St. 1901, p. 696], providing that no summons, writ, etc., in civil causes in any court of the United States shall be abated, arrested, quashed, or reversed for any "defect or want of form," does not include a defect in a summons in an action for a statutory penalty, consisting of a failure to indorse the summons with a reference to the statute under which the suit for penalties was brought. *Brown v. Pond* (U. S.) 5 Fed. 31, 40.

As used in Gen. St. c. 204, § 3, providing that, when the goods or estate of any person are attached, the summons "in the form prescribed" shall be delivered to the defendant, or left at his abode, means that it must be correct, not only so far as the form is given, but the blanks in that form must all be properly filled, so as to correspond with the writ in the formal part thereof. It would not be "in the form prescribed" if the names and residences of the parties were not properly inserted, or if made returnable to a wrong court, or at a wrong time, or if it was not witnessed by the proper magistrate, properly dated and signed by the clerk—all this being necessary to the form. *Keniston v. Chesley*, 52 N. H. 564, 566.

#### Formality distinguished.

See "Formality."

#### Substance distinguished.

The distinction between "form" and "substance" in pleadings is stated as follows in section 17 of chapter 9 of Gould's Pleading: "The difference between matter of form and matter of substance, in gen-

eral, under the statute of Elizabeth, as laid down by Lord Hobak, is that that without which the right doth sufficiently appear to the court is form, but that any defect by reason whereof the right appears not is a defect in substance." In the next section, giving his own definition, the author says: "If the matter pleaded be in itself insufficient, without reference to the manner of pleading it, the defect is substantial; but, if the only fault is in the form of alleging it, the defect is but formal." *Pierson v. Springfield Fire & Marine Ins. Co.* (Del.) 31 Atl. 966, 968, 7 Houst. 307.

## FORM AND MODE OF PROCEEDING.

See, also, "Modes of Proceeding."

Rev. St. §§ 914, 915, 916 [U. S. Comp. St. 1901, p. 684], provide that "the forms and modes of proceeding" in common-law actions, etc., shall be the same in federal courts as are provided in like cases by the laws of the state in which the court is held. Held, that the phrase "forms and modes of proceeding," both as used in such act and in the act of 1792, from which it was taken, embraces the whole progress of the suit and every transaction made from its commencement to its termination, which does not take place till the judgment is satisfied. *United States v. Sturgis* (U. S.) 14 Fed. 810, 811. See, also, *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 27, 6 L. Ed. 253.

The phrase "forms and modes of proceedings" in the uniformity of practice act, does not operate to impliedly repeal special provisions of the acts of Congress directing the modes of procedure and of service of process in the federal courts, and therefore the federal statute requiring service of process by the marshal is mandatory, and a service by others is invalid, and will not authorize a default judgment. *Schwabacker v. Reilly* (U. S.) 21 Fed. Cas. 764, 765.

### Evidence or conduct of trial.

In construing Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], it was said that the expression "practice, pleadings, and forms and modes of proceeding" is well satisfied without including in it the subject of evidence. At all events, it cannot be regarded as covering matters connected with the subject of evidence, which are regulated by specific provisions of law found in the same title of the same statute. *Beardsley v. Littell* (U. S.) 2 Fed. Cas. 1178, 1179.

The practice, pleadings, and forms and modes of proceedings in the uniformity of practice act do not apply to the personal conduct and administration of the judge in the discharge of his separate functions, and therefore the refusal of the trial judge to

allow the jury to take written instructions with them to the jury room is not erroneous, though permitted by the practice act of Illinois. *Nudd v. Burrows*, 91 U. S. 426, 442, 23 L. Ed. 286.

The phrase "practice, pleadings, and forms and modes of proceeding," in Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], providing that the practice, pleadings, and forms and modes of proceeding in civil causes other than equity and admiralty in the federal courts shall conform as nearly as may be to the "practice, pleadings, and forms and modes of procedure" existing at the time in the courts of record of the state within which the federal courts are held, does not include the mode of examination of witnesses upon the stand in a trial, nor the mode of taking the deposition of a witness for use in the federal court. *Sage v. Tauszky* (U. S.) 21 Fed. Cas. 145.

### Proceedings after judgment.

Rev. St. § 914 [U. S. Comp. St. 1901, p. 684], cannot be construed to apply to proceedings for the enforcement of judgments as well as to proceedings before the judgments were rendered, unless they were prescribed by a law of the state at the time the provisions of the section took effect, or, if subsequently prescribed by such law, until they had been adopted by a general rule of the court. *Lamaster v. Keeler*, 8 Sup. Ct. 197, 200, 123 U. S. 376, 31 L. Ed. 238.

The modification or suspension of a lien of a judgment is a case embraced within these general provisions, as an appeal in accordance with the state practice. *United States v. Sturgis* (U. S.) 14 Fed. 810, 811.

The expression "forms and modes of proceeding" will include the execution of process, that being a part of the proceedings in the suit. *Wayman v. Southard*, 23 U. S. (10 Wheat.) 1, 27, 6 L. Ed. 253.

## FORM AND SIMILITUDE.

A plate is in the form and similitude of the general instrument imitated if the finished parts of the engraving thereupon resemble and conform to similar parts of the genuine instrument. *Gen. St. Minn. 1894, § 6693.*

## FORM OF ACTION.

The Code abolishing forms of action merely included the difference in this respect between actions at law and suits in equity, and provided a single method of pleading. *Exchange Bank v. Ford*, 4 Pac. 746, 750, 7 Colo. 314.

The words "form of action" cannot be construed to be the meaning of the words "nature of the case" in a statute providing

that it shall not be deemed necessary in any declaration or other pleading to lay the venue in the county in which the action is brought, nor to set forth in any manner the place in which an act is alleged to have been done, unless when, from the nature of the case, the place may be material or traversable. "What is your form of action?" would not be answered by saying, "A tortious taking of a horse," any more than the inquiry, "What is the nature of your case?" would be responded to by saying, "Replevin." The form in which a suit is brought and the subject-matter of it, or its cause of action, or nature of its case, are totally distinct subjects. *Truax v. Parvis* (Del.) 32 Atl. 227, 228, 7 Houst. 330.

### FORM OF INDEBTEDNESS.

Other forms of indebtedness, see "Other."

### FORMAL DEFECT.

Within the meaning of the rule that formal defects in an indictment may be amended, the order of arrangement, the precise words, unless particular words alone convey the proper meaning, are formal matters. Judge Barrett, in *State v. Arnold*, 50 Vt. 731, 735, said: "It is obvious, without illustration, that a defect that does not affect the merits of the case or the evidence necessary to be given to maintain the indictment could be regarded as only formal." The words, "contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the state," are formal words, and their omission in one count of an indictment is a formal defect. *State v. Amidon*, 2 Atl. 154, 155, 58 Vt. 524.

### FORMAL MORTGAGE.

A "formal mortgage of personal property" is a conditional sale of it as security for payment of a debt or the performance of some other obligation. The condition is that the sale shall be void upon the performance of the condition named. *Cone v. Iverson*, 35 Pac. 933, 939, 4 Wyo. 203 (citing *Jones, Chat. Mortg.* § 1).

### FORMAL PARTIES.

Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation. They may be parties or not, at the option of the complainant. *Chadbourn v. Coe* (U. S.) 51 Fed. 479, 480, 2 C. C. A. 327.

### FORMALITY.

See, also, "Informality."

"Formalities," as used in Gen. St. c. 203, § 30, providing that the same "formalities shall be observed in the taking of depositions in perpetual memory as in other depositions," means the directions contained in previous sections respecting the manner in which the magistrate shall proceed in taking and the deponents in giving other depositions. A formality is a set form or manner of doing." *Remington v. Peckham*, 10 R. L. 550, 553.

"Formalities" is not synonymous with the word "form." If a person, on being told that another, who had just died, had left a will, shall ask in what form this will was, the answer would at once be "olographic, a nuncupative will by public act, a nuncupative will by private act, or a mystic will." If he were then to ask whether all the formalities required by law in the premises had been fulfilled, the person to whom the question was addressed would instantly know and recognize that this was not a repetition of the first, but an entirely new and distinct question, calling either for an affirmative answer or for the specifying of some particular act or acts which had been omitted or illegally or improperly performed. *Succession of Seymour*, 48 La. Ann. 993, 1001, 20 So. 217, 221.

### FORMALLY.

"Formally," as used in a statute providing that the person against whom an act under private signature is produced is obliged formally to avow or disavow his signature, means solemnly disavow his signature in writing, signed by himself, and in his own proper handwriting. *Clark's Ex'rs v. Cochran* (La.) 3 Mart. (O. S.) 353, 360.

### FORMED DESIGN.

Formed design, as applied to murder, is of two classes, general and special. The former is evidenced by carrying weapons likely to procure death, with a previously formed purpose to use them in resentment of any blow that may be received, come from what quarter it may. Such formed design has no particular person as its object. It is aimed at whoever may become an assailant. Formed design special differs from such design general only in the fact that it is aimed at, and the injury inflicted on, a particular person had in view. *Mitchell v. State*, 60 Ala. 26, 33.

The intentional taking of life with a deadly weapon implies a formed design to take the life, whether it be a willful, malicious, deliberate, and premeditated killing, constituting murder in the first degree; or

malicious merely, constituting murder in the second degree; or without malice, constituting manslaughter; or whether the homicide was excusable or justifiable. An instruction, therefore, that when one intentionally kills another with a deadly weapon the law presumes it was maliciously done, with a formed design to take life, unless the evidence which proves the killing shows the excuse or extenuation, was free from error. *Miller v. State*, 19 South. 37, 39, 107 Ala. 40. See, also, *Burton v. State*, 18 South. 284, 289, 107 Ala. 108.

The term "formed design" has sometimes been deemed expressive of the wilful, deliberate, premeditated purpose which characterizes murder in the first degree, but in more recent cases it has been held that such meaning does not necessarily attach to the term. So that an instruction using such term without defining it is properly refused, as likely to confuse the jury. *Wilson v. State*, 29 South. 569, 572, 128 Ala. 17.

The four elements necessary to constitute murder in the first degree are all embraced in the words "formed design." *Amos v. State*, 83 Ala. 1, 3 South. 749, 751, 3 Am. St. Rep. 682.

The phrase "formed design," as employed in the definition of malice that it is where one with "formed design," etc., means only that which flows from, and is the conclusion arrived at by the exercise of, the reasoning faculties, and hence the act must be preceded by deliberation of the mind. *Ake v. State*, 30 Tex. 466, 473.

## FORMEDON.

See "Writ of Formedon."

## FORMEDON IN THE REVERTER.

Formedon in the reverter lay at common law for the donor after the failure of the issue of the tenant in fee conditional at the common law, and under the statute *de donis*, it lay for the reversioner after the failure of issue in tail. *Orndoff v. Turman* (Va.) 2 Leigh, 200, 242, 21 Am. Dec. 608 (citing *Plowd.* 235a).

## FORMER.

2 Rev. St. p. 139, c. 8, tit. 1, § 5, providing that no second or other subsequent marriage shall be contracted by any person during the lifetime of any former husband or wife, unless the former marriage shall have been annulled or dissolved for some cause other than the adultery of such person, or unless such husband or wife shall have been finally sentenced to imprisonment for life, does not import that the relation still continues, or, on the other hand, that

it has ceased. On that point it is silent, but limits the inquiry to the dry fact whether the person with whom the prior marriage was contracted still lives at the time of the subsequent marriage. It cannot be construed as though it read "during the lifetime of any husband or wife to whom the party was formerly married." So read, it would or might import that the relation of husband and wife must still continue between the former husband and wife at the time of the subsequent marriage. *Cropsey v. Ogden*, 11 N. Y. 228, 231.

Rev. St. 4162, provides that when the relict of a deceased husband or wife shall die intestate and without issue, possessed of any real estate or personal property which came to such intestate from any former deceased husband or wife, the estate shall pass to the children of said deceased husband or wife. Held, that "any former deceased husband" means any husband who has deceased, leaving a widow to whom any real or personal property is passed by virtue of the provisions of said section, and is not confined in its application to cases where the widow has had two or more husbands who are deceased. *Anderson v. Gilchrist*, 44 Ohio St. 440, 8 N. E. 242.

## FORMER ACQUITTAL.

A plea of former acquittal will not be good unless the facts charged in the second indictment would, if they had been established on the trial of the first indictment, have sustained it. It is necessary that the crime charged be precisely the same. *Burns v. People* (N. Y.) 1 Parker, Cr. R. 182, 186.

A plea of former acquittal or former conviction should allege the proceedings which resulted in such former acquittal or conviction, i. e., matter of record, to wit, the former indictment and acquittal or conviction, and matters of fact, to wit, the identity of the person acquitted or convicted, and of the offense of which he was acquitted or convicted. *Williams v. State*, 13 Tex. App. 285, 286, 46 Am. Rep. 237.

## FORMER ADJUDICATION.

See, also, "Res Adjudicata."

The rule is that where a cause is disposed of upon a demurrer to an answer, and not upon its merits, it does not constitute a former adjudication. It is only where the matter in issue has been either actually or presumptively denied that the judgment is a bar to another action. *Beidenkoff v. Brazee*, 61 N. E. 954, 956, 28 Ind. App. 646.

In order to constitute a former adjudication it must affirmatively appear that the matter in dispute was put in issue and tried. *Eckert v. Pickel*, 13 N. W. 708, 710, 59 Iowa,



545; *Russel v. Place*, 94 U. S. 606, 608, 24 L. Ed. 214.

A former judgment, if rendered on the merits, constitutes an absolute bar to a subsequent action for the same cause of action between the same parties. The parties are concluded by the judgment not only upon all the issues which were actually tried, but upon all issues which might have been tried, in the former action, so that a new action for the same cause of action between the same parties cannot be maintained or defended on grounds which might have been tried and determined in the former action. *Foye v. Patch*, 132 Mass. 105, 110; *Cromwell v. Sac County*, 94 U. S. 351, 352, 24 L. Ed. 195.

A judgment constitutes a bar in a subsequent action between the same parties upon a different claim or cause of action only as to those matters in issue, or points controverted, upon the determination of which the former finding or verdict was rendered. *Cromwell v. Sac County*, 94 U. S. 351, 352, 24 L. Ed. 195.

A judgment, as to all matters decided thereby, and as to all matters necessarily involved in the litigation relating thereto, binds and estops all the parties thereto and their privies in all cases where the same matters are again brought in question. Such is the doctrine of *res judicata*. There is also the doctrine of *stare decisis*, which is of a different nature. When a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle and apply it to all after cases, where the facts are substantially the same, and this it does for the stability and certainty of the law. *Moore v. City of Albany*, 98 N. Y. 396, 410.

#### FORMER CONVICTION.

The plea of former conviction is not a plea upon the merits. It is not an inquiry as to anything that the defendant has or has not done, and is not, therefore, of a criminal nature. It is a collateral civil inquiry as to what action the court has taken on a former occasion. So distinct is this collateral issue from the criminal inquiry, that it is held that they should be treated separately, and the sustaining of a plea of the former conviction, which was afterwards set aside, did not place the defendant in jeopardy, so as to preclude a subsequent trial thereof. *State v. Ellsworth*, 42 S. E. 699, 131 N. C. 773, 92 Am. St. Rep. 790.

A plea of former acquittal or "former conviction" should allege the proceedings which resulted in such former acquittal or conviction, i. e., matter of record, to wit, the former indictment and acquittal or conviction, and matters of fact, to wit, the

identity of the person acquitted or convicted, and of the offense of which he was acquitted or convicted. *Williams v. State*, 13 Tex. App. 285, 286, 46 Am. Rep. 237.

#### FORMER JEOPARDY.

See "Jeopardy."

#### FORMER OWNER.

"Former owner," as used in Civ. Code, § 146, subd. 4, providing that, on divorce, if a homestead has been selected in the separate property of either, it shall be assigned to the former owner, would include a wife to whom the homestead property had been conveyed by a valid deed during coverture. *Burkett v. Burkett*, 20 Pac. 715, 718, 78 Cal. 310, 8 L. R. A. 781, 12 Am. St. Rep. 58.

The words "former owner," within the statute of West Virginia relating to sales by the state of lands forfeited or purchased at tax sale, and authorizing the former owner to redeem, embrace those who, in law, would have owned the lands upon the death of such owner if they had not been sold for taxes, or, if sold, had been redeemed within the prescribed time after the sale at which the state purchased, and thus include the heirs. *Rich v. Braxton*, 15 Sup. Ct. 1006, 1016, 158 U. S. 375, 39 L. Ed. 1022.

#### FORMER TRIAL.

Code Civ. Proc. § 830, providing that, where a party has died since the trial of an action, decedent's testimony taken or read at the former trial may be given in evidence at a new trial, do not mean the last trial only, but any former trial where evidence was given by a party since deceased. *Koehler v. Schelder*, 10 N. Y. Supp. 101, 16 Daly, 235.

#### FORNICATION.

"Fornication" is illicit sexual intercourse between parties neither of whom are married. *Banks v. State*, 11 South. 404, 405, 96 Ala. 78; *State v. Dana*, 10 Atl. 727, 731, 59 Vt. 614; *People v. Barnes*, 9 Pac. 532, 534, 2 Idaho (Hasb.) 161; *Territory v. Whitcomb*, 1 Mont. 359, 362, 25 Am. Dec. 740; *Territory v. Corbett*, 3 Mont. 50, 54.

Fornication is the living together, and having carnal intercourse with each other, or habitual intercourse with each other without living together, of a man and woman, both being unmarried. *Osgrove v. State*, 37 Tex. Cr. R. 249, 256, 39 S. W. 367, 66 Am. St. Rep. 802.

Illicit carnal connection, unaccompanied with any facts which tend to aggravate it is fornication. *Dinkey v. Commonwealth*, 17 Pa. (5 Harris) 126, 129, 55 Am. Dec. 542.

Fornication is sexual intercourse between a man, married or single, and an unmarried woman. *Hood v. State*, 56 Ind. 263, 267, 26 Am. Rep. 21; *State v. Johnson*, 69 Ind. 84, 87; *State v. Chandler*, 96 Ind. 591, 593.

Under the act of 1705, an unmarried person having sexual intercourse with another is guilty of fornication only. *Commonwealth v. Kilwell* (Pa.) 1 Pittsb. 255, 259.

Illicit intercourse between an unmarried man and a married woman is fornication, in the man, and not adultery. *Commonwealth v. Lafferty* (Va.) 6 Grat. 672, 673.

Fornication is criminal connection had between a male and a female, unmarried. The woman, unless she stands in relation of marriage to the man with whom she may have the connection, commits the offense of fornication, and either the man or woman may commit the higher offense of adultery in the act. The offense of fornication is considered as a minor offense, or a minor grade of crime. *Easley v. Commonwealth* (Pa.) 11 Atl. 220, 221.

Where, in a prosecution for fornication, it is not proven that either or both the parties were unmarried, or that they were not married to each other, when occupying the same room for months, a conviction cannot be sustained under the statute declaring that "fornication is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried." *Wells v. State*, 9 Tex. App. 160.

Fornication is the voluntary sexual intercourse of one person with another. There must be voluntary consent of the will on the part of the one, but the other party to the act may be the victim of force or fraud, or a child so young that the law regards her as incapable of giving consent. *People v. Barnes*, 9 Pac. 532, 534, 2 Idaho (Hask.) 161.

When the word "fornication" is used in an indictment for fornication as descriptive of the offense, it is an allegation of illicit intercourse of two unmarried persons of different sexes. *State v. Dana*, 10 Atl. 727, 731, 59 Vt. 614.

A single act of unlawful sexual intercourse falls within the definition of "adultery" or "fornication," according as the party is married or not. *State v. Brown*, 23 N. E. 747, 748, 47 Ohio St. 102, 21 Am. St. Rep. 790.

#### Other sexual offenses distinguished.

In Bacon's Abridgment, "Marriage and Divorce," 569, in distinguishing between fornication and adultery, it is said: "Fornica-

tion is unlawful because children are begotten without any care for their education. But adultery goes further. It entails a spurious race on a party, for whom he is under no obligation to provide." *Hood v. State*, 56 Ind. 263, 267, 26 Am. Rep. 21; *State v. Lash*, 18 N. J. Law (1 Har.) 380, 388, 32 Am. Dec. 397.

Unlawful sexual intercourse and open unlawful living together of a married man and a married woman, or where either are married, and thus have intercourse or live together, is adultery; and the same state of facts existing between unmarried persons, man and woman, is fornication. *Territory v. Whitcomb*, 1 Mont. 359, 362, 25 Am. Rep. 740.

By "fornication" is meant illicit carnal connection; unlawful sexual intercourse. This unlawful intercourse, unaccompanied by any circumstances which tend to aggravate it, is simple fornication; and when, as the result of such fornication, a child is born, it is called "bastardy." If a man who is married is guilty of unlawful sexual intercourse, we call it "adultery" in him. When the act is between parties sustaining relations to each other within certain degrees of consanguinity or affinity, we call it "incest." Where the female consents to unlawful intercourse through fraudulent acts, including a promise of marriage, we call it "seduction." In each case the essential act which constitutes the crime is fornication. *People v. Rouse*, 2 Mich. N. P. 209.

Fornication is not a common-law offense, and therefore both the information and proof under it must conform to the statute which prescribes the penalty. The commonly accepted legal meaning of fornication is illicit sexual connection between a man and woman as husband and wife, not being such. By Rev. St. § 4580, when a man commits fornication with a single woman, both of them shall be punished. The offense is limited to a man and a single woman, thus creating a clear distinction between fornication and adultery, which latter crime can be committed only by a married man or with a married woman. The crime of rape may be committed upon an unmarried woman not the wife of the defendant. The crime of incest can be committed only with a woman of certain consanguinity or relationship with the man. The crimes of incest, adultery, and fornication differ, therefore, only as to the persons, while the crime of rape differs from the other crimes against chastity, both as to the person and the manner of sexual connection, as by force and against the will of the woman. *State v. Shear*, 8 N. W. 287, 51 Wis. 460.

Adultery and fornication, while of the same grade, are essentially different offenses. To commit the former, one of the parties, at

least, must be at the time a married person. Whether, if one of the offenders be married, and the other single, the latter commits the offense of adultery, or fornication, the authorities are not in harmony. The better opinion seems to be that in such case the married offender is guilty of adultery, and the unmarried one of fornication. The offense of fornication proper is committed when neither of the offending parties is married. *Buchanan v. State*, 55 Ala. 154.

Neither fornication nor adultery were indictable offenses at the common law; they were held to be only private wrongs, for which the aggressor was answerable in a civil action for exemplary damages; and this continued to be the case, except for one short revolutionary period of time in England, until our own legislature made them indictable offenses. A married man is not guilty of adultery in having carnal connection with an unmarried woman. *State v. Lash*, 16 N. J. Law (1 Har.) 380, 384, 388, 32 Am. Dec. 397.

Connection with a single woman, though fornication, was not adultery. *State v. Hasty*, 96 N. W. 1115, 121 Iowa, 507.

Fornication is a misdemeanor for which an indictment lies. It is also a constituent of incest, adultery, seduction under a promise of marriage, and rape. *Commonwealth v. Arner* (Pa.) 30 Wkly. Notes Cas. 172, 173.

## FORSWORN.

The word "forsworn" is applicable not only to perjuries punishable at law, but also to offenses of the same description which incur no temporal punishment. *Tomlinson v. Brittlebank*, 4 Barn. & A. 630, 632.

The word "forsworn," although in one sense it may import perjury, yet it does not necessarily imply it, for a person may be forsworn without committing perjury. *Sheely v. Biggs* (Md.) 2 Har. & J. 363, 364, 3 Am. Dec. 552; *Deford v. Miller* (Pa.) 3 Pen. & W. 103, 106; *Pittsburg, A. & M. Pass. Ry. Co. v. McCurdy*, 8 Atl. 230, 232, 114 Pa. 554, 60 Am. Rep. 363.

The distinction taken in the English books between the words "forsworn" and "perjured" must have been founded on this: that the word "perjured" implied that the false oath was taken in a judicial proceeding, whereas a man might be forsworn in an oath taken on some other occasion, when it could not amount to perjury. Accordingly, when other words are added, showing that the oath spoken of was taken in a judicial court, the word "forsworn," with this explanation, has been considered as importing a charge of perjury, as "forsworn in the civil court" has been held to import a charge of perjury, and was "forsworn before a jus-

tice of the peace." *Fowle v. Robins*, 12 Mass. 498, 501.

## FORT.

As public use, see "Public Use."

"A fort is something more than a mere military camp, post, or station, such as are usually established and occupied for a few years on the border between new settlements and the wild Indian tribes, and implies a fortification, or a place protected from attack by some such means, a moat, wall, or parapet." *United States v. Tichenor* (U. S.) 12 Fed. 415, 424.

## FORTH.

See "And So Forth"; "Called Forth."

## FORTHCOMING BOND.

A forthcoming bond is a bond given for the security of the sheriff, conditioned to produce the property levied on when required. Such a bond, as the name indicates, and as it was always considered when it originated in the early history of the attachment law, was simply to secure the return to the officer of the identical property which he had seized under attachment in the event the attachment was sustained. It ran to the sheriff or other officer executing the writ, and in such case it could, of course, be reasonably contended that the property still remained in custodia legis. A bond given under a statute providing that the defendant may at any time release any property in the hands of the sheriff by virtue of any writ of attachment, by executing an undertaking, and that the property shall be released from the attachment and delivered to the defendant, is not, in the ordinary acceptance of the term, a forthcoming bond. *Nichols v. Chittenden*, 59 Pac. 954, 956, 14 Colo. App. 49.

## FORTHWITH.

"Forthwith" is convertible with "at once" and "prompt," and, in its ordinary acceptance, means "at the same point of time; immediately; without delay; at one and the same time; simultaneously; directly." *Lewis v. Hojer*, 16 N. Y. Supp. 534, 536.

"Forthwith" has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done; usually being construed as meaning as soon as, by reasonable exertion, confined to the object with relation to which it is used, that object may be accomplished. Its meaning, of course, varies with every particular case. In matters of practice and pleading, it is usually construed, and sometimes defined by rule of court, to mean within 24 hours. There

are many cases turning upon the question as to whether or not a person was too late in complying with a requirement that a thing must be done "forthwith," but it cannot be successfully contended that a person is in default of such a requirement because of doing the required thing too speedily. *Dickerman v. Northern Trust Co.*, 20 Sup. Ct. 311, 315, 176 U. S. 181, 44 L. Ed. 423.

In *Blackiston v. Potts* (Pa.) 2 Miles, 388, it is said that "forthwith" means "with convenient speed and diligence." The term is relative. Every case must be governed by its own circumstances. It is easy to imagine many things which would excuse a few days' delay. *McLain v. Warren*, 8 Pa. Dist. R. 585, 586.

The word "forthwith," in Code Civ. Proc. § 491d, providing that a copy of the appraisal of real estate to be sold at judicial sale shall be forthwith deposited in the office of the clerk of the proper court, means "immediately; without delay; directly." Regard may be had to the nature of the act to be performed. *Chadron Loan & Bldg. Ass'n v. O'Linn*, 95 N. W. 358, 2 Neb. (Unof.) 246 (citing *Burkett v. Clark*, 46 Neb. 466, 64 N. W. 1113).

The word "forthwith," in Tayl. St. p. 368, § 76, providing that if a town treasurer shall refuse to serve, or if his office shall become vacant, the town supervisors shall forthwith appoint a treasurer, does not require the board to act on the very day when the time for the treasurer-elect to qualify expires without his having done so, especially where he has up to that day manifested an intention to serve. *Supervisors of Omro v. Kaime*, 39 Wis. 468, 475.

Where the statute makes it an attorney's duty to declare forthwith the place of abode of plaintiff, a failure to declare for nearly six months, or for any period longer than the "quarto die post," which of old was the latest day of indulgence, may be regarded as a refusal to declare. *Whitney v. Merchants' Nat. Bank*, 40 N. J. Law (11 Vroom) 481, 483.

#### As immediately.

As used in Laws 1882, p. 145, providing that, in case of objections made to any evidence offered in a cause, the matter objected to, and the grounds of objection and the rulings of the court thereon, should be forthwith reduced to writing and certified by the judge, etc., "forthwith" means immediately; without delay. *Whittemore v. Smith*, 50 Conn. 376, 379.

The phrase "due and payable forthwith out of the property transferred," in Transfer Tax Law, § 222, providing that all taxes imposed by the article shall be due and payable at the time of the transfer, except, etc., does not necessarily mean that the property trans-

ferred shall be immediately appraised and assessed in cases where the clear market value cannot be ascertained or determined. Nor does it mean that the taxes shall be due and payable forthwith, out of the property transferred, before the property transferred is appraised, and the amount of the taxes ascertained and determined. In the case at bar the clear market value of the property transferred was incapable of being ascertained until the death of a certain person, and it was held that the property was not taxable until its value could be determined. In *re Babcock's Estate*, 75 N. Y. Supp. 928, 928, 37 Misc. Rep. 445.

#### As in reasonable time.

Forthwith means within a reasonable time. *Lincoln v. Field*, 16 S. W. 288, 290, 54 Ark. 471; *Pennsylvania R. Co. v. Reichert*, 58 Md. 261, 275; *Pittsburg, V. & C. Ry. Co. v. Commonwealth*, 101 Pa. 192, 196.

The construction given generally by the courts to the words "immediately" and "forthwith," whether they occur in contracts or in statutes, is that the act referred to should be performed within such convenient time as is reasonably requisite. *Martin v. Pifer*, 96 Ind. 245, 248.

Within the provisions of Laws 1890, c. 84, § 3, providing that certain persons shall open the returns of elections made to the Secretary of State, and shall forthwith proceed to ascertain the number of votes given to the different persons for said office, the expression "forthwith" means that the canvass must be completed within such reasonable time as is required to perform the duty enjoined upon the canvassers, namely, to canvass all the voters from all the counties of the state, as shown upon the face of the abstract deposited in the office of the county auditor. And hence such board was entitled to wait until legal and proper returns had been made. *Woods v. Sheldon*, 69 N. W. 602, 605, 9 S. D. 392.

A covenant whereby the covenantors agreed to sell a certain vessel "forthwith as soon as may be, for the largest sum that we can reasonably obtain," allows a reasonable latitude as to the time and manner of making the sale. *Adams v. Foster*, 59 Mass. (5 Cush.) 156, 157.

The term "forthwith," in a statute providing that a clerk perform a duty forthwith, means no more than that he must act promptly and with a reasonable dispatch; and, where the work required to be done is of such a nature that it cannot be done instantly, no rights will be lost, provided the work is done within a reasonable time. *Faivre v. Manderscheid*, 90 N. W. 76, 78, 117 Iowa, 724.

"Forthwith," as used in Code, § 491d, requiring an appraisal of real estate to

be filed with the clerk forthwith, means as soon as, with reasonable dispatch in the ordinary course of business, it can be done; and the fact that the copy of the appraisal was not filed until the fourth day following the one on which it was made, does not, of itself, show that the sheriff's return that he filed it forthwith is incorrect. *Hubbard v. Hennessey*, 90 N. W. 220, 2 Neb. (Unof.) 816.

In considering the meaning of the word "forthwith," as used in Rev. St. art. 3328, providing that a chattel mortgage shall be deposited and filed with the county clerk, the court, in *Hackney v. Schow*, 53 S. W. 713, 21 Tex. Civ. App. 613, says: "The term is an imperative one, and certainly admits of no unnecessary delay. Mr. Webster defines the term as meaning immediately; without delay; directly. *Bouvier*: as soon as the thing may be done by reasonable exertion confined to that object. Indeed, as was said by our Supreme Court, by Chief Justice Gaines, in the case of *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163, the term has been too often construed to require discussion. It will be sufficient to say that in the case cited the term, as used in our chattel mortgage statute, was defined to mean with all reasonable diligence and dispatch." *Austin v. Welch*, 72 S. W. 881, 884, 31 Tex. Civ. App. 528.

#### In charter party.

"Forthwith," as used in an agreement wherein plaintiff covenanted forthwith to procure a vessel and stow on board a certain telegraphic cable, and to rig, provision, and man her, did not mean immediately, but within a reasonable time. *Roberts v. Brett*, 18 C. B. 561, 574, 36 E. L. & Eq. 358, 365.

"Forthwith," in strictness, means immediately; but, as used in an agreement for the hire of a vessel to take a cargo on board the boat, "forthwith" allows a reasonable time for preparations to be made where the vessel was not ready when the contract was made. *Simpson v. Henderson*, 1 Moody & M. 300.

#### In contract of suretyship.

In *Burns' Ann. St. 1894, § 1224* (Horner's *Ann. St. 1897, § 1210*), providing that one bound as surety on a contract in writing, upon which the right of action has accrued, may by written notice require the obligee forthwith to institute an action on the contract, "forthwith" adds something to the meaning of the words with which it is used in the statute, so that it is not enough, therefore, to simply require the creditor in the notice to institute an action upon the contract, but some form of words must be used which will be equivalent to the requirement forthwith to institute an action on the contract. *McMillin v. Deardorff*, 48 N. E. 233, 18 Ind. App. 423.

#### In covenants to repair.

"Forthwith" means within a reasonable time or without unnecessary delay, so that a landlord, under a covenant in a lease to make repairs forthwith after notice of damage, must proceed with proper diligence to do whatever is necessary to repair the injury, and a delay of nine days authorized the tenant to abandon the premises. *Nimmo v. Harway*, 50 N. Y. Supp. 686, 687, 23 Misc. Rep. 126.

"Forthwith," as used in a covenant providing that the premises shall forthwith be put into complete repair, does not mean any specific time, but allows a reasonable time therefor. *Pittman v. Sutton*, 9 Car. & P. 706.

#### In demand for account.

A demand for an account forthwith is not the same, in substance and effect, as a demand for an account within 15 days, nor a demand without naming a time for compliance, but leaving it to be complied with within the statutory period. *Green v. Kelley*, 24 Atl. 133, 134, 64 Vt. 309.

#### In execution of award.

An award directing A. and B. to forthwith execute certain reconveyances to C., and that C. forthwith execute indemnities and releases to A. and B., means in the latter case as soon as A. and B. have, by their execution of the reconveyances, put themselves in a position to call for the execution of the indemnities. *Boyes v. Bluck*, 13 C. B. 652, 672.

#### In insurance.

"Forthwith," as used in an insurance policy requiring proof of loss to be given forthwith, means within a reasonable time, considering the circumstances of each case, and is to be determined by the jury. *Griffey v. New York Cent. Ins. Co.*, 100 N. Y. 417, 421, 3 N. E. 309, 53 Am. Rep. 202; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389, 402, 33 N. E. 475; *Carpenter v. German-American Ins. Co.*, 135 N. Y. 298, 303, 31 N. E. 1015; *Solomon v. Continental Ins. Co.*, 32 N. Y. Supp. 759, 762, 11 Misc. Rep. 513; *Attorney General v. Atlantic Mut. Life Ins. Co.*, 3 N. E. 193, 194, 100 N. Y. 279; *Brown v. Mechanics' & Merchants' Ins. Co.*, 4 Fed. Cas. 411; *Edwards v. Baltimore Fire Ins. Co. (Md.)* 3 Gill, 176; *Harnden v. Milwaukee Mechanics' Ins. Co.*, 41 N. E. 658, 164 Mass. 382, 49 Am. St. Rep. 467.

The purpose of the provision of an insurance policy that "in case of loss the assured shall forthwith give notice to the secretary of the company" is obvious. It is to enable the insurers to inquire immediately into the extent of the loss, and to investigate for themselves the circumstances attending

the casualty. *Inland Ins. & Deposit Co. v. Stauffer*, 33 Pa. (9 Casey) 400, 402.

To give a literal import to the terms "forthwith" and "as soon as possible," as used in policies of insurance requiring notice of loss to be forthwith given, and proofs of loss to be made as soon as possible, would, in almost every case of loss by fire that occurs, deprive the insured of all loss and indemnity for the loss incurred; and policies of insurance against fire would, as to the insured, instead of being contracts of indemnity, as they profess to be, become engines of fraud and injustice in the hands of the underwriters, and the recovery by the insured would be rarely, indeed, if ever, practicable. Such a construction, therefore, has not been sanctioned by courts of justice. The true meaning of those terms is with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. *Edwards v. Baltimore Fire Ins. Co. (Md.)* 3 Gill, 176, 187, 188.

The word "forthwith," as used in a provision in a fire policy to give notice forthwith in the case of loss, does not mean instantly, but within a reasonable time. *Solomon v. Continental Fire Ins. Co.*, 55 N. E. 279, 280, 160 N. Y. 595, 48 L. R. A. 682, 73 Am. St. Rep. 707; *Phoenix Ins. Co. v. Coomes*, 20 S. W. 900, 14 Ky. Law Rep. 603.

The word "forthwith," in an insurance policy requiring notice of loss to be given forthwith, means within a reasonable time. *Pennypacker v. Capital Ins. Co.*, 45 N. W. 408, 80 Iowa, 56, 8 L. R. A. 236, 20 Am. St. Rep. 395.

The term "forthwith," in an insurance policy providing that the insured shall give notice of loss forthwith, is to be construed as meaning within a reasonable time. *Jas. S. Kirk & Co. v. Ohio Valley Ins. Co. (Ohio)* 6 Wkly. Law Bul. 200.

May, in his work on Insurance (volume 2, § 462), says: "If the notice be required to be forthwith, or as soon as possible, it will meet the requirement if given with due diligence, under the circumstances of the case, and without unnecessary and unreasonable delay." *Munz v. Standard Life & Accident Ins. Co.*, 72 Pac. 182, 183, 26 Utah, 69, 62 L. R. A. 485.

As used in a policy of insurance requiring that notice of a loss by fire be forthwith given to the company, "forthwith" means without unnecessary delay, and notice must be given with due diligence under the circumstances of the case. In an action on such a policy an averment that notice was given forthwith is therefore equivalent to the averment that the notice was given with due diligence under the circumstances of the case, and it was only necessary that the proof should sustain such averment. *St. Louis*

*Ins. Co. v. Kyle*, 11 Mo. 278, 289, 49 Am. Dec. 74.

The true meaning of the requirement in a policy that a sworn statement of the loss shall be returned forthwith is that a statement shall be sent in as soon as the exercise of reasonable diligence will enable the assured to send it. *Parker v. Middlesex Mut. Assur. Co.*, 61 N. E. 215, 179 Mass. 528; *Cook v. North British & Mercantile Ins. Co.*, 66 N. E. 597, 598, 183 Mass. 50.

The term "forthwith" in a policy of insurance, used in connection with giving notice to the underwriter of the occurrence of a loss by fire, is not to be taken literally, but as meaning with due diligence, or without unnecessary procrastination or delay, under the circumstances. *Edwards v. Baltimore Fire Ins. Co. (Md.)* 3 Gill, 176, 187; *Phillips v. Protection Ins. Co.*, 14 Mo. 220, 223.

The word "forthwith," in a fire policy requiring the giving of notice of loss forthwith, must be construed, when considered in connection with the purpose for which it is required, to mean immediately or within a reasonable time; and, in the absence of circumstances excusing a delay, the rule which has been adopted in regard to bills of exchange, i. e., on the same day, if in the same town, or else by the next mail, would seem to furnish a fit analogy. *Whitehurst v. North Carolina Mut. Ins. Co.*, 52 N. C. 438, 436, 78 Am. Dec. 246.

The settled rule in all cases, however, is to construe such requirements liberally in favor of the assured, and strictly against the insurer. *Central City Ins. Co. v. Oates*, 6 South. 83, 84, 86 Ala. 558, 11 Am. St. Rep. 67 (citing *Piedmont & A. Life Ins. Co. v. Young*, 58 Ala. 476, 29 Am. Rep. 770; *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816).

"Forthwith," as used in a contract of insurance requiring notice of loss to be given forthwith, has been held by the great weight of authority to mean that due diligence and reasonable effort must be exercised on the part of the insured in giving the notice. *Woodmen's Acc. Ass'n v. Pratt*, 87 N. W. 546, 549, 62 Neb. 673, 55 L. R. A. 291, 89 Am. St. Rep. 777; *Konrad v. Union Casualty & Surety Co.*, 21 South. 721, 722, 49 La. Ann. 636; *Bennett v. Lycoming County Mut. Ins. Co.*, 67 N. Y. 274; *New York Cent. Ins. Co. v. National Protection Ins. Co. (N. Y.)* 20 Barb. 468, 475; *Inman v. Western Fire Ins. Co. (N. Y.)* 12 Wend. 452, 460; *Brown v. London Assur. Corp. (N. Y.)* 40 Hun, 101, 104; *Scammon v. Germania Ins. Co.*, 101 Ill. 621, 624; *Peoria, Marine & Fire Ins. Co. v. Lewis*, 18 Ill. (8 Peck) 553, 561; *Fisher v. Crescent Ins. Co. (U. S.)* 33 Fed. 544, 547; *West Branch Ins. Co. v. Helfenstein*, 40 Pa.

(4 Wright) 289, 298, 80 Am. Dec. 573; Edwards v. Lycoming County Mut. Ins. Co., 75 Pa. (25 P. F. Smith) 378, 380; Rines v. German Ins. Co., 80 N. W. 839, 840, 78 Minn. 46; Donahue v. Winsor County Mut. Fire Ins. Co., 56 Vt. 374, 378; St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 289, 49 Am. Dec. 74; Phillips v. Protection Ins. Co., 14 Mo. 220, 223; Provident Life Ins. & Inv. Co. v. Baum, 29 Ind. 236, 241.

**Same—Before suit.**

Where a policy requires written notice of loss to be given forthwith, it is sufficient to render the company liable if notice is given before suit is instituted. Phoenix Ins. Co. v. Coomes, 13 Ky. Law Rep. 238; Steele v. German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

**Same—One to ten days.**

A notice given the next morning after the fire is given forthwith. Fisher v. Crescent Ins. Co. (U. S.) 33 Fed. 544, 547; Hovey v. American Mut. Ins. Co., 9 N. Y. Super. Ct. (2 Duer) 554.

A notice given within two days after the loss was given forthwith. Peoria Marine & Fire Ins. Co. v. Lewis, 18 Ill. 553, 561.

Notice of loss to the agent of the insurer, through whom the policy was procured, two days after its occurrence, such agent at once notifying the company, is a substantial compliance with a condition that the insured should forthwith give notice to the general agent. Brink v. Hanover Fire Ins. Co., 70 N. Y. 593.

The giving of notice within five days after the fire was held a sufficient compliance with the condition. West Branch Ins. Co. v. Helfenstein, 40 Pa. (4 Wright) 289-298, 80 Am. Dec. 573.

A requirement in a fire policy that notice of loss be given forthwith was held not to be satisfied by the giving of notice five days after the fire, when the office of the company was only distant six miles from the place. Roumage v. Mechanics' Fire Ins. Co., 13 N. J. Law (1 J. S. Green) 110, 113.

A notice of loss is given forthwith, within the meaning of a fire policy requiring such notice, when the fire occurs on the 15th of June, and insured knows thereof on the 18th, and sends notice to the insurer by mail on the 23d. New York Cent. Ins. Co. v. National Protection Ins. Co. (N. Y.) 20 Barb. 468, 475.

In an accident insurance policy requiring notice forthwith of any accident, the meaning of the term "notice forthwith" depends on the particular circumstances of each case; it being held that six days' delay was noncompliance with a requirement

for notice forthwith. Railway Pass. Assur. Co. v. Burwell, 44 Ind. 460, 464.

**Same—Less than 20 days.**

A delay of 11 days, unexcused, was a breach of a requirement to give notice of a fire forthwith. Trask v. State Fire & Marine Ins. Co., 29 Pa. (5 Casey) 198, 72 Am. Dec. 622.

A notice of loss to a fire insurance company 12 days thereafter, under a policy requiring the giving of such notice forthwith, will not work a forfeiture of the rights of the insured, if it appears that no harm has been caused by the delay, and the company did not at any time intend to pay the loss. Capital Ins. Co. v. Wallace, 31 Pac. 1070, 50 Kan. 453.

Under Rev. St. 1881, § 3770, which makes conditions inserted in policies issued by foreign insurance companies, requiring notice of loss to be given forthwith or within less than 5 days, null and void, the insured must use reasonable diligence in giving notice of loss; and 15 days was a reasonable time within which to give the notice. Germania Fire Ins. Co. v. Deckard, 3 Ind. App. 361, 28 N. E. 868. It was held that 18 days was not an unreasonable time, under the circumstances. Rines v. German Ins. Co., 80 N. W. 839, 840, 78 Minn. 46. Eighteen days was held to be too long. Edwards v. Lycoming County Mut. Ins. Co., 75 Pa. (25 P. F. Smith) 378, 380.

**Same—Less than 30 days.**

A delay of 20 days, in the absence of circumstances excusing the failure to give notice, is too long. Whitehurst v. North Carolina Mut. Ins. Co., 52 N. C. 433, 435, 78 Am. Dec. 246.

A notice given in 20 days is within time, especially as the company could not attend to the loss then on account of press of business. Phillips v. Protection Ins. Co., 14 Mo. 221, 223.

It was held to be a question for the jury whether a notice given in 22 days was a compliance. Donahue v. Windsor County Mut. Fire Ins. Co., 56 Vt. 374, 378.

Written notice on the twenty-sixth day after the loss held to be in sufficient time, where oral notice was given the next day or two after the fire, and the insured did not know that an additional notice was necessary. Bennett v. Lycoming County Mut. Ins. Co., 67 N. Y. 274.

**Same—Fifty days or less.**

A notice given the 2d of April, when the loss was on the 23d of February, was not given forthwith. Inman v. Western Fire Ins. Co. (N. Y.) 12 Wend. 452, 460.

A delay of 48 days held not to be a reasonable time. *Brown v. London Assur. Corp.*, 40 Hun, 101, 104.

An unexplained delay of 50 days in giving notice of loss is unreasonable, under a policy issued by a foreign insurance company requiring notice to be given forthwith, though such requirement is invalid as to such companies, under Rev. St. 1881, § 3770. *Pickels v. Phoenix Ins. Co.*, 21 N. E. 898, 901, 119 Ind. 291.

Making proof of loss within 53 days was held to be within a provision requiring proof of loss to be made forthwith. *Solomon v. Continental Ins. Co.*, 32 N. Y. Supp. 759, 762, 11 Misc. Rep. 513.

#### Same—Four and seven months.

The condition of a fire insurance policy that in case of loss the insured shall forthwith give notice thereof, in writing, to the company, is not complied with where the notice was not given until more than four months after the fire. *McEvers v. Lawrence* (N. Y.) Hoff. Ch. 172, 174, 175.

Under the provision of a fire policy requiring notice of loss to be given forthwith, due diligence is always required under the circumstances of each case. "The meaning and purport of the word 'forthwith' has often been the subject of judicial interpretation. Courts have considered that it contemplated reasonable delay, but that at times, under certain circumstances, beyond the control of the insured, excuses were admissible to justify its omission. The death of the insured, his nonresidence, his absence, his ignorance of the fact, his confinement by an injury, his insanity, the refusal of the insurer to surrender papers, have been accepted as sufficient justifications for delays of notice and preliminary proof. Under the requirement that notice shall forthwith be given, it has been held a delay of 6, 11, 18, 20 days, or a month, 5 weeks, 4 months, was fatal." Thus a notice of loss given more than seven months after the fire was held not to have been given forthwith, within the meaning of the policy, though insured had been arrested for arson. *McCall v. Merchants' Ins. Co.*, 33 La. Ann. 142, 144.

#### In mandatory orders or rules.

An order of the court directing the appellant to pay costs to the respondent forthwith does not mean instantanely. *Reg. v. Isle of Ely*, 5 E.L. & Bl. 489, 495.

A writ of mandamus commanding that certain acts be done forthwith does not mean that the act commanded to be performed must be performed instantly, but means that the defendant must set about the performance of the matter commanded to be performed promptly, and do whatever can

be done. *President v. City of Elizabeth*, 40 Fed. 799, 803 (citing *Rex v. Commissioners*, 3 Adol. & Ell. 550).

In rule of court No. 56, requiring the report upon exceptions to be delivered to the party obtaining the reference, who is required forthwith to file the same in the proper office, etc., "forthwith" is not to be construed into a necessity of doing the thing the moment after delivery, but may be held to mean within 24 hours. *Champlin v. Champlin* (N. Y.) 2 Edw. Ch. 328, 329.

A rule in an action to plead forthwith means as soon as by reasonable exertion it may be accomplished. "Forthwith" has a relative meaning, and will imply a longer or shorter period, according to the nature of the thing to be done. As used in a rule to plead forthwith, it should be construed as meaning to plead within 24 hours. *Moffat v. Dickson*, 3 Colo. 313, 314.

#### In reference to official duties.

"Forthwith," as used in statutes regulating official duties, has generally been construed as meaning that the duty is to be performed promptly and with all convenient dispatch, but this requirement is always modified by the circumstances and the nature of the duty to be performed. *Gunn v. Lauder*, 87 N. W. 999, 1002, 10 N. D. 389 (citing *Anderson v. Goff*, 13 Pac. 73, 72 Cal. 65, 1 Am. St. Rep. 34; *Moffat v. Dickson*, 3 Colo. 313).

"Forthwith," as used in Code, art. 16, § 72, providing that a copy of the bill, decree, and trustee's report of a foreclosure sale shall be filed in the clerk's office, and, on receipt of the copies, the clerk shall forthwith docket and index the bill and other proceedings, means that it should be done immediately on receipt, and that no delay shall occur in giving notice to any who may need it of the true state of the case. *Murgulondo v. Hoover*, 18 Atl. 907, 909, 72 Md. 9.

"Forthwith," as used in St. 17 Geo. III, c. 3, § 2, providing that overseers of the poor shall permit inhabitants of the parish to inspect writs at all reasonable times, "and shall upon demand forthwith give copies of the same to any inhabitant of the parish," does not mean immediately, but that the overseer is entitled to a reasonable time for making them out. *Spenceley v. Robinson*, 3 Barn. & C. 658; *Tennant v. Bell*, 9 Q. B. 684, 687.

Where a sheriff's return of a sale shows that a copy of the appraisement was forthwith deposited with the clerk of the court, "forthwith" means merely as soon as with reasonable dispatch, in the ordinary course of business, the filing could be done. Where such an appraisement was deposited on the 3d of February, the appraisement being



made on the 2d, it was deposited forthwith after such appraisement. *Northwestern College v. Shreck*, 89 N. W. 289, 2 Neb. (Unof.) 484.

Code 1873, § 1925, providing that when any written instrument is filed for record the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his entry book all the particulars required by the statute, means that the entry cannot be delayed to permit the doing of other work, but must be performed as soon as it can be done with reasonable exertion. The diligence required is determined by the nature of the work and the objects to be accomplished by it, as well as by the circumstances which affect the performance of the duty. A delay of 16 hours was held to be too great. *First Nat. Bank v. Clements*, 54 N. W. 197, 198, 87 Iowa, 542.

#### In proceedings on arrest.

Act 1725, providing that, if a defendant exempt from arrest is taken by any writ of arrest, the court where such writ is pending shall forthwith, on the defendant's motion, record all further proceedings, means with convenient speed and due diligence; and, where the practice has been to make such motion before the expiration of the quarto die post—the return day—it is not to be changed. *Blackiston v. Potts* (Pa.) 2 Miles, 388, 389.

#### In service of writs and orders.

In 2 Hill's Code Wash. § 496, providing that, when a writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows: "If property has been attached, he shall indorse on the execution, and pay to the clerk forthwith, the amount of the proceeds of sales of property," etc., "forthwith" means after he has received the writ, and there must be an actual writ. *Sabin v. Barnett* (U. S.) 79 Fed. 947, 950.

The word "forthwith," in the bankruptcy act of 1867, § 11, requiring the marshal to forthwith publish and serve notices of the meeting of creditors, to be held at a time and place designated in the warrant, not less than 10 nor more than 90 days after the issuing of the same, means as soon as conveniently practicable after the issuing of the warrant; but the entire statute is to be construed as requiring the publication to be completed and the notices served before the commencement of the period of 10 days immediately preceding the return day of the warrant. *In re Devlin*, 7 Fed. Cas. 563, 564.

"Forthwith," as used in an order by a court that a copy of a certain affidavit and order be served on the defendants therein forthwith, means as soon as, by reasonable exertion confined to the object, it may be

accomplished. Its meaning, however, varies with every particular case. Where it appeared that the notice was served at 3 p. m., but the time of making the order was not given, the court could not hold, as a matter of law, that, if the order had been made at 10 a. m., the notice was served forthwith. *Howell v. Howell*, 5 Pac. 681, 66 Cal. 390.

"Forthwith," as used in Rev. Laws, § 1348, requiring a writ of habeas corpus to be returnable forthwith, should be construed to include a writ made returnable the first secular day after its issue. *State v. Ferry*, 18 Atl. 451, 452, 61 Vt. 624.

"Forthwith," as used in a summons returnable forthwith, is satisfied by the service of the summons on the day after it is delivered to the constable; it not appearing that it could have been served sooner. *Hunter v. Roach* (Del.) 40 Atl. 192, 1 Pennewill, 265.

In Code Civ. Proc. § 658, providing that where, in an attachment, the jury find for the claimant, the sheriff must forthwith deliver the goods to him, unless plaintiff gives an undertaking, "forthwith" does not necessarily mean at the very instant of the rendition of the verdict of the sheriff's jury. It means within a reasonable time, without unreasonable delay, or with due diligence under the circumstances of the case; and a bond given within 48 hours held to be sufficient. *Haas v. Swick*, 30 N. Y. Supp. 145, 146, 23 Civ. Proc. R. 397.

#### In service of summons by mail.

"Forthwith," as used in Code Civ. Proc. § 413, providing that the court or judge shall direct a copy of the summons and complaint to be forthwith deposited in the post office, being applied to the performance of an act, imports that it shall be performed as soon as, by reasonable exertion, confined to that object, it might be, and which must consequently vary according to the circumstances of each particular case. "Like the term 'immediately,' it is not, in law, to be necessarily construed as a time immediately succeeding, without an interval, but an effectual and lawful time, allowing of the adjuncts and accompaniments necessary to give an act full legal effect to be performed." *Anderson v. Goff*, 13 Pac. 73, 76, 72 Cal. 65, 1 Am. St. Rep. 34.

The term "forthwith," in an order requiring a petition or notice to be mailed forthwith, is not to be strictly construed. The mailing of the notice on the second day after the making of the order held sufficient. *Lyon v. Comstock*, 9 Iowa, 306, 308.

"Forthwith," as used in an order for a publication of a summons, requiring the summons and complaint to be deposited in

the post office forthwith, is defined by Webster to mean without delay, and "with all reasonable dispatch," which is a reasonable meaning, and, so understood, leaves it to the decision of the court to pass on the question to determine, under the circumstances of each case, whether the order in that respect has been complied with, and a delay of four days was not too great. *Van Wyck v. Hardy* (N. Y.) 39 How. Prac. 392, 399; *Van Wyck v. Hardy* (N. Y.) 20 How. Prac. 222, 228, 11 Abb. Prac. 473, 478; *Star v. Mahan*, 30 N. W. 169, 4 Dak. 213.

#### As to delivery of goods.

In an agreement by plaintiff to sell to defendants goods to be delivered forthwith, the price to be paid in cash in 14 days from the date of the contract, the parties intended, by the use of the word "forthwith" in connection with the payment in 14 days, that the goods should be delivered some time within 14 days. *Staunton v. Wood*, 16 Q. B. 638, 642.

#### As to appeals.

The word "forthwith," when used in a statute relating to appeals from justices' courts, excludes all mean time, and is not synonymous with "then and there," but means such convenient time as is reasonably necessary for doing the thing. Legal lexicographers define it as being synonymous with "within twenty-four hours." *State v. Cleverger*, 20 Mo. App. 626, 627 (citing 1 Bouv. Law Dict. 682, 1 Abb. Law Dict. 581).

A bond given on filing of a petition for a review, conditioned to forthwith prosecute the review to final judgment, means "within such time as the court having jurisdiction of the petition may order." *Bamforth v. Raddin*, 96 Mass. (14 Allen) 66, 67.

#### As to application for dismissal.

Application for a certificate of dismissal not made till some months after the hearing and determination can in no sense be said to have been made forthwith, as required by St. 9 Geo. IV, c. 31, § 27. *Reg. v. Robinson*, 12 Adol. & Ell. 672, 680.

#### As to filing of mortgage.

"Forthwith," as used in *Sayles' Ann. St. art. 3190b*, making a chattel mortgage not accompanied by change of possession void, as against purchasers and creditors, unless forthwith filed in the office of the county clerk, means with all reasonable diligence and dispatch. *Anderson v. Goff*, 13 Pac. 73, 72 Cal. 65, 1 Am. St. Rep. 34; *Moffat v. Dickson*, 3 Colo. 313; *Roberts v. Brett*, 11 H. L. Cas. 337; *Jones v. Hutchinson*, 10 C. B. 522; *Bennett v. Locoming County Mut. Ins. Co.*, 67 N. Y. 274. Thus a mortgage executed at 11 p. m., and filed at 7 a. m., was filed forthwith, within the meaning of the

statute requiring chattel mortgages to be filed forthwith. *Smelser v. Baker*, 29 S. W. 377, 379, 88 Tex. 26, 33 L. R. A. 163.

The statute requiring that a mortgage shall be deposited and filed forthwith does not mean that it must be deposited and filed on the very day that it was executed. The word signifies "as soon as by reasonable exertion, confined to the object, it may be accomplished." *Freiberg v. Brunswick-Balke-Collender Co.* (Tex.) 16 S. W. 784, 785.

"Forthwith" is held to be an imperative term, and admits of no unnecessary delay. It is defined as meaning "as soon as the thing required may be done by reasonable exertion confined to that object." Evidence that a chattel mortgage executed at noon, December 14th, and filed on the morning of December 17th, was treated by the mortgagees as other chattel mortgages given to them, and was sent by mail, in the due course of their business, to the clerk for filing—there being mails leaving their place of business daily about 5 o'clock p. m., and reaching the place of filing an hour later—was insufficient to support a finding that it was filed forthwith, within *Rev. St. 1895, art. 3328*, providing that every chattel mortgage, where there is no change of possession, shall be void as against creditors unless it is filed forthwith. *Hackney v. Schow*, 53 S. W. 713, 714, 21 Tex. Civ. App. 613.

#### As to issuance of writs or process.

The use of the word "forthwith," in speaking of a requirement that process shall issue forthwith, has no definite signification. *McEntie v. Sandford*, 42 N. J. Law (13 Vroom) 260, 262.

"Forthwith," as used in a judge's certificate providing that execution shall issue "forthwith," means in the ordinary course of the business of the office. *Snooks v. Smith*, 7 Man. & G. 528.

#### As to payment at tax sales.

As used in *Code 1897, § 1426*, providing that the purchasers at tax sales shall forthwith pay to the treasurer the amount of the bid, "forthwith" means immediately; without delay; directly; as soon as the thing required may be done by reasonable exertion confined to that object. *Sheldon v. Steele*, 87 N. W. 683, 685, 114 Iowa. 616.

In *Comp. St. c. 77, art. 1, § 111*, requiring the purchaser of property at a tax sale to forthwith pay the purchase price to the county treasurer, "forthwith" means as soon as the county treasurer, in the reasonable course of the orderly conduct of the business of his office, is prepared to receive and properly receipt for the moneys to be paid. *Leavitt v. S. D. Mercer Co.*, 80 N. W. 426, 64 Neb. 31.

**As to rendition of judgment.**

"Forthwith," as used in Rev. St. c. 120, § 160, requiring a justice of the peace, on receiving a verdict, to render judgment forthwith, has received a strict construction in the decisions of the courts. "It follows from them that nothing—neither hunger, nor thirst, nor weariness, nor want of sleep, nor pain, nor sickness, nor heat, nor cold, nor religious scruples, nor any earthly thing—shall excuse any justice for not rendering judgment instantan on receipt of the verdict." *Wearne v. Smith*, 32 Wis. 412, 414.

"Forthwith," as used in Rev. St. § 8632, providing that, in all cases where verdicts shall be rendered in favor of either party in a justice's court, the justice shall forthwith render judgment, and enter the same on his docket, means instantan. *Hull v. Mallory*, 14 N. W. 374, 56 Wis. 355.

As used in Rev. St. c. 120, § 160, providing that a justice of the peace, in all cases where a verdict shall be rendered, shall forthwith render judgment thereon, means an immediate entry of judgment, though the verdict is received on the 22d of February. *Perkins v. Jones*, 28 Wis. 243, 244.

Gen. St. 1878, c. 65, § 68, requires a judgment to be rendered by the justice forthwith on the return of the verdict. Held, that the word "forthwith" means the judgment must be rendered within a reasonable time, having regard to the circumstances of the case. *Sorenson v. Swensen*, 55 Minn. 58, 60, 56 N. W. 350, 43 Am. St. Rep. 472.

**Same—Overnight.**

"Forthwith," as used in Code Civ. Proc. § 3015, providing that, where a verdict is rendered, the justice must forthwith render judgment, and enter it in his docket book, means within a reasonable time, under all the conditions surrounding the case; and the failure of a justice to enter a judgment which was received late at night until the next morning does not invalidate the judgment. *Sweet v. Marvin*, 37 N. Y. Supp. 442, 443, 2 App. Div. 1. A judgment entered at 11 a. m., after a verdict rendered at 10:30 p. m. the day before, was entered forthwith. *Davis v. Simma*, 14 Iowa, 154, 156, 81 Am. Dec. 462. The failure to render judgment till the following day is a violation of the statute. *Sibley v. Howard* (N. Y.) 3 Denio, 72, 73, 45 Am. Dec. 448.

Under Rev. St. c. 120, § 160, providing that a justice of the peace on receiving a verdict shall render judgment forthwith, where a verdict in justice's court was received at 11 p. m., and the court then adjourned on account of the lateness of the hour, and at 9 a. m. the next day rendered and entered a judgment in accordance with the verdict, jurisdiction was lost by such ad-

journment, and the judgment was invalid. *Wearne v. Smith*, 32 Wis. 412, 414.

**Same—Twenty-four hours.**

As used in Code Civ. Proc. § 3015, providing that, when a verdict is rendered in a justice court, the justice must forthwith render judgment, and enter it, "forthwith" will be held to mean within 24 hours. *Tousley v. Mowers*, 35 N. Y. Supp. 855, 856, 14 Misc. Rep. 125 (citing *Goodrich v. Sullivan*, 1 *Thomp. & C.* 191).

The statute directing a justice to forthwith render judgment must harmonize with the provision which forbids the transaction of any business in court on Sunday. The language of the statute directing the justice to render judgment forthwith is of the character considered in law to be directory, and not involving the validity of the act if not done at the time directed. It has, however, been held to be imperative, or to impose a condition, because that was believed to be the intention of the Legislature, on grounds of public policy, though the same terms directing the entry in the docket are held to be directory. Therefore, where, in an action in justice's court, a verdict is rendered on Sunday, judgment entered thereon the following Monday is rendered forthwith, within the meaning of the statute. *Allen v. Godfrey*, 44 N. Y. 433, 435.

**Same—More than 24 hours.**

"Forthwith," as used in Code Civ. Proc. § 3015, providing that a justice shall enter judgment forthwith after the submission of the cause, will not be held to permit judgment to be rendered four days after such submission. *Smith v. McMillan*, 36 N. Y. Supp. 24, 26, 90 Hun, 542.

"Forthwith," as used in Code 1873, § 3552, providing that, where a verdict is rendered by a jury in a justice's court, the justice shall render judgment thereon forthwith, means within a reasonable time; and hence a judgment entered 90 days after the return of the verdict is void for want of jurisdiction. *Thomlinson v. Litze*, 47 N. W. 1015, 82 Iowa, 32, 31 Am. St. Rep. 458.

A delay of 60 days in entering judgment was held to render the judgment void. *Harper v. Albee*, 10 Iowa, 389, 390.

**Same—Two days, including Sunday.**

A statute requiring a justice of the peace to render judgment forthwith on receiving the verdict of a jury requires that it be done before Monday afternoon, where the verdict was rendered on Saturday night. *McNamara v. Speas*, 25 Wis. 539, 541.

In Gen. St. 1878, c. 65, § 68, providing that in cases where the plaintiff is nonsuited

or withdraws his action, or where a judgment is confessed, and in all cases where a verdict is rendered, the justice shall forthwith render judgment, and enter the same in his docket, "forthwith" means that the judgment must be rendered a reasonable time after the return of the verdict. What constitutes such reasonable time will depend on the circumstances surrounding each particular case. There should be no unreasonable delay. And where verdict was rendered after noon on the 20th, and judgment entered the 22d—Sunday intervening—it was in time, especially as the justice was engaged in trying other cases on the 20th. *Sorenson v. Swensen*, 56 N. W. 350, 55 Minn. 58, 43 Am. St. Rep. 472.

Entering judgment on Monday, when verdict was rendered on Saturday evening, held to be in time. *Burchett v. Casady*, 18 Iowa, 342, 344.

#### As to revival of action.

Under Civ. Code, § 509, providing that an order to revive an action in the name of a representative or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made, it is obvious the word "forthwith" relates to the term of court at which the order could have been made, and the limitation of one year begins to run from the time of such term, and not from the death of the plaintiff. *Horsley v. Asher's Heirs*, 22 S. W. 434, 435, 94 Ky. 314.

### FORTNIGHT.

Where a work was to be done within a fortnight before a given day, the contract should be construed to require the completion of the work within the 14 days prior to the day stated. *Thomas v. Lambert*, 3 Adol. & El. 61.

### FORTUITOUS.

A fortuitous event is that which happens by a cause which we cannot resist. Civ. Code La. 1900, art. 3356, subd. 15; *Vit-terbo v. Friedlander*, 7 Sup. Ct. 962, 973, 120 U. S. 707, 30 L. Ed. 776; *Eugster v. West*, 35 La. Ann. 119, 120, 48 Am. Rep. 232.

"Fortuitous event," within the meaning of a lease providing that, if lessees shall be deprived of the use of the leased premises by any fortuitous event, they shall be allowed a reduction or diminution of rent, does not include the failure of the lessees, and the seizure of their property by creditors. *Taylor v. Syme*, 45 N. Y. Supp. 707, 709, 17 App. Div. 517.

### Flood or unusual cold.

The term "fortuitous event" includes great floods, as they are neither to be foreseen nor prevented by the providence of man. Such events cast no blame or liability on any one, and thus an injury by logs carried down stream by such a flood does not render the owner of the logs liable. *Sheldon v. Sherman* (N. Y.) 42 Barb. 368, 369, affirmed 42 N. Y. 484, 1 Am. Rep. 569.

The term "fortuitous accident" may be applied to the formation of ice from extreme and unusual cold, which prevents the unloading of a vessel, and the owner of the cargo is not liable for damage by reason of a delay caused thereby. *Houge v. Woodruff* (U. S.) 19 Fed. 136, 138.

### FORTUNE.

In a will by which testatrix gave a great number of pecuniary legacies, and then gave a picture and some other specific articles, and then added that whatever money over and above what he had already bequeathed which might be left at his death should be divided among his relations in the proportion he had bequeathed the other part of his fortune, the word "fortune" meant money legacies. *Maitland v. Adair*, 3 Ves. Jr. 231.

### FORTY.

By "forty," as used in connection with lands, is meant either the north or south half of a half of a quarter section of land. *Lente v. Clarke*, 1 South. 149, 154, 22 Fla. 515, 525.

### FORWARD.

The word "forward," as applied to goods, has been judicially held to be equivalent to "carry" or "transport" in several cases. *Davis v. Jacksonville Southeastern Line*, 28 S. W. 965, 968, 126 Mo. 69; *St. Louis, K. C. & N. Ry. Co. v. Piper*, 13 Kan. 505, 511 (citing *Read v. Spaulding*, 17 N. Y. Super. Ct. [5 Bosw.] 395, affirmed 30 N. Y. 630, 86 Am. Dec. 426; *Southern Exp. Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783; *Christenson v. American Exp. Co.*, 15 Minn. 286 [Gil. 208], 2 Am. Rep. 122).

The use of the word "forward" in a letter to a collection agent, instructing the latter to forward the proceeds of a certain note, when collected, is sufficient to authorize the agent to forward the proceeds of the note by mail. *Buell v. Chapin*, 99 Mass. 594, 596, 97 Am. Dec. 58.

In a complaint against a carrier, alleging that the plaintiffs caused to be delivered to defendant certain property, to be carried by defendant over its road to a certain sta-

tion, and thence to be forwarded to plaintiffs at another place, etc., the words "to be forwarded," instead of importing an absolute and unqualified undertaking on the part of the defendants to deliver the goods to some carriers, who should undertake to transport them, amount to an acknowledgment of the purpose for which the goods had been delivered by the owners; that is, to be forwarded or carried by the defendants themselves under the existing arrangement. *Davis v. Jacksonville Southeastern Line*, 28 S. W. 965, 968, 126 Mo. 69; *Blossom v. Griffin*, 18 N. Y. 569, 576, 67 Am. Dec. 75.

#### As importing through transportation.

A bill of lading by which an express company undertook to forward a package of currency to a certain place means that the company should carry and deliver the package to its destination, though it was in fact an extension of its liability beyond its own line. *Reed v. United States Exp. Co.*, 48 N. Y. 462, 469, 8 Am. Rep. 561; *Colfax Mountain Fruit Co. v. Southern Pac. Co.*, 50 Pac. 775, 776, 118 Cal. 648, 40 L. R. A. 78; *St. Louis, K. C. & N. Ry. Co. v. Piper*, 18 Kan. 505, 511.

The term "forward," in contracts by parties doing business under the name of a transportation company, and contracting with owners to forward goods from New York to Chicago for an agreed compensation, does not render such parties mere forwarders, and not common carriers, even though they have the goods transported by others, as the contract embraces the carriage of the goods in question. *Mercantile Mut. Ins. Co. v. Chase* (N. Y.) 1 E. D. Smith, 115, 121.

#### FORWARDER.

As defined by Bouvier, a "forwarder" is a person who receives and forwards goods, taking on himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. *Schloss v. Wood*, 17 Pac. 910, 911, 11 Colo. 287.

Where plaintiffs put certain goods on board of the defendant's sloop at the city of New York, to be transported to Troy, and from thence to be forwarded by defendants to plaintiffs' residence in a canal boat, the defendants were common carriers only from New York to Troy, from where their duty was simply that of forwarders, which was fully discharged on their delivering the goods to the canal boat, and they were in no way responsible for loss occurring while the goods were on such boat. *Ackley v. Kellogg* (N. Y.) 8 Cow. 223, 224.

The liabilities of common carriers and forwarders, independent of any express stip-

ulation in the contract, are entirely different. The liability of forwarders is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire, not subject to extraordinary liabilities. They are responsible for ordinary care, skill, and diligence—that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business. *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 26, 85 Am. Dec. 211.

#### As a common carrier.

A forwarder of merchandise, who maintains a warehouse for the receipt of goods, and forwards them therefrom by common carriers to such destination as the owners may designate, is not a common carrier, nor liable as such, though he derives a benefit from the carriage of the goods, in receiving cash from the owners of the cargoes, and paying the boatmen in goods, and also in charging more than he actually paid. *Roberts v. Turner* (N. Y.) 12 Johns. 232, 233, 7 Am. Dec. 311.

A forwarder is one who, for a compensation, takes charge of goods intrusted or directed to him, and forwards them; that is, puts them on their way to their place of destination by the ordinary and usual means of conveyance, or according to the instructions he receives. Where he has a warehouse for the reception and safe-keeping of the goods until they can be forwarded, he unites the twofold occupation of warehouseman and forwarder. His occupation is further distinguished from that of the carrier by the circumstance that he has no interest in, and receives no part of, the compensation that is paid for the carriage and due delivery of the goods. An express company, which holds out to the public that it will take goods or parcels to be delivered at certain points or places, and which receives a compensation for the carriage and delivery, is a common carrier, and not a forwarder. *Place v. Union Exp. Co.* (N. Y.) 2 Hilt. 19, 25.

The term "forwarder" includes persons simply engaging to forward goods to a certain destination, which agreement is discharged by shipping the goods by the usual or most direct conveyance to the place designated, but it does not include persons agreeing to forward the goods to the place of destination when the agreement includes the charge for freight for the entire distance, but the latter person is a carrier. *Kreder v. Wolcott* (N. Y.) 1 Hilt. 223-227.

#### FORWARDING MERCHANTS.

Justice Story defines "forwarding merchants" as a class of persons usually combining in their business the double character of warehousemen and agents, for a compen-

sation, to ship and forward goods to their destination. This class of persons is especially employed upon canals and railroads, and in coasting navigation by steam vessels and other packets. Their liability is like that of warehousemen and common agents, and they are responsible for ordinary care, skill, and diligence. *Bush v. Miller* (N. Y.) 13 Barb. 481, 488.

Storing and forwarding merchants and wharfingers, who do not receive a profit on account of the transportation, are not liable to the same extent as innkeepers and common carriers. When property intrusted to a warehouseman, wharfinger, or storing and forwarding merchant, in the ordinary course of business, is lost, injured, or destroyed, the weight of proof is with the bailee to show a want of fault or negligence on his part, or, in other words, to show that the injury did not happen in consequence of his neglect to use all that care and diligence on his part that a prudent and careful man would exercise in relation to his own property. He is bound to guard against all probable danger—the common carrier, against all possible danger—and there is no middle line or degree of vigilance between these two. *Platt v. Hibbard* (N. Y.) 7 Cow. 497, 500.

## FOSSILS.

"Fossils are organic substances which have become permeated by earth and metallic particles; petrified forms of plants and minerals." *Doster v. Friedensville Zinc Co.*, 21 Atl. 251, 252, 140 Pa. 147 (quoting Webster Dict.)

## FOUL.

The statement that a person had been "caught afoul of a cow" does not warrant the innuendo that he was guilty of the crime of bestiality. The most usual signification of the word "foul," as an adjective, is unclean; filthy; dirty. The phrase "to fall foul" is not an uncommon one. The definition of it given in Webster's Dictionary is to rush on with haste, rough force, and unreasonable violence; to run against, as the ship fell foul of her consort. Dr. Johnson gives the following example: "In his sallies, their men might fall foul of each other." *Harper v. Delp*, 3 Ind. 225, 231.

## FOUL PLAY.

The statement that "there was foul play there," in connection with another statement that "he killed her," and "he is to blame for her death," may naturally be found to signify something more than mere bad conduct, and therefore the words are actionable. *Thomas v. Blasdale*, 18 N. H. 214, 215, 147 Mass. 438.

## FOUND.

See "Find—Found"; "Office Found."

"Found and endow," as used in a provision of a will as follows: "And in further trust to found and endow, at a cost of five hundred and forty thousand dollars, an institution to be called," etc.—means that the trustees shall expend the money for that purpose. *Floyd v. Rankin*, 24 Pac. 938, 939, 86 Cal. 159.

A will bequeathing property to the erection and maintenance of a hospital, but providing that if, at the end of a certain period, such hospital should not be "founded and established," the property should go to testator's legal heirs, did not mean built and completely equipped, ready for immediate occupation, but merely required that the enterprise should be so far promoted as to be reasonably certain of success. *Appeal of Seagrave*, 17 Atl. 412, 416, 125 Pa. 362.

The purchaser would be "found" by the broker, in the meaning of the law entitling him to commissions in such a case, if procured through his exertions. *Evans v. Gay* (Tex.) 74 S. W. 575, 576.

## FOUNDATION OF A LIEN.

The foundation of a lien is an indebtedness existing on a contract by the person sought to be charged. *Hagan v. American Baptist Soc.*, 6 N. Y. St. Rep. 212, 218.

## FOUNDED IN FACT.

A reputation that a place is an establishment where intoxicating liquors are sold is "founded in fact," where the reputation comes from persons passing and repassing the place, and who see therein the ordinary concomitants of drinking saloons; see persons going in apparently sober, and coming away intoxicated; see casks, decanters, and jugs, with names of various kinds of intoxicating liquors; and such reputation is based upon, or grows out of, the fact that such liquors are kept for sale. *State v. Morgan*, 40 Conn. 44, 46.

## FOUNDED IN FRAUD.

The United States bankrupt act, excluding from the operation of a discharge in bankruptcy debts and demands "founded in fraud," means a debt or demand which would be enforced by an action showing a material and traversable allegation of fraud as its sole foundation. *Palmer v. Preston*, 45 Vt. 154, 158, 12 Am. Rep. 191.

## FOUNDED ON A CONSIDERATION.

"The expression, that a promise is founded upon a consideration, conveys the notion

that the consideration precedes the promise in the mind of the party making the promise; he promises because the consideration exists; and this form of expression is shown by the authorities to have been frequently used when the consideration and the promise are concurrent." *Steele v. Hoe*, 14 Adolp. & E. 431, 445.

#### FOUNDED ON ANY INDEBTEDNESS.

The phrase "founded on any indebtedness," as used in the statute limiting the remedy by attachment to actions founded on any indebtedness, does not include actions ex delicto. *Fellows v. Brown*, 38 Miss. 541, 543.

#### FOUNDED ON CONTRACT.

See "Action on Contract."

A claim for damages for breach of warranty, though based on a contract, is not one founded on a contract, within Bankr. Act July 1, 1898, c. 541, § 63, subd. "a," cl. 4, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], so as to permit it to be the basis of an adjudication in bankruptcy, but is such an unliquidated claim as after such an adjudication may, under section 63, subd. "b," be liquidated as directed by the court. In re *Morales* (U. S.) 105 Fed. 761.

#### FOUNDED UPON A GRANT.

A deed from a purchaser at a sheriff's sale, reciting the former deed from the original grantee of the land to the judgment debtor, is a deed of conveyance "founded upon a grant," within the meaning of the act of limitations affording protection to those holding seven years' possession under such a deed. *Love v. Love's Lessee*, 10 Tenn. (2 Yerg.) 288, 289.

#### FOUNDER.

"The founder of all corporations (says Sir William Blackstone) in the strictest and original sense, is the King alone, for he only can incorporate a society, and in civil corporations, such as mayor, commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the King; but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation—the one, fundatio incipiens, or the incorporation, in which sense the King is the general founder of all colleges and hospitals; the other, fundatio perficiens, or the donation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law, the founder; and it is in this last sense we generally call a man the founder of a college or hospital." *Dartmouth College v. Woodward*, 17 U. S.

(4 Wheat.) 518, 667, 4 L. Ed. 629 (quoted in *Trustees of Union Baptist Ass'n v. Hunn*, 26 S. W. 755, 756, 7 Tex. Civ. App. 249).

#### FOUNDRY.

A foundry consists of works for the casting of metals, without regard to whether they are cast for agricultural or mechanical or other purposes. *Benedict v. City of New Orleans*, 11 South. 41, 44 La. Ann. 793.

#### FOUNTAIN.

"Fountain" is a word applied to pens of a certain kind. *Cooke & Cobb Co. v. Miller*, 169 N. Y. 475, 478, 62 N. E. 582.

#### FOUR.

"Four successive weeks," as used in Code Civ. Proc. 1877, § 42, authorizing the service of summons by publishing at least once a week for four successive weeks, does not mean four weeks of seven days each, but the publication is completed on the day on which the summons is published in the fourth successive week, though less than twenty-eight days have elapsed since it was first published. *Calvert v. Calvert*, 24 Pac. 1043, 15 Colo. 390.

#### FOUR HORSE POWER PULLEY FACE.

"Four horse power pulley face," as used in a lease of a building which includes the furnishing by the lessor of four horse power pulley face, means four horse power at the lessee's pulley; such lessee not being chargeable with the loss of power in transmission from the lessor's pulley. *Jourgensen v. Traitel*, 20 N. Y. Supp. 33, 65 Hun, 620.

#### FOURTH OF JULY.

The Fourth of July is a legal day, except when it happens to fall on Sunday, for the transaction of all business, unless otherwise provided by statute. *Rogers v. Brooks*, 30 Ark. 612, 629.

#### FOWL.

The term "fowl" comprehends all birds and poultry, but the term "wild fowl" is taken in a more restrained sense, and applies to ducks—mallards, widgeons, teals—and wild geese, and does not include sparrows, wrens, or robin redbreasts. *Keeble v. Hickeringill*, 11 East, 574, 577.

#### FRACTION.

A fraction is a fragment; a separate portion; a disconnected part; and it designates a fragmentary part of the whole, dis-

connected and distinct within itself, rather than an undivided interest—a several, not a joint, interest—so that a description of land as a fraction of lot No. 2 does not convey the idea of an undivided interest in such lot, and hence the description is insufficient. *Jory v. Palace Dry Goods & Shoe Co.*, 48 Pac. 786, 788, 30 Or. 196.

### FRACTIONAL.

The term "fractional," as used in describing a section of land partly within and partly without a meander line, refers simply to the circumstance that the section does not contain 640 acres of dry land, and does not bound the same by the meander line. *Tolleston Club of Chicago v. State*, 38 N. E. 214, 217, 141 Ind. 197.

"Fractional," as used in a description of a piece of land in a conveyance as follows: "The south fractional half of fractional section twenty-nine, and that part of the E. J. Spanish confirmation No. 2327 which lies north of the military road, and joins the fractional half section above described, in township seven north, range nine east," implies that the parties were attempting to describe an irregularly shaped piece of land, the number of acres in which might greatly exceed or fall short of the quantity contained in a half section. The word used as descriptive of the south half of the section at once raises a presumption that a greater or less number of acres of land than is ordinarily contained in a half section was referred to. *Parke v. Meyer*, 28 Ark. 281, 287.

A fractional township is a township where the outer boundary lines cannot be carried out in full because of a water course or some other external interference. A township is not made fractional because, in laying it off in sections, there is an excess or deficiency to be carried into the western and northern ranges of half and quarter sections. *Goltermann v. Schliermeyer*, 19 S. W. 484, 487, 111 Mo. 404.

### FRAIL

The fact that firecrackers were described as frail, in a bill of lading, did not establish that they were unfit for the voyage. Such description is characteristic of this class of goods, and does not indicate that these were different from usual shipments. The use of the word, however, showed that the carrier knew that the goods required special care in stowing. In view of such knowledge, and acceptance of the goods, it was incumbent upon the carrier to stow them in such place and in such manner that they would not be injured by the ordinary contingencies of the voyage. *Doherr v. Houston*, 123 Fed. 834, 335.

### FRAME.

The word "frame" as used in an ordinance prohibiting the erection of wooden or frame buildings, is interchangeable with "wooden"; one having the same meaning as the other. A wooden building is a frame building, and a frame building is a wooden building. *Ward v. City of Murphysboro*, 77 Ill. App. 549.

### FRAME BUILDING.

A fire policy covering an engine, boiler, and pumps, barkmill, and machinery in the tannery, and providing that the policy shall be void in case of other insurance on such property not consented to by the company, was not affected by another policy on the "frame building detached, occupied by the assured as a tannery"; the latter policy covering the building only, and not the machinery contained therein. *Sunderlin v. Aetna Ins. Co. of New York (N. Y.)* 18 Hun, 522, 523.

### FRAMEWORK.

Under Laws 1897, c. 754, § 64, providing that, where a highway crosses a railroad by an overhead bridge, the framework of the bridge shall be maintained and kept in repair by the railroad company, and the roadbed by the municipality, the framework should be construed to include the stringers sustaining the planking of the floor. *Bush v. Delaware, L. & W. R. Co.*, 59 N. E. 838, 844, 166 N. Y. 210.

### FRANCES.

The name Frances is one universally applied to females only, and indicates that the person to whom it is applied is a female. *Taylor v. Commonwealth (Va.)* 20 Grat. 825, 828.

### FRANCHISE.

See "Corporate Franchise"; "Elective Franchise"; "Ferry Franchise"; "Municipal Franchise"; "Personal Franchise"; "Public Franchise"; "Secondary Franchise"; "Special Franchise"; "Street Railway Franchise"; "Exclusive Privilege, Immunity, or Franchise."

"Franchise" is a word of extensive signification. It is a liberty or privilege. In England, under the common law, a franchise was a gem in the royal diadem. It was also a certain privilege inherent to the crown, and subsisted in the hands of a subject by grant from the King. It was therefore defined to be a "royal privilege in the hands of a subject." In this country the people not only



have all the rights and privileges of English subjects, but they have secured all the rights and privileges of the crown. *State v. City of Topeka*, 2 Pac. 587, 589, 30 Kan. 657.

A franchise is a royal privilege or a branch of the King's prerogative subsisting in the hands of a subject, and must arise from the King's grant, or in some cases may be held by prescription, which presupposes a grant, *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 357, 386, 8 Am. Dec. 243 (citing 2 Bl. 17); *Chicago City R. Co. v. People*, 73 Ill. 541, 547; *People v. Holtz*, 92 Ill. 426, 428; *State v. Scougal*, 51 N. W. 858, 860, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756; *State v. Peel Splint Coal Co.*, 15 S. E. 1000, 1003, 36 W. Va. 802, 17 L. R. A. 385; *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. 1020, 1025, 40 Minn. 213, 3 L. R. A. 510; *Maestri v. Board of Assessors*, 34 South. 658, 661, 110 La. 517; *Horst v. Moses*, 48 Ala. 129, 146; *State v. Moore*, 19 Ala. 514, 520; *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802, 808, 61 Neb. 109; *Central Pac. R. Co. v. People of State of California*, 16 Sup. Ct. 766, 778, 162 U. S. 91, 40 L. Ed. 903; *California v. Central Pac. R. Co.*, 127 U. S. 1, 38, 8 Sup. Ct. 1073, 32 L. Ed. 150; *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 21 Atl. 989, 991, 142 Pa. 580; *People v. Stanford*, 18 Pac. 85, 88, 77 Cal. 360, 2 L. R. A. 92; or, to speak more correctly for this country, a special privilege existing in an individual by grant of the sovereignty, and not otherwise exercisable, *Mayor of Detroit v. Moran*, 44 Mich. 602, 604, 7 N. W. 180, 181. Commenting on the definition, Thompson, in his work on Corporations, vol. 4, § 5335, says: "It has been well observed that, under our American system of government and laws, this definition is not strictly correct, since our franchises spring from contracts between the sovereign power and private citizens, made upon a valuable consideration, for purposes of public benefit, as well as of individual advantage. To be a franchise, the right possessed must be such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature, which cannot be legally exercised without legislative grant." *Maestri v. Board of Assessors*, 34 South. 658, 661, 110 La. 517. It is any immunity or exemption from ordinary jurisdiction—a constitutional or statutory right or privilege. *Louisville Tobacco Warehouse Co. v. Commonwealth*, 20 Ky. Law Rep. 1047, 1050, 48 S. W. 420. Being derived from the government, it is supposed to have been originally granted by the government. *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 36. Privileges and franchises are the rights bestowed by a state, to be withdrawn or destroyed at the pleasure of the Legislature. Privileges and franchises are not vested rights, either in the letter or the spirit of the act of 1856, declaring that all subsequent charters to cor-

porations should be subject to amendment or repeal. *Henderson Nat. Bank v. City of Henderson*, 19 Ky. Law Rep. 728, 742, 39 S. W. 1030.

A franchise is a branch of a royal prerogative subsisting in the hands of a subject by grant from the King, annexed to manors, as the right to hold courts-leet, and to have waifs, wrecks, and royal fish, which consist of whales and sturgeons. *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 87, 10 Am. Dec. 356.

"A 'franchise' is a word of extensive significance. It is defined by Finch, whom all subsequent writers have followed, to be a royal privilege in the hands of a subject. Finch, 164. 'Franchises are divers,' says Finch, 'and almost infinite. Of such sort are the liberty of holding a court of one's own; the right of warren in another's land; the right of holding markets, fairs, and taking tolls, etc.'" *Commonwealth v. Arrison* (Pa.) 15 Serg. & R. 127, 130, 16 Am. Dec. 531.

A franchise is a privilege or authority vested in certain persons, by grant of the sovereign, to exercise powers, or to do and perform acts, which without such grant they could not do or perform. *West Manayunk Gaslight Co. v. New Gaslight Co.*, 21 Pa. Co. Ct. R. 369, 378.

A franchise is defined to be a particular privilege conferred by grant from the government, and vested in individuals. *Ex parte Henshaw*, 15 Pac. 110, 113, 73 Cal. 486 (citing 3 Kent, Comm. 458); *Londoner v. People*, 25 Pac. 183, 15 Colo. 246. "A franchise has been defined to be a particular privilege conferred by the sovereign power of the state, and vested in individuals." *Dike v. State*, 38 N. W. 95, 96, 38 Minn. 366. A franchise is a particular privilege conferred by grant from a sovereign or a government, and vested in individuals or a corporation. *Chicago Municipal Gaslight & Fuel Co. v. Town of Lake*, 22 N. E. 616, 617, 130 Ill. 42, 53; *Chicago City Ry. Co. v. People*, 73 Ill. 541, 547. A franchise is a particular privilege conferred by the grant of government and vested in individuals—a branch of the King's prerogative subsisting in the hands of a subject. *State v. Pittsburg, Y. & A. R. Co.*, 33 N. E. 1051, 1053, 50 Ohio St. 239; *Arapahoe County Com'rs v. Rocky Mountain News Printing Co.*, 61 Pac. 494, 499, 15 Colo. App. 189; *Wilmington & R. R. Co. v. Downward* (Del.) 14 Atl. 720, 721; *Young v. Webster City & S. W. Ry. Co.*, 39 N. W. 234, 235, 75 Iowa, 140; *People v. Utica Ins. Co.* (N. Y.) 15 Johns. 358, 387, 8 Am. Dec. 243; *Milhan v. Sharp*, 27 N. Y. 611, 619, 84 Am. Dec. 314; *Miller v. Commonwealth*, 65 S. W. 828, 829, 112 Ky. 404; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9, 66; *Crum v. Bliss*, 47 Conn. 592, 602; *Sellers v. Union Lumbering Co.*, 39 Wis. 525, 526; *Truckee & T. Turnpike R. Co. v. Campbell*, 44 Cal. 89, 91.

A "franchise" is defined to be a special privilege conferred by government on individuals, and which does not belong to the citizens of a country generally by common right. *City Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. Ed. 274; *People's Passenger R. Co. v. Memphis R. Co.*, 77 U. S. (10 Wall.) 38, 50, 19 L. Ed. 848; *Western Union Tel. Co. v. Norman* (U. S.) 77 Fed. 13, 22; *Curtis v. Leavitt*, 15 N. Y. 9, 170; *Smith v. City of New York*, 68 N. E. 552, 555; *State v. Scongal*, 51 N. W. 858, 860, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Green v. Knife Falls Boom Corp.*, 27 N. W. 924, 925, 35 Minn. 155; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 28 N. E. 248, 249, 137 Ill. 231; *Martens v. Rock Island County Attorney*, 57 N. E. 871, 873, 186 Ill. 314; *People v. Holtz*, 92 Ill. 426; *Lasher v. People*, 55 N. E. 663, 665, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103; *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571, 575; *Watson v. Fairmont & S. Ry. Co.*, 39 S. E. 193, 198, 49 W. Va. 528; *State v. Austin & N. W. R. Co.*, 62 S. W. 1050, 1052, 94 Tex. 530; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 106; *Abbott v. Omaha Smelting Co.*, 4 Neb. 416, 421; *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9, 66; *Maestri v. Board of Assessors*, 34 South. 658, 661, 110 La. 517; *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083, 118 Iowa, 234; *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 379, 24 Am. Rep. 511; *City of Baltimore v. Johnson*, 54 Atl. 646, 649, 96 Md. 737, 61 L. R. A. 568; *Denver & Swansea Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673, 682.

The ordinary signification of the word "franchise," as defined by Webster, is a particular privilege or right granted by a prince or sovereign to an individual or to a number of persons; an exemption from a burden or duty to which others are subject. *Central R. & Banking Co. v. State*, 54 Ga. 401, 409.

A franchise is generally understood to be a special privilege emanating from the sovereign power of the state, owing its existence to a grant, or to prescription presupposing a grant. *Board of Trade of Chicago v. People*, 91 Ill. 80, 82; *Chicago City R. Co. v. People*, 73 Ill. 541, 547; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 28 N. E. 248, 137 Ill. 231; *State of New Jersey v. Wright*, 6 Sup. Ct. 907, 908, 117 U. S. 648, 29 L. Ed. 1021; *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802, 808, 61 Neb. 109.

A franchise is a grant of a right or privilege to an individual or a corporation by the government or sovereign power. *State v. New York, L. E. & W. R. Co.*, 2 N. Y. Civ. Proc. R. 82, 89.

"A franchise is said to be a right reserved to the people by the Constitution, as the elective franchise. Again, it is said to be a privilege conferred by grant from gov-

ernment, and vested in one or more individuals, as a public office. Corporations or bodies politic are the most usual franchises known to our laws. In England they are very numerous, and are defined to be royal privileges in the hands of a subject." *People v. Ridgley*, 21 Ill. (11 Peck) 65, 69.

"The word 'franchise' is generally used to designate a right or privilege conferred by law." *State v. Western Irrigating Canal Co.*, 19 Pac. 349, 350, 40 Kan. 96, 10 Am. St. Rep. 166. "Such a right is not transferable without the consent of the grantor, and this consent is said to be, in reality, a grant of authority from the state to the latter association, to which the transfer is made, to exercise franchises of the former upon the happening of the contingency, to wit, the act of transfer." *Moranetz*, § 536. The franchise to be a corporation is not the subject of sale and transfer, unless by some positive provision of the statute law pointing out the mode in which the transfer may be made. *State v. Butler*, 83 Tenn. (15 Lea) 104, 111, 113 (citing *Itagan & Buffett v. Aiken*, 77 Tenn. [9 Lea] 609, 614, 42 Am. Rep. 684).

A franchise is a branch of the sovereign power of the state, subsisting in a person or corporation by grant from the state. As long as the privilege bestowed on the grantee continues to exist, all other persons and corporations are under the most solemn obligation, as a duty they owe the public, to observe the franchise, and forbear from interfering with its enjoyment. All franchises are supposed to be for the public good. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.* (N. Y.) 44 Hun, 206.

A right which belongs to the government, when conferred upon the citizen, is a franchise. No one can exercise the right of eminent domain, or establish a highway or railway, and charge tolls for the same, without a grant from the Legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and, when the state grants such a right, it is a franchise. *Lasher v. People*, 55 N. E. 663, 665, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103 (citing *Chicago Board of Trade v. People*, 91 Ill. 80; *People v. Holtz*, 92 Ill. 426).

"If there are certain immunities and privileges in which the public have an interest, as contradistinguished from private rights, which cannot be exercised without authority derived from the sovereign power, it would seem to me that such immunities and privileges must be franchises." *Commonwealth v. City of Frankfort*, 76 Ky. (18 Bush) 185, 189.

Spell. Extr. Rel. § 1907, says that where, by statute, the legal exercise of a right which

at common law was private is made to depend on compliance with conditions imposed for the security of the public, the necessary inference is that it is no longer private, but has become a matter of public concern—that is, a franchise, the assumption and exercise of which, without complying with the conditions prescribed, would be a usurpation of a public or sovereign function. *State v. Ackerman*, 51 Ohio St. 163, 194, 37 N. E. 828, 24 L. R. A. 298.

Corporations and bodies politic are the most usual franchises known to our law. *Wilmington & R. R. Co. v. Downward* (Del.) 14 Atl. 720, 721; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 106; *People v. Ridgley*, 21 Ill. (11 Peck) 65, 69.

In this country the term "franchise" can only embrace corporations, ferries, bridges, wharves, and the like, where tolls are authorized to be taken, and, we may add, the elective franchise, as it is granted by the Constitution to a portion of the people to elect their officers; but it does not include an office, within the meaning of the Constitution and statute prescribing the appellate jurisdiction of the Supreme and Appellate Courts. *People v. Holtz*, 92 Ill. 426, 428.

**Authority to foreign corporation to do business.**

The authority given to a foreign insurance company to do business in the state emanates from the state, and the privilege granted is a franchise. *State v. Ackerman*, 51 Ohio St. 163, 194, 37 N. E. 828, 24 L. R. A. 298.

The certificate of authority issued to a foreign insurance company to do business in a state confers on such company a privilege or right not possessed by citizens generally, and not conferred upon it by its original franchise. This right or privilege so conferred is in that sense a franchise, and by it the company is authorized to establish, conduct, and maintain an insurance business. *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke Co.*, 72 Pac. 982, 984, 28 Mont. 484.

**As capital stock.**

See "Capital Stock."

**As a commodity.**

See "Commodity."

**As contract or property right.**

See, also, "Property."

A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act or series of acts of public concern; and, when accepted, it becomes a contract, and is irrevocable, unless the right to revoke

it is expressly reserved. *Trustees of Freeholders & Commonalty of Town of Southampton v. Jessup*, 56 N. E. 538, 539, 162 N. Y. 122 (citing *People v. Utica Ins. Co.* [N. Y.] 15 Johns. 358, 387, 8 Am. Dec. 243; *Bank of Augusta v. Earle*, 38 U. S. [13 Pet.] 519, 595, 10 L. Ed. 274; *California v. California Pac. R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1078; 32 L. Ed. 150).

A grant by a state Legislature constitutes an executed contract, and its obligation as such continues in force, and therefore is within the provision of the Constitution prohibiting the "impairing of the obligation of contracts." *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. Ed. 162. See, also, to the same effect, *State of New Jersey v. Wilson*, 11 U. S. (7 Cranch) 164, 3 L. Ed. 303; *Terrett v. Taylor*, 18 U. S. (9 Cranch) 43, 3 L. Ed. 650; *University v. Foy*, 3 N. C. 310; *Pawlet v. Clark*, 13 U. S. (9 Cranch) 292, 3 L. Ed. 735. And in the case of *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 4 L. Ed. 629, the court stated that the constitutional provision embraced every species of contract respecting property and objects of value, and which concerned rights that may be asserted in a court of justice. Judge Story said that the Constitution extended to all manner of contracts and grants, whether beneficial or not to the person in whom the rights and privileges secured by them vested. In *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 5 L. Ed. 547, it was decided that a contract between two states was a contract, within the meaning of the Constitution. But there has been no case which could be cited as an authority for the proposition that a statute providing that "no mispleading or lack of pleading shall hereafter render any executor or administrator liable" individually to pay the debt of the deceased, etc., would come within the constitutional prohibition; and, to say the least, it is certainly doubtful whether the provision would cover such a statute. *Martindale v. Moore* (Ind.) 3 Blackf. 275, 279.

"The older English authorities (as Finch) define franchises to be 'branches of the royal prerogative subsisting in the hands of a subject by grant from the King.' 3 Cruise, Dig. 278. They regarded such franchises as being mere donations of the sovereign, to be treated strictly and jealously. In their day, they commonly were so. But the advance of liberty, of commerce, and the arts and conveniences of life have given to franchises a higher character of public utility. They have become contracts between the sovereign power and the private citizen, made upon valuable consideration, for purposes of public benefit as well as of private advantage. I therefore prefer and adopt the definition of Chancellor Kent: 'Franchises are privileges conferred by grant from government, and vested in private individuals

They contain an implied covenant on the part of the government not to invade the rights vested, and, on the part of the grantees, to execute the conditions and duties prescribed in the grant." *Thompson v. People*, 23 Wend. 537, 578 (quoting 3 Kent, Comm. 458).

Franchises are legal estates vested in the corporation as soon as it is in esse, and are as varied as the purposes for which corporations are created. *Society for Savings v. Colte*, 73 U. S. (6 Wall.) 594, 606, 18 L. Ed. 897; *State v. Anderson*, 63 N. W. 746, 748, 90 Wis. 550.

The grant of a franchise is in the nature of a vested right of property, subject, however, in most cases, to the performance of conditions and duties on the part of the grantees. They generally involve important duties of a public character, often onerous upon the grantees. They are necessarily exclusive in their character. Otherwise their value would be liable to be destroyed or seriously impaired. So long as the grantee fulfills the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right, which cannot be taken away, or otherwise impaired by the government, any more than other property. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, 422.

A franchise is a vested right peculiar in its nature, and is a quasi property. *Jacob Tome Inst. of Port Deposit v. Crothers*, 40 Atl. 261, 266, 87 Md. 569.

A franchise obtained by a grant from the Legislature has the legal character of an estate or property. *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 373, 13 Am. Rep. 181.

Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not in ordinary cases subject to execution or to sale and transfer, even in payment of the debts of the corporation. *Randolph v. Larned*, 27 N. J. Eq. (12 C. E. Green) 557, 560.

A franchise is a mere legal right or privilege, and may result from a simple legislative enactment, without any contract between the state and the possessor of the privilege. *Pennsylvania R. Co. v. Bowers*, 23 Wkly. Notes Cas. 257, 259, 16 Atl. 836, 124 Pa. 183, 2 L. R. A. 621.

The grant of a franchise to a corporation to erect and maintain a bridge is an executed contract, and the plaintiffs are entitled to be protected in the enjoyment of the property acquired under it to as great an extent as they are protected in the enjoyment of any other species of property. *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35, 68.

A franchise is property. *Sellers v. Union Lumbering Co.*, 39 Wis. 525, 526.

The franchise of a corporation is property, and hence subject to taxation. *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561, 577.

Although the franchises of a company will be considered in one sense property, and valuable property, yet they are not property within the meaning of that term as used in a Bill of Rights declaring that every person holding property in the state shall be subject to taxation. *City of Baltimore v. Johnson*, 54 Atl. 646, 649, 96 Md. 737, 61 L. R. A. 568 (citing *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 379, 24 Am. Rep. 511).

A franchise is property which may be transferred by sale or devise, and it will descend to heirs like other property. As a franchise is a species of property derived by grant from the government, it follows that if the government has no power to make the grant, either because it is contrary to public policy, or because the government has no title to the thing granted, no title can be conveyed to the grantee. *Norwich Gaslight Co. v. Norwich City Gas Co.*, 25 Conn. 19, 36.

The franchises of a corporation are not property, in the meaning of that term as used in the Bill of Rights, declaring that every person holding property ought to contribute his proportion of public taxes. *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361, 379, 24 Am. Rep. 511.

A franchise is property, and it cannot wantonly or of whim be taken away by legislative act, and transferred to another. *Wilmington & R. R. Co. v. Downward (Del.)* 14 Atl. 720, 721.

The grant of a franchise has the legal character of an estate or property. *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365, 378, 13 Am. Rep. 181.

#### As corporate franchise.

A franchise is a grant of governmental power to others. It is not essentially corporate, since there may be franchises granted to private persons which do not in their nature apply to or affect corporations; and, whenever the franchise of a corporation is meant, the term "franchise" should be modified by the adjective "corporate," in order to distinguish it from noncorporate franchises. *Black River Imp. Co. v. Holway*, 59 N. W. 126, 128, 87 Wis. 584.

The term "franchise" is often used in the sense of privileges generally, but in its more appropriate and legal sense the term is confined to such rights and privileges as are conferred upon corporate bodies by legis-

lative grant. *Flitsam v. Hay*, 13 N. E. 501, 122 Ill. 298, 3 Am. St. Rep. 492.

It is not essential that the franchise be given to a corporation rather than an individual. *Watson v. Fairmont & S. Ry. Co.*, 39 S. E. 193, 198, 49 W. Va. 528.

#### Corporation and corporate capacity.

Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege, or public concern which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway or a public ferry or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No person can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. *Central Pacific R. Co. v. People of State of California*, 16 Sup. Ct. 766, 778, 162 U. S. 91, 40 L. Ed. 903 (citing *California v. Central Pac. R. Co.*, 127 U. S. 1, 38, 8 Sup. Ct. 1073, 32 L. Ed. 150).

A franchise includes the right of an association under the protection of an artificial personality to do business, whether obtained by special charter, or under a general incorporation law. *State v. Travelers' Ins. Co.*, 40 Atl. 465, 467, 70 Conn. 590, 66 Am. St. Rep. 188.

Franchises are usually conferred on corporations for the purpose of enabling them to do certain things. The franchises are vested in the corporate entity, rather than in the officers. *Londoner v. People*, 25 Pac. 183, 15 Colo. 246.

The right to be and do business as a corporation is a franchise. The power to exercise a franchise is one of the most important a corporation can acquire. *Iron Silver Min. Co. v. Cowie*, 72 Pac. 1067, 1068, 81 Colo. 450.

The word "franchise" is to be regarded as a generic term covering all rights granted to a corporation by legislative act or statute. A corporation—by which is meant an association of individuals organized into a body lawfully exercising corporate powers—is itself a franchise, and the different powers which may be exercised by the corpora-

tion are also franchises. *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1083, 118 Iowa, 234.

The word "franchise" has various significations, both in a legal and popular sense. A corporation is itself a franchise belonging to the members of the corporation, and a corporation, being itself a franchise, may hold other franchises, as rights and franchises of the corporation. *Pierce v. Emery*, 32 N. H. 484, 507.

The corporation itself is not a franchise, but it is the attributes of the corporation which comprise the franchise thereof—its special powers and rights. *Young v. Webster City & S. W. Ry. Co.*, 89 N. W. 234, 235, 75 Iowa, 140.

"The franchise of forming a corporation is but an exemption from the general rule of the common law prohibiting the formation of a corporation of persons. All persons in this state have now the right of forming corporate associations, on complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity, under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise." *State v. Western Irrigating Canal Co.*, 19 Pac. 349, 351, 40 Kan. 96, 10 Am. St. Rep. 166.

"The right to be a corporation has sometimes been called a 'franchise,' but that is a misapplication of terms. The right to create a corporation is a franchise. So is the right to create an office or coin money, to hold courts, and money privileges. A franchise is a right belonging to the government as a sovereign, yet committed in trust to some officer, individual, or corporation." *Knoup v. Piqua Bank*, 1 Ohio St. 603, 613.

#### As elective franchise.

The word "franchise," in 9 Anne, c. 20, providing that in case any person or persons shall usurp, intrude into, or unlawfully hold or execute any office or franchise, it shall and may be lawful, etc., which is substantially copied in Revision, p. 906, has always been construed in the English courts to refer to the franchise of being a freeman of a municipality, and no more; and the remedy of quo warranto under that act is either confined to municipal or public or quasi public corporations. Its application to offices and private corporations had its origin in this country. *Union Water Co. v. Kean*, 27 Atl. 1015, 1021, 52 N. J. Eq. (7 Dick.) 111.

In a more popular sense, the political rights of subjects and citizens are called "franchises," like the electoral franchise. *Pierce v. Emery*, 32 N. H. 484, 507 (citing *Ang. & A. Corp.* 3).

**As exclusive right.**

Franchises are necessarily exclusive in their character; otherwise their value would be liable to be destroyed or seriously impaired. And even though the grant does not declare the privilege to be exclusive, yet that is necessarily implied from its nature. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, 422.

A franchise is, in law, sometimes used to mean an exclusive right held by grant from the sovereign power—such in its nature that the same right cannot be granted to another without an invasion of the franchise of the first grantee. The strictly legal signification of the word is not always confined to exclusive privileges, but the term is used in law to designate powers and privileges which are not exclusive in their nature. The term, according to Blackstone, embraces in its legal meaning several kinds of rights—some exclusive and some not exclusive. *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571, 575.

**Ferry.**

The term "franchise" includes the right given under a ferry license. *Hackett v. Wilson*, 6 Pac. 652, 653, 12 Or. 25.

Kent says: "The privilege of making a road or establishing a ferry, and taking tolls for the use of the same, is a franchise. Railroads certainly do not form an exception. Monopoly is not an essential feature of a franchise." *Milbau v. Sharp*, 27 N. Y. 611, 619, 84 Am. Dec. 814.

The grant of the right to maintain and operate a ferry, and collect toll for transporting persons and property for a period of years, on the payment of a certain sum annually, is the grant of a franchise. It is a right only vested in individuals by a grant from the government. It is a sovereign prerogative, and in this country vests in an individual only by a legislative grant, and it makes no difference whether the grant be made directly by the Legislature, or by a subordinate body to whom the power is delegated. It is still a grant emanating from the authority of the state. A ferry is *publici juris*. It is a franchise that no one can erect without a license from the crown. *Evans v. Hughes County*, 54 N. W. 603, 604, 3 S. D. 580.

The grant of a ferry is a franchise. There are a great variety of franchises—some of them founded on valuable considerations, and necessarily exclusive in their meaning, and which the government cannot resume at pleasure, or do any other act to impair the grant without a breach of the contract. An estate in such a franchise necessarily implies that the government will not either directly or indirectly interfere with it so as to destroy or materially impair its value, either by the creation of a rival

franchise or otherwise. A grant of a ferry over a public water course, and for the convenience of the community, is not such an exclusive grant as is contemplated in such a case. *Dyer v. Tuskaloosa Bridge Co. (Ala.)* 2 Port. 296, 304, 27 Am. Dec. 655.

**As a grant, not a prohibition.**

The real meaning of "franchise" is a privilege granted, not a right taken away; and as used in Const. art. 14, § 2, providing that the right to collect compensation for the use of water supplied any county, city, or town, or the inhabitants, is a franchise, is not a negative word, signifying prohibition, instead of being, as it is, an affirmative word denoting a grant. Whatever right a ditch owner had to sell and distribute water at the time the Constitution was adopted, or after, was not destroyed because it was called in the Constitution a "franchise." The term "franchise" was properly used with the notion that it would make more clear and certain the intention to make the use of water a public use than to subject it to state regulation. *Fresno Canal & Irrigation Co. v. Park*, 62 Pac. 87, 88, 129 Cal. 437.

**Grant from government essential.**

It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the state. *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. Ed. 274; *State v. Scougal*, 51 N. W. 858, 860, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756; *Western Union Tel. Co. v. Norman (U. S.)* 77 Fed. 13, 22.

In England a franchise is concisely defined to be a royal privilege in the hands of a subject. In this country it is defined as a privilege of a public nature, which cannot be exercised without a legislative grant. With us, therefore, the wrongful assumption of powers which can alone be rightfully exercised when granted by the sovereign authority is a violation of a sovereign franchise. *State ex rel. Read v. Weatherby*, 45 Mo. 17, 20 (citing Ang. & A. Corp. 697).

"Franchises are here, as in England, privileges of the sovereign in the hands of the subject. A franchise, which in England is a branch of the royal prerogative subsisting in the hands of a subject, in this country can only be derived from the Legislature. Whoever claims an exclusive privilege with us must show a grant from the Legislature. A privilege or immunity of a public nature, which cannot be legally exercised without legislative grant, is a franchise." *Blake v. Winona & St. P. Ry. Co.*, 19 Minn. 418, 425 (Gil. 362, 369).

It is essential that a franchise should be created by a grant from the sovereign au-

thority. *Denver & Swansea Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673, 682.

A franchise is a privilege or authority vested in certain persons by grant of a sovereign to exercise powers or to do and perform acts which without such grant they could not do or perform. *Watson v. Fairmont & S. Ry. Co.*, 39 S. E. 193, 198, 49 W. Va. 528.

"A franchise is a privilege vested in certain individuals, by grant from the sovereign authority in the state, to exercise, possess, or to perform acts which without such grant they could not do or perform." *Twelfth St. Market Co. v. Philadelphia & R. T. R. Co.*, 28 Wkly. Notes Cas. 111, 21 Atl. 989, 142 Pa. 580.

A franchise "is a right such as cannot be exercised without the express permission of the sovereign power—a privilege or immunity of a public nature which cannot be legally exercised without legislative grant." *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. 1020, 1025, 40 Minn. 213, 3 L. R. A. 510.

Franchises are derived entirely under grants from the Legislature, either by general or special laws. *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398, 422.

"A franchise has been defined to be a privilege or immunity of a public nature, which cannot legally be exercised without legislative grant. To be a corporation is a franchise. The various powers conferred on corporations are franchises. The execution of a policy of insurance by an insurance company, and the issuing of a bank note by an incorporated banking company, are the exercise of franchises. Without legislative authority, neither could lawfully be done by a corporation; and, were a bank to execute a policy of insurance, or an insurance company to issue bank notes, such acts would be usurpations of franchises." *State v. City of New York*, 10 N. Y. Super. Ct. (3 Duer) 119, 144 (citing *People v. Trustees of Geneva College*, 5 Wend. 211, 217; *People v. Utica Ins. Co.* [N. Y.] 15 Johns. 358, 387).

A franchise is a sovereign prerogative, and vests in an individual only by virtue of a legislative grant. It makes no difference whether the grant be made direct by the Legislature, or by a subordinate body to whom the power is delegated. It is still a grant emanating from the sovereign authority of the state. *Truckee & T. T. Road Co. v. Campbell*, 44 Cal. 89, 91.

A privilege is none the less a franchise, in the proper sense of the term, because it is granted not directly by legislative enactment, but under an ordinance of a city under the sanction of the charter; and therefore a grant to a railroad company to construct a track in a street under an ordinance under the powers given in the charter of the city

may be considered as the grant of a franchise by the Legislature. *Port of Mobile v. Louisville & N. Ry. Co.*, 4 South. 106, 109, 84 Ala. 115, 5 Am. St. Rep. 342.

#### As generic term covering all rights.

The word "franchise" is generic, covering all the rights granted a corporation by the Legislature, so that, as the greater power includes every less power which is a part of it, a statutory right to withdraw a franchise must authorize a withdrawal of any or every right or privilege which is a part of the franchise. *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.* (Del.) 46 Atl. 12, 16.

The word is generic, covering all the rights granted by the Legislature. It is too narrow a definition of the word to hold that it means only the right to be a corporation. *State v. Berry*, 19 Atl. 665, 668, 52 N. J. Law (23 Vroom) 308 (citing *Atlantic & Gulf R. R. Co. v. Georgia*, 98 U. S. 359, 365, 25 L. Ed. 185).

#### Immunity from taxation.

Exemption from taxation, being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. *State of New Jersey v. Wright*, 6 Sup. Ct. 907, 911, 117 U. S. 648, 29 L. Ed. 1021.

The word "franchise" is used sometimes to denote all the rights, powers, and privileges of a corporation in its large sense, and sometimes, in a still larger sense, to signify all that the company possesses. One of the legal meanings of the word, approaching very closely to its primary significance, is freedom, exemption, immunity. The term is now generally used in the more restricted sense, and for that reason the Supreme Court of the United States has held in a number of cases that, because of the reason for adopting a strict construction of language claimed to create or transfer exemption from taxation, a reference to the franchises of a corporation would not include its immunities, in the absence of other language or circumstances indicating that the term was used with a signification wide enough to include them. *Buchanan v. Knoxville & O. R. Co.* (U. S.) 71 Fed. 824, 334, 18 C. C. A. 122.

"Franchises are positive rights or privileges, without the possession of which the roads of the company could not be successfully worked. Immunity from taxation is not one of them." *Morgan v. State of Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860 (quoted in *State v. Chicago, B. & K. C. Ry. Co.*, 14 S. W. 522, 524, 89 Mo. 523).

The term "franchise" should be construed so as not to include immunity from taxation, since it is a personal privilege of the company,

and hence it is not a franchise of the railroad, which passes as such to a purchaser of its property. *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860; *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 277, 26 L. Ed. 152; *Chesapeake & O. Ry. Co. v. Miller*, 5 Sup. Ct. 813, 818, 114 U. S. 176, 29 L. Ed. 121; *Baltimore, O. & A. Ry. Co. v. Ocean City*, 42 Atl. 922, 923, 89 Md. 89; *Evansville, H. & N. R. Co. v. Commonwealth*, 72 Ky. (9 Bush) 438, 443; *Wilson v. Gaines (Tenn.)* 9 Baxt. 546, 552.

#### **As incorporeal hereditament.**

A franchise, during the period of its continuance, is an incorporeal hereditament. *Horst v. Moses*, 48 Ala. 129, 146.

"A franchise is an incorporeal hereditament, known as a species of property as well as an estate in lands. It is property which may be bought and sold, and will descend to heirs, and may be devised. Its value is greater or less according to the privilege granted to the proprietors." *Enfield Toll-bridge Co. v. Hartford & N. H. R. Co.*, 17 Conn. 40, 59, 42 Am. Dec. 716.

Franchises are classed as incorporeal hereditaments, as stated by Chancellor Kent with some impropriety, as they have no inheritable quality. *State v. Anderson*, 63 N. W. 746, 748, 90 Wis. 550.

A railroad's franchise is an incorporeal hereditament, as distinguished from land, which is a corporeal hereditament. *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700.

#### **Liquor license.**

The term "franchise," as used in the statute providing that certain cases shall be appealed to this court, is used in its strict legal sense. The license to keep a saloon confers no special right or privilege upon the holder, but is merely one of the means adopted by the Legislature for regulating the sale of intoxicating liquors; and such a license is not, therefore, within the legal definition of a franchise. *Martens v. Rock Island County Attorney*, 57 N. E. 871, 873, 186 Ill. 314.

#### **Political privilege.**

A franchise, involving solely matters of pecuniary interest, or a privilege in respect to property, cannot, in a just sense of the word, be called a political privilege. It touches no duty which the citizen, as such, owes to the state. *Atchison Street Ry. Co. v. Missouri Pac. Ry. Co.*, 3 Pac. 284, 285, 31 Kan. 661.

Under Const. art. 4, § 22, prohibiting the Legislature from passing any law granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever, the Legislature has no power to authorize the an-

nual appointment by incorporated associations, organized for the promotion of interests allied to the produce commission business, from their membership, of a state board to serve for one year, who shall have power to license and exercise control over the business of produce commission merchants. *Lasher v. People*, 55 N. E. 663, 665, 183 Ill. 226, 47 L. R. A. 802, 75 Am. St. Rep. 103.

#### **Membership in board of trade.**

The term "franchise" is not synonymous with "privileges and immunities of a personal character," and hence does not include the right to membership in a private corporation, such as the Board of Trade of Chicago. *Board of Trade of Chicago v. People*, 91 Ill. 80, 83.

#### **Office.**

The statute authorizing the direct appeal from the circuit court to the Supreme Court in cases in which a franchise is involved does not include an office, and hence a direct appeal from the trial court to the Supreme Court in a proceeding by quo warranto bringing in question the right to hold and execute the duties of an office will not lie. *McGrath v. People*, 100 Ill. 464, 465; *Graham v. People*, 104 Ill. 321, 322.

#### **As privilege.**

See "Privilege."

#### **Privilege of banking.**

The term "franchise" includes the privilege of banking. *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 595, 10 L. Ed. 274; *State v. Mayor*, 10 N. Y. Super. Ct. (3 Duer) 119, 144.

The term "franchise" does not embrace the right of a corporation to receive money on general or special deposit, to lend money on security, or to discount or purchase bills, notes, or other evidences of indebtedness, as the right to carry on such business belongs to all citizens of common right. *International Trust Co. v. American Loan & Trust Co.*, 65 N. W. 78, 79, 62 Minn. 501; *State v. Scougal*, 51 N. W. 858, 3 S. D. 55, 15 L. R. A. 477, 44 Am. St. Rep. 756.

#### **Privilege of insurance business.**

The privilege of doing business as an insurer is a franchise subject to legislative regulation. This franchise has grown up from a small beginning of necessity, but is not a departure from the general rule characterizing the meaning of the term. As the business of insuring lives, property, credits, and fidelity of conduct has become of such large public concern in connection with the business enterprises and activities of the people of the state generally, such business has essentially become one of a public character; and it has been found necessary by the Legis-



lature to guard the people of the state in their dealings with the persons and corporations assuming to act as insurance companies, in the same manner as it has been found essential to deal with the business of banking. It has been held repeatedly that the state has the right to regard the business of insurance as one dependent upon the exercise of a franchise which the state has the right to give and to withhold. *People v. Loew*, 44 N. Y. Supp. 42, 43, 19 Misc. Rep. 248.

#### **As property owned under franchise.**

In the constitutional provision that no corporation shall lease or alienate any franchise so as to relieve the franchise or property held thereunder from the liability of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise, or any of its privileges, the word "franchise" means the corporate existence or chartered privileges, as distinguished from the corporeal property, of the corporation. *Bailey v. Southern Ry. Co.*, 61 S. W. 31, 112 Ky. 424.

But though one may have a franchise to build a pier on lands belonging to the municipality, the pier itself is by no means a franchise, but is rather real estate, under the statutory definition of "real estate" as including "all buildings and other articles erected upon or affixed to" the land. *Smith v. City of New York*, 68 N. Y. 552, 555.

As used in Ky. St. § 4077, providing that certain corporations and companies shall, in addition to other taxes, annually pay a tax on their franchise to the state, etc., the word "franchise" is intended to include all intangible property, whether or not such property be legally franchises or corporate franchises. So that it is a tax not upon the occupation of franchises granted by other states or by the United States, but upon the property owned and enjoyed by these associations, companies, and corporations, which is claimed to be within the taxing power of the state. *Western Union Telegraph Co. v. Norman* (U. S.) 77 Fed. 13, 22.

"The term 'franchise' has several significations, and there is some confusion in its use. The better opinion deduced from the authorities seems to be that it consists of the entire privileges embraced in and constituting the grant. It does not embrace the property acquired by the exercise of the franchise." *City of Bridgeport v. New York & N. H. R. Co.*, 36 Conn. 255, 266, 4 Am. Rep. 63.

#### **As real estate.**

See "Real Property."

#### **As rights, privileges, and immunities.**

The term "franchise," as applied to railroad corporations, is not synonymous with

"rights, privileges, and franchises," "rights, powers, and privileges," and the like. By the term "franchise" is meant the positive rights or privileges, without the possession of which the road of the company could not be successfully worked. *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 277, 28 L. Ed. 152.

"Franchises" is often used as synonymous with "rights, privileges, and immunities," though of a temporary and personal character, so that, if any one of these exists, it is loosely termed a "franchise," and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860; *In re White Plains Board of Water Com'rs*, 76 N. Y. Supp. 11, 16, 71 App. Div. 544.

The term "franchises," in a legal sense, contains the elements of a grant or immunity, privilege or exemption, of public or quasi public authority. It may sometimes be used in a popular sense as a privilege, but, as used in a sheriff's certificate of sale of certain property, together with a newspaper, good will, and franchises thereof, the term "franchises" is not used in the legal sense, or in its ordinary, popular sense, and is too indefinite to cover a contract by the newspaper company with the Associated Press, by which it is to be furnished news. *Lawrence v. Times Printing Co.*, 61 Pac. 166, 169, 22 Wash. 482.

Any definition of the word "franchise" must include the word "privileges." *Williamette Woolen Mfg. Co. v. Bank of British Columbia*, 7 Sup. Ct. 187, 190, 119 U. S. 191, 30 L. Ed. 384.

A franchise is a liberty or privilege granted by the government to an individual. *State v. City of Topeka*, 2 Pac. 587, 589, 30 Kan. 653, 657.

The word "franchise," as used in Appellate Court Act, § 8, providing that appeals may be had directly from the trial court to the Supreme Court in cases in which a franchise is involved, does not include liberty or privilege, merely, but should be construed in the restrictive sense of a special privilege conferred by grant from the state or sovereign power, as being something not belonging to the citizen of common right. *Hesing v. Attorney General*, 104 Ill. 292, 295.

#### **Right of eminent domain.**

Whenever any citizen or corporation receives the right to construct a railroad upon the land of another without his consent by virtue of the right of eminent domain, such individual or corporation has a franchise of eminent domain. *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603, 613.

**Right of fishery.**

The term "franchise," in Const. art. 3, § 18, forbidding the granting of any franchise, except to promote the public welfare, includes an exclusive right of one person of fishing in any part of the Hudson river, and therefore such privilege cannot be granted. Such privilege is a private, exclusive monopoly of a public right, and is manifestly a franchise. *Slingerland v. International Contracting Co.*, 60 N. Y. Supp. 12, 17, 43 App. Div. 215.

**Right to acquire land.**

The term "franchise," when applied to a corporation, includes a corporate right to select and acquire land for the authorized purposes of the corporation. *Baltimore & F. Turnpike Road v. Baltimore, O. & E. M. Pass. R. Co.*, 31 Atl. 854, 855, 81 Md. 247.

**Right to be or exist distinguished from powers.**

There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation, a right to exist as an artificial being, a right conferred on the sovereignty of the state, and those rights, subsidiary in their nature, by which the corporation obtains privileges of more or less value, to the existence of which corporate existence is not a prerequisite. *State v. Topeka Water Co.*, 60 Pac. 337, 341, 61 Kan. 547.

The sovereign power, which makes several persons a single entity as a corporation, confers on them the franchise of acting as one person. This new person, creature of the law, and existing through the grace of and at the will of the sovereign, was then clothed with certain powers and granted certain privileges. These are its franchises: First, the franchise of existence as a corporation—its life and being. This is inseparable from it. When it parts with it, it parts with its life. But with respect to the other franchises with which it is clothed, the right and privilege to act as a common carrier, to carry passengers and goods, to charge tolls, and to operate a railroad—these it enjoys as an individual could. They are inseparable from its existence. They are its property. A franchise to be a corporation is distinct from a franchise of a corporation to maintain and operate a railroad. *Central Trust Co. v. Western N. C. R. Co.* (U. S.) 89 Fed. 24, 31.

**Right to build on public road or way.**

The right to build in and on a public road or way is a franchise. *Pennsylvania R. Co. v. Philadelphia Belt Line R. Co.*, 10 Pa. Co. Ct. R. 625, 631.

**Right to confer degrees.**

Franchise is a privilege or immunity of a public nature which cannot legally be ex-

ercised without legislative grant. For example, to be a corporation is a franchise; the execution of a policy of insurance by an insurance company, and the using of a bank note by an incorporated banking company, are franchises. Since corporations can exercise only such powers as are granted expressly or incidentally, the same act, when done by an individual, may be no franchise, yet be one when done by a corporation. For example, the issuance by an individual or private association of negotiable notes for circulation like bank notes was permissible before the passage of the restraining act, while such an act by a corporation was a franchise. The conferring of degrees and appointment of tutors and professors by educational corporations are franchises, though an individual may instruct pupils and may employ teachers and grant certificates without any legislative authority. Consequently, the appointment of a medical faculty in the city of New York, by a college located in Geneva, without legislative authority, was a usurpation of a franchise. *People v. Trustees of Geneva College* (N. Y.) 5 Wend. 211, 217.

**Right to construct and operate railroad.**

The term "franchise" is properly applied to a grant to a corporation of a right to lay out, construct, and operate a railroad. Such a grant operates to give the corporation the capacity to exercise a portion of the powers of sovereignty for the purpose of making pecuniary profit to itself. *Driscoll v. Norwich & W. R. Co.*, 32 Atl. 354, 357, 65 Conn. 230.

**Right to construct and operate street railroad.**

The grant of an exclusive right to construct and operate a horse railway in a city is a franchise. *Denver & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673, 682.

**Right to erect a bridge.**

Resolutions of the trustees of a town, which give a person liberty to make a roadway and erect a bridge, and which are passed in the exercise of governmental power conferred by charter in colonial days, create a franchise rather than a license or an easement. *Trustees of Freeholders & Commonalty of Town of Southampton v. Jessup*, 56 N. E. 538, 539, 162 N. Y. 122.

**Right to lease market stalls.**

The exclusive privilege vested in one pursuant to a city ordinance, and contract predicated thereon, made by him with a city, to furnish the ground, build thereon a structure suitable for a public market, and then operate it for a specified period by renting stalls to those engaged in the market business, and collecting and appropriating to himself the revenues derived from the renting of the stalls, is a franchise. *Maestri v.*

Board of Assessors, 34 South. 658, 661, 110 La. 517.

#### **Right to practice law.**

The term "franchise" properly describes the right granted to a lawyer to practice law. In re Attorneys' Oaths (N. Y.) 20 Johns. 492, 493.

#### **Right to preside over city council.**

Within Revision 1860, c. 151, § 3743, providing that where several persons claim to be entitled to the same office or franchise an information may be filed against all or any portion thereof in order to try their respective rights thereto, the right of the mayor of a city to preside over the meetings of a city council is a franchise. *Cochran v. McCleary*, 22 Iowa, 75, 89.

#### **Right to take tolls.**

A franchise is a pledge of royal prerogative to a subject, such as the right of taking toll for a bridge way or wharf. *Talcott v. Pine Grove* (U. S.) 23 Fed. Cas. 652, 668.

The right to collect tolls on bridges, roads, etc., is a franchise. *Truckee & T. T. R. Co. v. Campbell*, 44 Cal. 89, 91.

#### **Right to trade-mark.**

The right of a corporation to use a name as a trade-mark is not a franchise. *Hazleton Boller Co. v. Hazleton Tripod Boller Co.*, 28 N. E. 248, 137 Ill. 231.

#### **Right to use public streets.**

The word "franchise" is in common use to designate the right or privilege of constructing and operating railroads in city streets. Such right must always proceed in some source from the state, as authority to use the public streets of a city for railroad purposes primarily resides in the state, and is a part of the sovereign power. *Adee v. Nassau Electric Co.*, 72 N. Y. Supp. 992, 1000, 65 App. Div. 529. See, also, *Port of Mobile v. Louisville & N. R. Co.*, 4 South. 106, 108, 84 Ala. 115.

Within the constitutional provision prohibiting the Legislature from enacting any special or private laws granting corporate rights or privileges, a municipal ordinance granting a franchise to a street railway company is not invalid, the franchise not being essentially corporate, and it is not the grant of a franchise which is prohibited, but a corporate franchise. *Linden Land Co. v. Milwaukee Electric Railway & Light Co.*, 83 N. W. 851, 858, 107 Wis. 493.

A special privilege granted by sovereign authority either to an individual or a corporation is a franchise. A grant made by a city council, by authority of its charter, to construct, maintain and operate a system of

waterworks in such city, and to use the streets and alleys for that purpose, is a legislative grant through the medium of an authorized legislative agency, and is a franchise. As used in Rev. St. § 3466, authorizing the Attorney General to bring proceedings for the forfeiture of franchises, the word "franchise" is used in its general sense, so as to include franchises regardless of whether they are corporate or not. *State v. Portage City Water Co.*, 83 N. W. 697, 700, 107 Wis. 441.

A grant of a franchise proceeds from the state, and is distinguished from consent of a municipal authority, which merely goes to consent for a form of street use. *Ghee v. Northern Union Gas Co.*, 56 N. Y. Supp. 450, 454, 34 App. Div. 551.

The license given by a city to a street railway company, authorizing it to use the streets of the city for its railway, is not a franchise. *Lincoln St. Ry. Co. v. City of Lincoln*, 84 N. W. 802, 808, 61 Neb. 109.

The grant of the right to run a railroad in the city streets is a franchise which cannot be granted by the city without authority from the Legislature. *State v. Mayor*, 10 N. Y. Super. Ct. (3 Duer) 119, 144.

The franchise made taxable by Tax Law, § 2, subd. 3, as amended by Laws 1899, c. 712, does not mean the right to exercise corporate functions, but the right to use the public streets, highways, or public places for the purpose of laying pipes or mains, either as an individual or a corporation. The right to so use the public streets or highways is a property right, and it is because such property has a value that the right exists to assess it. The franchise thus made taxable must mean some special privilege derived from some governmental body or some political body having authority to grant the property right sought to be taxed. It is this species of property, intangible in its nature, which the law was enacted to reach. *People v. Priest*, 77 N. Y. Supp. 382, 383, 75 App. Div. 131.

#### **Wharfage.**

In *Walsh v. New York Floating Dry Dock Co.*, 77 N. Y. 448, 452, it was said that the term "franchise" included a right to collect wharfage, as such right depended upon a grant by the sovereign power. *Flandreau v. Elsworth*, 45 N. E. 853, 854, 151 N. Y. 473.

#### **Of corporation.**

A general franchise of a corporation is its right to live and to do business by the exercise of the corporate powers granted by the state. *People v. State Board of Tax Com'rs*, 67 N. E. 69, 72, 174 N. Y. 417.

The franchise of a company is the right to hold property and exercise its corporate

privileges. *Hancock v. Singer Mfg. Co.*, 41 Atl. 846, 850, 62 N. J. Law, 289, 42 L. R. A. 852 (citing *Wilmington & W. R. R. Co. v. Reid*, 80 U. S. [13 Wall.] 264, 20 L. Ed. 568); *Singer Mfg. Co. v. Heppenheimer*, 84 Atl. 1061, 1063, 58 N. J. Law (29 Vroom) 633, 32 L. R. A. 643. As applied to corporations it constitutes its right to do business, and also, in so doing, to exercise certain special powers and privileges which do not belong to citizens of the country generally of common right, and is vested in the corporate entity. *Arapahoe County Com'rs v. Rocky Mountain News Printing Co.*, 61 Pac. 494, 499, 15 Colo. App. 189.

A franchise of a corporation is its right to exist and perform certain acts. *Thompson v. Schenectady Ry. Co.* (U. S.) 124 Fed. 274, 279.

#### Of municipality.

A municipal corporation may have the franchise of a market or of a local court; and the different powers of a private corporation, like the right to hold and dispose of property, are its franchises. *Pierce v. Emery*, 32 N. H. 484, 507.

#### Of railroad company.

A mortgage by a railroad company, conveying the "road and its franchises," does not bring in question the much vexed subject of the power of the corporation to transfer its franchises of existence. The term used embraces only such rights and privileges as are involved in the owning, maintaining, and operation of the railroad, and in the receipt and enjoyment of the income and emoluments of so doing. The franchise conveyed is by the language restricted to the franchise that the corporation had in the road itself, and therefore cannot be regarded as touching other franchises, such as that of being a corporation with the right of perpetual succession and of suing and being sued by the corporate name. *Miller v. Rutland & W. R. Co.*, 86 Vt. 452, 493.

"The franchises of a railroad company are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges without the possession of which the road of a company could not be successfully worked." *State v. Maine Cent. R. Co.*, 66 Me. 488, 512 (quoting *Morgan v. Louisiana*, 93 U. S. 217, 223, 23 L. Ed. 860); *New Orleans, S. F. & L. R. Co. v. Delamore*, 5 Sup. Ct. 1009, 1012, 114 U. S. 501, 29 L. Ed. 244; *Baltimore, C. & A. Ry. Co. v. Ocean City*, 42 Atl. 922, 923, 89 Md. 89; *Wilson v. Gaines*, 9 Baxt. (Tenn.) 546, 552.

The ordinary franchises of a railroad corporation are the right to exist and to transact business as a corporation, and to condemn property for its uses. *State v. Austin & N. W. R. Co.*, 62 S. W. 1050, 1052, 94 Tex. 530.

A statute providing that the franchises of a railroad company should be considered in ascertaining the value of the property assessed means the legal privileges which the company enjoys in the use of its property. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 608, 48 N. J. Law (19 Vroom) 146.

In discussing the meaning of the word "franchise," Mr. Justice Field, in the case of *Morgan v. State of Louisiana*, 93 U. S. 223, 23 L. Ed. 860, uses the following language: "Much confusion of thought has arisen in this case, and in similar cases, from attaching a vague and indefinite meaning to the term 'franchise.' It is often used as synonymous with rights, privileges, and immunities, though of a personal and temporary character, so that, if any one of these exist, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company; but the term must always be considered in connection with a corporation or property to which it is alleged to appertain. The franchises of the railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value, such as a franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked." Where a railroad had obtained from a municipal corporation its unconditional consent to the construction of a railroad on one of its streets, a purchaser at foreclosure sale of all the properties, privileges, and franchises of the railroad acquired its rights to the use of the street. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co. of Texas*, 72 S. W. 201, 205, 80 Tex. Civ. App. 474.

#### Of street railroad company.

The general franchise of a street railroad company is the special privilege conferred on a certain number of persons, known as the corporation, to become a street railroad corporation on certain conditions. *People v. State Board of Tax Com'rs*, 67 N. E. 69, 72, 174 N. Y. 417.

#### Of water company.

A franchise of a water company having its chief office or place of business in a city, and which furnishes water to some other persons outside the city, and whose pumping station and a part of the mains are outside

of the city, does not consist in pumping the water or in maintaining the reservoirs. Such pumping and maintaining is only a means of exercising a franchise, which is the supplying of the city and its inhabitants with water. Board of Councilmen of Frankfort v. Stone, 56 S. W. 679, 681, 108 Ky. 400.

### FRANCHISE TAX.

A franchise tax is a tax imposed directly on the corporation, and not on its capital stock, its property, the shares of the stockholders, or the dividends or profits accruing. Worth v. Petersburg R. R. Co., 89 N. C. 301, 305.

A franchise tax is not a tax on the property of the corporation. Tremont & Suffolk Mills v. City of Lowell, 59 N. E. 1007, 178 Mass. 469.

A franchise tax, when applied to a domestic corporation, is the tax upon the right of a corporation to exercise the privilege conferred upon it, and is not a property tax. The manner in which the value of its franchise shall be assessed, and the rate of taxation applied thereto, are matters of legislative discretion, subject to the restriction of the domestic Constitution, and no question in respect to such a tax arises under the federal Constitution. Chicago & E. I. R. Co. v. State, 51 N. E. 924, 928, 153 Ind. 134.

A franchise tax is one exacted from a corporation as the price of the right and the privilege which it receives from the state as being a corporation. "Although the amount to be paid is determined by the amount of the capital stock and the duration of the corporate life, yet these are only the criteria chosen by the Legislature for ascertaining the probable value of the corporate franchise." Marsden Co. v. State Bd. of Assessors, 39 Atl. 688, 689, 61 N. J. Law, 461.

Franchise taxes are levied directly by an act of the Legislature, and the corporations are required to pay the amount into the state treasury. They differ from property taxes, as levied for state and municipal purposes, in the basis prescribed for computing the amount, in the manner of assessment, and in the mode of collection. Comparative valuation in assessing property taxes is the basis of computation in ascertaining the amount to be contributed by an individual, but the amount of a franchise tax depends upon the business transacted by the corporation, and the extent to which they have exercised the privileges granted in their charter. Home Ins. Co. v. State, 10 Sup. Ct. 593, 597, 134 U. S. 594, 33 L. Ed. 1025 (citing Provident Institution for Savings v. Massachusetts, 73 U. S. (6 Wall.) 611, 18 L. Ed. 907); People v. Home Ins. Co., 92 N. Y. 328, 342.

The franchise tax is not laid on property at all, but is imposed on the corporation for

the privilege of carrying on business in the state and exercising corporate franchises granted by the state. People v. Knight, 67 N. E. 65, 66, 174 N. Y. 475, 63 L. R. A. 87.

### FRANKLINITE.

The term "franklinite" does not mean the pure mineral of that name, which is never found except in small and detached specimens, but those veins or lodes in which franklinite predominates, and which is known and designated as "franklinite ore." New Jersey Zinc Co. v. New Jersey Franklinite Co., 13 N. J. Eq. (2 Beas.) 322, 344.

The term "franklinite" was held to mean zinc and iron in chemical combination, and not properly either a metal or an ore. New Jersey Zinc Co. v. Boston Franklinite Co., 15 N. J. Eq. (2 McCart.) 418, 445.

### FRATERNAL.

The term "fraternal" is defined by Pub. Acts 1895, p. 592, c. 255, § 1, relative to the general subject of insurance, as meaning having a lodge system with a ritualistic form of work and a representative form of government, providing for the paying of benefits in case of death. Wm. A. Miles & Co. v. Odd Fellows' Mut. Aid Ass'n of Connecticut, 55 Atl. 607, 76 Conn. 132.

### FRATERNAL ASSOCIATION.

The term "fraternal beneficial society," as used in the statutes of Missouri, authorizing the incorporation of such associations, was used in its ordinary sense to designate an association or society that is engaged in some work that is of a fraternal and beneficial character. According to this view, a fraternal beneficial society would be one whose members have adopted the same or a very similar calling, avocation or profession, or who are working in unison to accomplish some worthy object, and who have for that reason banded themselves together as an association or society to aid and assist one another, and to promote the common cause. The term "fraternal" can properly be applied to such an association for the reason that the pursuit of a common object, calling, or profession usually has a tendency to create a brotherly feeling among those who are engaged. But an association organized for the sole purpose of engaging in the business of assessment insurance, though called a fraternal beneficial society, and having in its constitution some provisions for a literary and social entertainment and for visiting the sick, is not within the statute. National Union v. Marlow (U. S.) 74 Fed. 775, 778, 21 C. C. A. 89.

A fraternal beneficiary association is a corporation or society formed or organized

and carried on for the sole benefit of its members and beneficiaries, and not for profit. Pub. St. N. H. 1901, p. 578, c. 86, § 1.

A fraternal association is hereby declared to be a corporation, society, or voluntary association formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Rev. St. Mo. 1899, § 1408; Rev. St. Okl. 1903, § 3236. Such associations having a lodge system, with ritualistic form of work and a representative form of government, and making provision for the payment of death benefits, may, in addition thereto, provide for the payment of benefits in case of accident, sickness, disability, or old age of its members. The fund from which the payment of such benefits shall be made and the fund from which the expenses of such association shall be defrayed shall be derived from assessments or dues collected from its members. Walker v. Giddings, 61 N. W. 512, 514, 103 Mich. 344.

#### FRATERNAL INSURANCE.

Fraternal insurance is temporary insurance; insurance from the maturity of one assessment to the maturity of another; and stipulations to insure promptitude in the payment of the assessments constitute both the substance and the essence of the contracts for it. Modern Woodmen of America v. Tevis (U. S.) 117 Fed. 869, 872, 54 C. C. A. 293.

#### FRATERNITY.

A corporation is properly an investing the people of a place with the local government thereof, and therefore their laws shall bind strangers; but a fraternity is some people of a place united together in respect to a mystery or business into a company, and their laws and ordinances cannot bind strangers, for they have not a local power or government. Ouddon v. Eastwick, 1 Salk. 192.

#### FRAUD.

See "Actionable Fraud"; "Actual Fraud"; "Constructive Fraud"; "Legal Fraud"; "Positive Fraud."

See "Badges of Fraud"; "In Fraud Of"; "Judgment for Fraud."

Action for, see "Action for Deceit or Fraud."

"Fraud has been defined to be any cunning deception, or artifice used to circumvent, cheat, or deceive another." Farwell v. Metcalf, 61 Ill. 372, 375; Roberts v. Woolbright, Ga. Dec. 98, 100, pt. 1; Shipp v. Commonwealth, 41 S. W. 856, 101 Ky. 518, 19 Ky. Law Rep. 634, 639; Anheuser-Busch Brewing Ass'n v. Davless County Distilling

Co. (Ky.) 49 S. W. 541, 542; Hatch v. Barrett, 8 Pac. 129, 137, 34 Kan. 223; In re Reiffeld's Will, 73 N. Y. Supp. 808, 809, 36 Misc. Rep. 472; Jacobs v. George (Ariz.) 20 Pac. 183, 188. See, also, Brown v. Manning, 3 Minn. 35, 44 (Gil. 13, 16), 74 Am. Dec. 736; Williams v. Harris, 54 N. W. 926, 927, 4 S. D. 22, 46 Am. St. Rep. 753; Noble v. Enos, 19 Ind. 72, 79. This definition, however, seems to embrace only actual or positive fraud. Kennedy's Heirs v. Kennedy's Heirs, 2 Ala. 571, 598; People v. Taylor (N. Y.) 4 Parker, Cr. R. 158, 161.

Fraud is defined to be all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one. Turley v. Taylor, 65 Tenn. (6 Baxt.) 376, 386; People v. Taylor (N. Y.) 4 Parker, Cr. R. 158, 161.

Fraud is any trick or artifice by one to induce another to fall into or remain in an error to his harm. Maher v. Hibernia Ins. Co., 67 N. Y. 283, 292.

Fraud is defined by Webster as an intentional perversion of the truth for the purpose of obtaining some valuable thing or promise from another, and this is its use when used in the definition of forgery. Barnes v. Crawford, 20 S. E. 386, 387, 115 N. C. 76.

Bigelow defines fraud to be an endeavor to alter rights by deception touching motives or by circumstances not touching motives. Anheuser-Busch Brewing Co. v. Davless County Distilling Co., 49 S. W. 541, 542, 20 Ky. Law Rep. 1522.

Judge Willard, in his Equity Jurisprudence, says: "Fraud has been defined to be any kind of artifice by which another has been deceived." People v. Taylor (N. Y.) 4 Parker, Cr. R. 158, 160.

Fraud consists in one man endeavoring by deception or circumvention to alter another's rights. Cloud County Com'rs v. Hostetler, 51 Pac. 62, 63, 6 Kan. App. 286.

Fraud is defined to be "the unlawful appropriation of another's property with knowledge, by design, and without criminal intent." Oldham v. Stephens, 25 Pac. 863, 864, 45 Kan. 369 (citing 1 Bouv. Law Dict. 612).

Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, which accomplishes the end desired. Alexander v. Church, 4 Atl. 103, 104, 53 Conn. 561 (citing Cooley, Torts, 474).

Fraud consists in an undue advantage taken of a party under circumstances which mislead, confuse, or disturb the just results of his judgment, and thus expose him to be the victim of the willful, the importunate, and the cunning. Pursley v. Wike, 19 N. E.

478, 480, 118 Ind. 189; *Shirk v. Mitchell*, 36 N. E. 850, 853, 137 Ind. 185.

Fraud is what is done in secret, and where there is a concealment from a party in a matter which concerns his interest. *Dale v. Smith*, 1 Del. Ch. 1, 5, 12 Am. Dec. 64.

Pol. Cont. 534, lays down the rule that to constitute fraud "it must be such an appropriation as is not permitted by law; (2) it must be with the knowledge that the property is another's, and with design to deprive him of it." *Anheuser-Busch Brewing Ass'n v. Daviess County Distilling Co.*, 49 S. W. 541, 542, 20 Ky. Law Rep. 1522.

Justice Story says: "It is a very old axiom of equity that, if a representation is made to another person going to deal in a matter of interest on the faith of that representation, the former shall make the representation good if he knew it to be false." *Story's Eq. Jr. § 191*; *Neville v. Wilkinson*, 1 Brown, Ch. 146. Lord Shelton declares that if a man, on a treaty for any contract, will make a false representation, by means of which he puts the party bargaining under a mistake, it is a fraud. *Foxworth v. Bullock*, 44 Miss. 457, 465.

The most essential element of fraud is deceit, and there can be no fraud where a party is not deceived. *Studer v. Bleistein*, 22 N. E. 243, 245, 115' N. Y. 316, 5 L. R. A. 702.

#### **As act involving breach of duty, trust, or confidence.**

Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another. *City of Clay Center v. Myers*, 35 Pac. 25, 26, 52 Kan. 363 (citing 1 *Story, Eq. Jur. § 187*); *Hatch v. Barrett*, 8 Pac. 129, 138, 34 Kan. 223; *Gandolfo v. Hood (Pa.)* 1 Pears. 269, 270; *Moore v. Crawford*, 9 Sup. Ct. 447, 448, 130 U. S. 122, 32 L. Ed. 878; *Sears v. Hicklin*, 21 Pac. 1022, 1025, 13 Colo. 143; *Kayser v. Maugham*, 6 Pac. 808, 810, 8 Colo. 232; *Jacobs v. George (Ariz.)* 20 Pac. 183, 188; *Richardson v. Trimble (N. Y.)* 38 Hun. 409, 416; *In re Hill's Estate*, 7 N. Y. Supp. 328, 329, 2 Con. Sur. 25; *In re Reiffeld's Will*, 73 N. Y. Supp. 808, 809, 36 Misc. Rep. 472; *Kennedy's Heirs v. Kennedy's Heirs*, 2 Ala. 571, 593; *Cock v. Van Etten*, 12 Minn. 522, 527, (Gil. 431, 435); *Shotwell v. Nicollet Nat. Bank*, 45 N. W. 842, 844, 43 Minn. 389; *Lumpkin v. Snook*, 19 N. W. 333, 334, 63 Iowa, 515, 518; *Larson v. Williams*, 69 N. W. 441, 442, 100 Iowa, 110, 62 Am. St. Rep. 544; *Jones v. Seward County*, 4 N. W. 946, 948, 10 Neb. 154; *Crislip v. Cain*, 19 W. Va. 438, 439, 464; *Roberts v. Woolbright*, Ga. Dec.

98, 100, pt. 1; *Diversey v. Johnson*, 93 Ill. 547, 560. This rule has, in effect, been applied to a judgment recovered by one party against another when the defendant has been prevented from availing himself of his defense by fraud or accident. *Richardson v. Trimble (N. Y.)* 38 Hun. 409, 416. See, also, *Lumpkin v. Snook*, 19 N. W. 333, 334, 63 Iowa, 515, 518; *Larson v. Williams*, 69 N. W. 441, 442, 100 Iowa, 110, 62 Am. St. Rep. 544.

Fraud is deception or artifice by which disadvantage results to one who has a right to rely upon openness, candor, and fair dealing. It is not deception or artifice for one whose duty it is to make a just appraisal to disregard that duty and make an unjust appraisal, even though it be done through corrupt and dishonest motives. *Downey v. Atchison, T. & S. F. R. Co.*, 57 Pac. 101, 103, 60 Kan. 499.

Fraud is a secret and intentional violation of private confidence, including all acts, omissions, and concealments which involve a breach of legal or equitable duty, and which are injurious to another. *Cock v. Van Etten*, 12 Minn. 522, 527 (Gil. 431, 435). See, also, *Adamson v. Union Ry. Co.*, 26 N. Y. Supp. 136, 141, 74 Hun. 3, 9.

"That fraud which the statute of frauds is intended to suppress consists in the assertion of a contract which was never made, whereas the fraud against which courts of equity afford relief consists in the repudiation of a contract which has been made, and upon which an innocent party has actually proceeded to do that for which the jurisdiction of the law courts affords him no just recompense." *Hall v. Linn*, 5 Pac. 641, 645, 8 Colo. 264 (citing *Browne, St. Frauds, § 438*).

#### **As actual fraud or fraud in fact.**

The term "fraud," as used in the bankruptcy laws, declaring that no debt created by the fraud or embezzlement of the bankrupt shall be discharged, means positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality. *Neal v. Clark*, 95 U. S. 704, 709, 24 L. Ed. 586; *Wolf v. Stix*, 99 U. S. 1, 7, 25 L. Ed. 309; *Hennequin v. Clews*, 4 Sup. Ct. 576, 579, 111 U. S. 676, 682, 28 L. Ed. 565; *Upshur v. Briscoe*, 11 Sup. Ct. 313, 315, 138 U. S. 365, 34 L. Ed. 931; *Strang v. Bradner*, 114 U. S. 555, 559, 5 Sup. Ct. 1038, 29 L. Ed. 248; *Ames v. Moir*, 11 Sup. Ct. 311, 312, 138 U. S. 306, 34 L. Ed. 951; *Noble v. Hammond*, 9 Sup. Ct. 235, 236, 129 U. S. 65, 69, 32 L. Ed. 621; *Forsyth v. Vehmeyer*, 20 Sup. Ct. 623, 625, 177 U. S. 177, 44 L. Ed. 723; *Western Union Cold Storage Co. v. Hurd (U. S.)* 116 Fed. 442; *In re Benedict*, 75 N. Y. Supp.

163, 167, 37 Misc. Rep. 230; *Palmer v. Hussey*, 87 N. Y. 303, 307; *Hennequin v. Clews*, 77 N. Y. 427, 429, 33 Am. Rep. 641; *Bergen v. Patterson* (N. Y.) 24 Hun, 250, 252; *Shattuck v. Haworth*, 91 Pa. 449, 455; *Laithe v. McDonald*, 7 Kan. 254, 264; *Ohio & W. Mortgage & Trust Co. v. Carter*, 58 Pac. 1040, 1041, 9 Kan. App. 621; *Crawford v. Burke*, 66 N. E. 833, 836, 201 Ill. 581; *Crosby v. Miller, Vaughn & Co.* (R. I.) 55 Atl. 328, 329.

As used in Code, § 396, providing that elections may be contested for malconduct, fraud or corruption on the part of any inspector, clerk, returning officer, or board of supervisors means actual fraud, evil motives, wickedness. *Talliaferro v. Lee*, 13 South. 125, 129, 97 Ala. 92.

If the words "fraud," "defraud," "fraudulent," and "fraudulently" in the chapter relating to insolvency proceedings in Pub. St. c. 201, §§ 27, 34, 37, 40, 49, relate to actual fraud alone, it would be difficult to explain why the Legislature in another section of the same chapter used the word "fraudulent" to include fraud in law. If that had been the legislators' purpose, some equivocal indications of this would be expected. *Thompson v. Esty*, 45 Atl. 566, 571, 69 N. H. 55.

"Fraud," as used in Pub. St. c. 206, § 9, authorizing a writ of arrest to issue against a debtor who has committed fraud in the concealment of the disposition of his property, includes constructive as well as actual fraud. *Eichenberg v. Marcy*, 26 Atl. 46, 49, 18 R. I. 169.

"Fraud," as used in Code, § 179, subd. 4, authorizing an arrest when the defendant has been guilty of fraud in contracting the debt or incurring the obligation upon which the action is brought, "applies only to actual personal fraud on the part of defendant, and does not include merely legal or constructive fraud." *Hathaway v. Johnson*, 55 N. Y. 93, 94, 14 Am. Rep. 186.

#### **Bad faith synonyms.**

The words "fraud" and "bad faith" are synonymous. *Hilgenberg v. Northup*, 33 N. E. 786, 787, 134 Ind. 92.

#### **Concealment or suppression of facts.**

Fraud in the suppression of a material fact arises only where one party to a contract fraudulently and intentionally conceals from the adverse party something which he knows and the other party does not know, and which the first party was bound to state; the suppression of which has induced the adverse party to enter into the contract. Suppression veri, or concealment, will amount to fraud where the concealment is of material facts, where there is such a relation of trust and confidence between the parties that the

one party is under some legal or equitable duty to give full information to the other, and which the latter has a right, *juris et de jure*, to know, and then the withholding of such information purposely may be a fraud. *American Credit Indemnity Co. v. Wimpfheimer*, 43 N. Y. Supp. 909, 912, 14 App. Div. 498.

The term includes any suppression of a fact material to be known, and which the party is under an obligation to communicate. The obligation to communicate may arise from the confidential relations of the parties or the peculiar circumstances of the case. *Fechheimer v. Baum* (U. S.) 37 Fed. 167, 177.

Fraud may consist in conduct, and may exist where there are only positive representations. Silence where necessity requires speech may sometimes constitute fraud. The rule that a man may be silent and be safe is by no means a universal one. Where one contracting party knows that the one has bargained by one thing he has no right by silence to deceive him, and suffer him to take an altogether different thing from that for which he bargains. *Parrish v. Thurston*, 87 Ind. 437, 438.

#### **As conclusion of law.**

Fraud is a conclusion of law, and hence an allegation of fraud is not an allegation of facts constituting a cause of action or authorizing the court to pronounce judgment. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 301, 56 Am. Rep. 31; *Steiner v. Parsons*, 13 South. 771, 774, 103 Ala. 215; *Nichols v. Stevens*, 25 S. W. 578, 583, 123 Mo. 96, 45 Am. St. Rep. 514; *Davis v. Davis*, 36 Atl. 475, 476, 55 N. J. Eq. 37.

Fraud is not a fact, but a conclusion of law from facts; and the term may not be used at all in the pleadings if facts are averred which show fraud as a conclusion of law. *Avery v. Job*, 36 Pac. 293, 296, 25 Or. 512; *Stimson v. Helps*, 10 Pac. 290, 291, 9 Colo. 33. See, also, *Mock v. Pleasants*, 34 Ark. 63, 71.

"Fraud is a conclusion of law upon facts, so that in pleading it it is not sufficient to charge it in general terms. The pleadings should point out and state the facts which are relied on as constituting it with enough particularity to enable the person charged not only to deny and explain those facts, but to disprove them." *Davis v. Davis*, 36 Atl. 475, 476, 55 N. J. Eq. 37.

Fraud is a conclusion of law from facts stated and proved. Where it is pleaded at law or in equity, the facts out of which it is supposed to arise must be stated. A mere general averment without such facts is not sufficient. The court cannot, on such averment, pronounce judgment. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 301, 56 Am. Rep. 31;



Steiner v. Parsons, 13 South. 771, 774, 103 Ala. 215; Nichols v. Stevens, 25 S. W. 578, 583, 123 Mo. 96, 45 Am. St. Rep. 514.

#### As criminal offense.

The term "fraud," as used in Code 1873, § 3138, providing that no person examined on oath shall be excused from answering any question on the ground that his examination will tend to convict him of a fraud," but that his answer shall not be used as evidence against him on a prosecution for such fraud, is not synonymous with "criminal offense." Park v. Johnson, 53 N. W. 285, 86 Iowa, 475.

Defendant got possession of a note by pretending that he wished to look at it, and then carried it away and refused to return it. These facts did not constitute any criminal offense. It was a mere private fraud, which, according to the doctrine laid down in the case of People v. Babcock, 7 Johns. 204, 5 Am. Dec. 256, is not indictable. A fraud indictable at common law must be such as would affect the public, and such as common prudence would not be sufficient to guard against; as the using of false weights and measures, or false tokens, or where there has been a conspiracy to cheat. People v. Miller (N. Y.) 14 Johns. 371, 372.

"Fraud," as used in Rev. St. § 5425 [U. S. Comp. St. 1901, p. 3669], making any one guilty of a felony who obtains, accepts, or receives any certificate of citizenship known to such person to have been procured by fraud, includes the acceptance of such a certificate obtained by fraud practiced on the court which issued it at the time thereof, and not simply to the acceptance of a fraudulent certificate outstanding in the hands of third persons. United States v. Lehman (U. S.) 39 Fed. 768, 771.

#### Damage must result.

A fraud, whether inhering in a contract or not, is a wrong, but, like other wrongs, is not, in a legal sense, a tort, or actionable, unless it has resulted in damages to some innocent person. Carpenter Paper Co. v. News Pub. Co., 87 N. W. 1050, 1051, 63 Neb. 59.

Fraud does not consist in mere intention, but in intention carried out by hurtful acts. Bump, Fraud. Conv. (3d Ed.) 19. Acts which are done in pursuance of the statute cannot be deemed fraudulent. Fraud without damage is not sufficient to support an action, nor is it ground for relief in equity. It can never, in judicial proceedings, be predicated on a mere emotion of the mind, disconnected from an act occasioning an injury to some one. Hodges v. Coleman, 76 Ala. 103, 119.

#### Error or mistake.

It cannot be legally said that "fraud" and "mistake" are synonymous terms. They

have different technical meanings. Matador Land & Cattle Co. (Tex.) 54 S. W. 256, 258.

The fraud for which a final settlement of an administrator's account will be set aside is exactly the same in character as that which is required to set aside any other final judgment, to wit, fraud upon the court in procuring the final settlement or judgment, not mere errors of judgment in the court upon the matters presented to it for its consideration and judgment. Baldwin v. Dalton, 67 S. W. 599, 603, 168 Mo. 20.

The term "fraud," as used in U. S. Bankr. Act 1841, § 4, which provides that the certificate of discharge shall be a full discharge "unless the same shall be impeached for some fraud, or willful concealment of his property or rights of property as aforesaid, and contrary to the provisions of this act," means an intentional fraud. It would not include an omission on the part of the bankrupt to insert some articles of property on the schedule of effects, which occurred by reason of accident or mistake. Loud v. Pierce, 25 Me. (12 Shep.) 233, 240.

"Fraud and false swearing," as employed in a motion to set aside a verdict in an action on a fire policy, "implies something more than some mistake of fact or honest misstatement on the part of the assured. They consist of unknowingly and intentionally stating on oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground to believe to be true." Atherton v. British America Assur. Co., 39 Atl. 1006, 91 Me. 289 (citing Linscott v. Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435; Dolloff v. Phoenix Ins. Co., 82 Me. 226, 19 Atl. 396, 17 Am. St. Rep. 482; Claflin v. Commonwealth Ins. Co., 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76).

#### As fact to be proved.

Fraud is a term of law applied to certain facts as a conclusion from them, but is not in itself a fact. Nock v. Pleasants, 34 Ark. 63, 71; Stimson v. Helps, 10 Pac. 290, 291, 9 Colo. 33; Avery v. Job, 36 Pac. 293, 299, 25 Or. 512.

Fraud is not a presumption, but is a fact to be shown by legal and competent evidence, as any other fact proven. Shafer v. Shafer, 37 Atl. 167, 169, 85 Md. 554 (citing Spitze v. Baltimore & O. R. Co., 75 Md. 162, 171, 23 Atl. 307, 32 Am. St. Rep. 378).

Actual fraud, or fraud in the ordinary sense and meaning of the term, is a matter of fact to be proved to the satisfaction of the jury. This proof shall consist of proof of acts or conduct which the court calls badges of fraud, and it is for the court and judge to decide what is such a badge. Kirkley v. Lacey (Del.) 30 Atl. 994, 995, 7 Houst. 213.

**False swearing synonymous.**

False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement intentionally and knowingly or fraudulently made certainly constitutes fraud, and the statement of a fact as true which a party does not know to be true, and which he has no reasonable grounds for believing to be true, is fraudulent. Thus, in an instrument in an action on a fire policy, in which fraud and false swearing is set up as a defense, it is immaterial whether the court employs the language "fraud and false swearing" or "fraud or false swearing." The significance of these expressions is the same when taken in connection with the issue. *Linscott v. Orient Ins. Co.*, 34 Atl. 405, 88 Me. 497, 51 Am. St. Rep. 435.

**As fraud on provisions of act.**

"Fraud," as used in Insolvent Act 1880, § 55, which provides that if a transfer of property by a debtor is not made in the usual course of business it shall be prima facie evidence of fraud, means fraud on the provisions of the insolvent act. *Washburn v. Huntington*, 21 Pac. 805, 306, 78 Cal. 573.

**Fraudulent concealment, constructive fraud, and deceit synonymous.**

In the application of the rule that if a lessor has knowledge of defects in the premises, which are not discoverable by the tenant, and which will imperil his person or property, and a liability arises from the fraudulent concealment thereof, the terms "fraud," "fraudulent concealment," "constructive fraud," and "deceit," are synonymous. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 67 N. E. 715, 716, 68 Ohio St. 328.

**Gain to wrongdoer.**

Fraud is a deception practiced in order to induce another to part with property or to surrender some legal right; and where it does not appear that the defendant, or any one else through his acting, has obtained either money, goods, or credit, he is not guilty of fraud. *Leber v. Dietz*, 49 N. Y. Supp. 1002, 22 Misc. Rep. 524.

Fraud may be only an artifice to deprive another of his right without gain to the person practicing it. In the analogous cases of cheating and swindling it is doubtful whether gain to the wrongdoer is an essential element, so that under Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3697], making it a crime to use the mail for promoting a scheme and artifice to defraud, it is not necessary that there should have been an element of gain to the person charged. *United States v. Beach* (U. S.) 71 Fed. 160.

**As inequitable or unconscientious.**

Jeremy defines fraud to be a device by means of which one party has taken an un-

conscientious advantage of the other. *Gandolfo v. Hood* (Pa.) 1 Pears. 269, 270 (citing *Jeremy*, Eq. B. 3, pl. 2, p. 358); *People v. Taylor* (N. Y.) 4 Parker Cr. R. 158, 160.

The word "fraud," as used in the rule that equitable estoppel may be described as such conduct by a person that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate it and set up claims inconsistent with it, is virtually synonymous with "unconscientious" or "inequitable." *Norfolk & W. R. Co. v. Perdue*, 21 S. E. 755, 759, 40 W. Va. 442; *The Ottumwa Belle* (U. S.) 78 Fed. 643, 648.

**Injustice distinguished.**

In *Pride v. Baker* (Tenn.) 64 S. W. 329, 332, the Court of Chancery Appeals of Tennessee observes that courts have declined to give any hidebound definition of fraud, but that it may be said that fraud that avoids a transaction is any misrepresentation of fact or any circumvention or overreaching that gives one party to the transaction an unconscionable and inequitable advantage over the other.

"Fraud is deception practiced by the party; injustice is the fault or error of the court. They are not equivalent words in substance, or in a statute authorizing a new trial on a showing of fraud or injustice; and any attempt to give them that construction is futile. Fraud is always the result of contrivance and deception; injustice may be done by the negligence, mistake, or omission of the court itself." *Silvey v. United States*, 7 Ct. Cl. 805, 824.

**Intention and act.**

There must be an intention to deceive. *Hanson v. Edgerly*, 29 N. H. 343, 354. "Fraud means an intention to deceive." *Sentman v. Gamble*, 13 Atl. 58, 61, 69 Md. 293.

Fraud "is a deceitful practice or willful device resorted to with intent to deprive another of his right, or in some manner to do him injury. It is always positive. The mind concurs with the act. What is done is done designedly and knowingly." *Gardner v. Heartt* (N. Y.) 3 Denio, 232, 236.

"Fraud in its broadest sense includes all acts or omissions which involve a breach of legal duty which are injurious to the rights of others, and in contemplation of a court of equity many acts constitute fraud in this broad sense of the word which do not involve any actual intention to defraud." *Shotwell v. Nicollet Nat. Bank*, 45 N. W. 842, 844, 43 Minn. 389.

To constitute fraud in an action to recover property which it was claimed had been fraudulently obtained, there must be an intention to cheat, or at least there must be an intention to do an act the necessary re-

sult of which would be to defraud another. *Nichols v. Pinner*, 18 N. Y. 295, 299; *Wakefield Rattan Co. v. Tappan*, 24 N. Y. Supp. 430, 434, 70 Hun, 405.

Fraud in all cases implies a willful act on the part of any one whereby another is sought to be deprived by illegal or inequitable means of what he is entitled to either at law or in equity. *Turley v. Taylor*, 65 Tenn. (6 Baxt.) 376, 386 (citing *Kerr*, *Fraud*, p. 42).

Fraud is something more than the expression of an opinion which may prove not to be true, with no intent or desire to wrong or mislead. Nothing but an actual intention to deceive, nothing but an actual fraud, would justify the impeachment of plaintiff's compliance with the terms of a contract. The intentional perversion of the truth for the purpose of obtaining some advantage or other would be necessary. *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County* (U. S.) 62 Fed. 698, 704, 10 C. C. A. 595.

Fraud is a false representation made by defendant with intention to deceive plaintiff, and thereby prevent his acquiring a lien on her property, which he had then but partially accomplished, which representations had their intended effect. *Alexander v. Church*, 4 Atl. 103, 104, 53 Conn. 561.

One who knowingly and willfully makes false representations as to material facts with intention to induce the other to enter into a contract with him, and who does so induce the other to enter into the contract to his injury, is guilty of actual fraud, without regard to his intent as to injury to the other party. *Northwestern Mut. Life Ins. Co. v. Montgomery*, 43 S. E. 79, 80, 116 Ga. 799 (citing *Foster v. Charles*, 6 Bing. 396, 19 E. C. L. 183).

A willful intent to deceive, or such gross negligence as is tantamount thereto, and the actual deceit of the victim to his damage, are essential elements to actionable fraud. The perpetrator must have been guilty of some moral turpitude or some breach of duty, and the victim must have been deceived, and must have acted upon the deceit. *Daniels v. Benedict* (U. S.) 97 Fed. 367, 380, 38 C. C. A. 592 (citing *Farmers' & Merchants' Bank v. Farwell*, 7 C. C. A. 391, 394, 396, 58 Fed. 632, 636, 639; *New York Life Ins. Co. v. McMaster*, 30 C. C. A. 532, 535, 87 Fed. 63, 66; *Henshaw v. Bissell*, 85 U. S. [18 Wall.] 257, 271, 21 L. Ed. 835).

"Fraud is falsehood applied to the purpose of injury, and will not, in the legal sense of the term, exist unless there is, first, an effort to deceive, and, next, a false impression produced. Both of these things must concur, and the existence of both must in some appropriate way be established by

the complainant." *Vulcan Oil Co. v. Simons*, 6 Phila. 561, 564.

Fraud consists in unlawful conduct that operates prejudicially upon the rights of others. The term "fraud" imports something of a more vicious character than the mere production of a delay of satisfaction of a deed so as to vitiate a transfer. Fraud does not necessarily impute a corrupt or dishonorable motive. Parties may do what they consider perfectly fair for the purpose of preventing a sacrifice of their property, and with the intention of paying all the creditors ultimately, or may be animated by motives of affection or compassion; but the law does not sanction any contrivance for either defeating or delaying creditors, and invalidates such contrivance without regard to the motives of the party. *Monroe Mercantile Co. v. Arnold*, 34 S. E. 176, 179, 106 Ga. 449.

Fraud includes any collusive act of parties whereby the record in a suit is made up to purposely deceive the court as to the true intent and object of the suit. It matters not how innocent is the ultimate object desired to be obtained, nor how justifiable the parties were in proposing to attain that end, nor how absurdly unnecessary was the deceit which was practised. *Connolly v. Cunningham*, 5 Pac. 473, 477, 2 Wash. T. 242.

Fraud in law is of two kinds—actual and constructive. The former arises from deception practiced by means of the misrepresentation or concealment of a material fact; the latter from a rule of public policy, or the confidential or fiduciary relation which one of the parties affected by the fraud sustained towards the other. It is a constituent of actual fraud that the party alleged to have been defrauded was deceived. No positive dishonesty of purpose is required to show constructive fraud. *Forker v. Brown*, 30 N. Y. Supp. 827, 829, 10 Misc. Rep. 161.

Fraud consists of two necessary elements—the *concilium fraudis*, the *eventus damni*—that is, there must be a purpose to defraud coupled with the doing of the act, the legal effect of which is to cause injury and damage. *Koenig v. Huck*, 26 South. 543, 545, 51 La. Ann. 1368.

Fraud is always a question of fact with reference to the intention of the grantor. Every case depends upon its circumstances; and is to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test. *Swayne, J.*, in *Lloyd v. Fulton*, 91 U. S. 479, 485, 23 L. Ed. 363. Any alienation of property for the purpose of hindering, delaying, or defeating creditors in subjecting the property to the payment of the debts is fraudulent. *Taub v. Swofford Bros. Dry Goods Co.*, 45 Pac. 513, 514, 8 Colo. App. 213.

Fraud as meant and signified by the plea of fraud and covin is not merely legal but is moral fraud as well, practiced on the defendant by the plaintiff or its authorized agent, with the intent to deceive or mislead him in respect to the very transaction or question which is the subject of controversy between the parties. It means more than a mere false statement ignorantly or erroneously made under a misapprehension, and without any intent or design to deceive. It consists in the false representation or concealment of material facts with intent to deceive. Fraud occurs where one party substantially misrepresents a material fact peculiarly within his own knowledge, in consequence of which a delusion is created, or makes a statement which he knows to be untrue, and which is naturally calculated to lull the suspicions of a careful man, and induce him to forego inquiry into a matter upon which the other party had knowledge or information, although such information may not be exclusively within his own reach. But a representation, though false, will not vitiate a contract unless it be fraudulent also, and operates as an inducement influencing the party to enter into it. *Kent County R. Co. v. Wilson* (Del.) 5 *Houst. Del.* 49, 56.

In order that the acts of a party purchasing goods when he is insolvent should constitute fraud, there must be such facts and circumstances attending the transaction not only in relation to the purchaser's want of property and credit, present and prospective, if such is the case, but facts sufficient to prove to the satisfaction of the jury that the purchase was made with the intention of not paying for the goods; and where this is the case the party will be guilty of fraud whether he discloses his pecuniary condition or not. *Morrill v. Blackman*, 42 *Conn.* 324, 329.

The fraud necessary to impeach a decree is defined in the case of the *Duchess of Kingston*, where the judges, being consulted by the House of Lords, replied to one of the questions: "Fraud is an extrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." The fraud there spoken of must clearly be actual fraud, such as there is on the part of the person chargeable with it the *malus animus*, the mala mens putting itself in motion, and acting, in order to take an undue advantage of some other person for the purpose of actually and knowingly defrauding him. *McDonald v. Pearson*, 114 *Ala.* 630, 643, 21 *South.* 534, 537 (citing *Patch v. Ward*, 2 *Ch. App.* 205).

The fraud on which courts of equity go in case of part performance is not fraud merely of that nature which is said to exist in every case of refusal to fulfill an agree-

ment, but that sort of fraud cognizable in equity only. *Ham v. Goodrich*, 33 *N. H.* 82, 39. Therefore the courts have held that the inability of the vendor to repay the money by reason of his insolvency does not, in that respect, modify the rule, because, there being nothing intrinsically fraudulent in the transaction, this circumstance is not a sufficient ground for imputing to the vendor the wrongful intent, which alone furnishes an occasion for the interference of equity to enforce verbal agreements. *Townsend v. Fenton*, 21 *N. W.* 726, 727, 32 *Minn.* 482.

Within the meaning of Code, § 179, subd. 5, which provides that defendant may be arrested who has removed or disposed of his property, or is about to do so with intent to defraud his creditors, the word "fraud" means fraud in fact, meditated fraud, a purpose existing in the mind to do a dishonest act. There must be the intent to defraud. *In re Caldwell*, 13 *Abb. Prac.* 405, 413.

Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. *Civ. Code La.* 1900, art. 1847.

A party may be guilty of fraud by stating his belief as knowledge. A representation of a fact as of the party's own knowledge, if it proves false, is, unless explained, inferred to be willfully false, and made with an intent to deceive; at least in respect to the knowledge professed. *Cabot v. Christie*, 42 *Vt.* 121, 1 *Am. Rep.* 313. The fraud consists in averring actual knowledge of that which is capable of being known but is in fact not known, with an intent to deceive. It is substantially the affirmation of a fact either known to be false or not known to be true with fraudulent intent. *Darling v. Stuart*, 63 *Vt.* 570, 575, 22 *Atl.* 634, 635 (citing *Rowell v. Chase*, 61 *N. H.* 135).

The purchase of goods with the preconceived intention not to pay for them is a fraud upon the vendor, which will entitle him to repudiate the sale. *Stewart v. Emerson*, 52 *N. H.* 301, 323 (citing *Dow v. Sanborn*, 85 *Mass.* [3 *Allen*] 181).

The word "fraud," as used in *Mills' Ann. Code*, § 2164, providing that in any action for tort, if the jury shall state in their verdict that defendant was guilty of any fraud, malice, or wilful deceit, then plaintiff may have execution against the body of defendant, is understood in its odious sense. *Geraghty v. Randall* (Colo.) 70 *Pac.* 767, 768, 769.

Fraud never consists in mere intent. *Theusen v. Bryan*, 85 *N. W.* 802, 805, 113 *Iowa*, 496.

**Knowledge of falsity of representation.**

\* It is not necessary, in order to constitute a fraud, that the party who makes a false representation should know it to be false. He who makes a representation as of his own knowledge not knowing whether it be true or false and it is in fact untrue, is guilty of fraud as much as if he knew it to be untrue. In such a case he acts, to his own knowledge, falsely, and the law imputes a fraudulent intent. *Stimson v. Helka*, 10 Pac. 290, 292, 9 Colo. 83.

Every false affirmation does not amount to a fraud. To constitute a fraud, a knowledge of the falsity of the representations must be shown to have existed in the minds of the persons making them at the time such representations were made. *Middleton v. Jerdee*, 40 N. W. 629, 631, 73 Wis. 39.

Fraud has a well defined meaning at law. It may be said to be a false representation of fact, with knowledge of its falsity, and with intent that it be acted upon, when the person to whom it is made acts upon it, and by so doing suffers an injury. *Byard v. Holmes*, 34 N. J. Law (5 Vroom) 296. In *Brackett v. Griswold*, 112 N. Y. 454, 467, 20 N. E. 376, it is defined as "representation, falsity, scienter, deception, injury." *Ley v. Metropolitan Life Ins. Co.*, 94 N. W. 568, 570, 120 Iowa, 203.

The word "fraud" imports guilty knowledge, and there is no possibility that an act of fraud can be committed without a fraudulent intent, so that a definition of "defraud" as to deprive of right either by taking something by deception or artifice or by taking something wrongfully without the knowledge or consent of the owner, is erroneous, as not requiring criminal intent. *People v. Wiman*, 32 N. Y. Supp. 1037, 1045, 85 Hun, 320.

\* Fraud may consist in a false representation knowingly made without belief in the truth of the facts stated, or by recklessly stating a thing to be a fact on which another is invited to rely without caring whether it be true or false. *Porter v. Beattie*, 59 N. W. 499, 503, 88 Wis. 22.

\* Whether a party misrepresenting a material fact knows it to be false, or made the assertion without knowing whether it was true or false, is wholly immaterial, for the affirmation of what one does not know or believe to be true is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false; and, even if a party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates a surprise and misrepresentation on the other party. *Crislip v. Cain*, 19 W. Va. 438, 464.

Fraud is defined by Judge Ewing in *Ball v. Lively* (Ky.) 4 Dana, 370, "consists in a willful misrepresentation of facts, or in

fraudulent concealment of them with a view to deceive. If a party honestly believe the representations which he makes to be true, he is guilty of no moral turpitude or legal responsibility for making them. To be guarded against injury, each of the contracting parties should inform himself of the true state of the facts, or exact a warranty from the other for his indemnity, knowing, as he should be taught by the law, that he has no redress over or discharge from his contract, unless he has been deceived into it by the willful misrepresentations or fraudulent concealment of material facts by the other contracting party." *Livermore v. Middlesborough Town-Lands Co.*, 50 S. W. 6, 10, 106 Ky. 140.

To constitute fraud there must coincide in one and the same person knowledge of some fact and conduct inequitable having regard to such knowledge. *Nibert v. Baghurst*, 20 Atl. 252, 254, 47 N. J. Eq. (2 Dick.) 201.

In 1 Madd. 208, it is said: "If, indeed, a man in a treaty for any contract makes a false representation, whether knowingly or not, by means of which he puts the party bargaining under a mistake as to the terms of the bargain, it is a fraud, and relievable at equity." "If knowingly he represents what is not true, without doubt he is bound. If, without knowing it is true, he takes it upon himself to make a representation to another upon the faith in which that other acts, no doubt he is bound, though his mistake was innocent." *House v. Marshall*, 18 Mo. 388, 374 (citing *Ainslie v. Dellicot*, 9 Ves. 21).

**Moral turpitude.**

The word "fraud" implies moral turpitude. *Hagerman v. Buchanan*, 17 Atl. 946, 947, 45 N. J. Eq. (18 Stew.) 292, 14 Am. St. Rep. 732.

A policy of insurance providing for the forfeiture of the policy in case of "fraud or attempt at fraud" by false swearing or otherwise on the part of the insured means an injury or attempted injury of the insurers by immoral means, such as false swearing; that being one instance or example of many possible means. *Shaw v. Scottish Com. Ins. Co.* (U. S.) 1 Fed. 761, 764.

Within the provision of the bankruptcy act that a discharge in bankruptcy shall release the bankrupt from all his provable debts except such as are judgments in actions for fraud or obtaining property by false pretenses or false representations, the word means moral turpitude. Within such meaning an action for a price of goods sold, under which property in the possession of a third person was attached on the allegation that it had been conveyed to him by the defendant in fraud of the latter's creditors, is

not a judgment in an action for fraud. In re Blumberg (U. S.) 94 Fed. 476, 479.

#### Misrepresentation.

Fraud consists in the misrepresentation or concealment of a material fact calculated to deceive the opposite party. Dillard's Adm'r v. Moore, 7 Ark. 166, 171.

A misrepresentation of material facts is a fraud. Hogsett v. Ellis, 17 Mich. 351.

A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof, with intention that it shall be acted upon, followed by reliance upon and by action thereon amounting to substantial change of position, is a "fraud" of which the law will take cognizance. Watson v. Jones, 25 South. 678, 681, 41 Fla. 241; Wheeler v. Baars, 15 South. 584, 33 Fla. 696; Bank of Atchison County v. Byers, 41 S. W. 325, 331, 139 Mo. 627. See, also, Shrimpton v. Netzorg, 62 N. W. 843, 344, 104 Mich. 225; Hasse v. Freud, 78 N. W. 131, 132, 119 Mich. 358.

It is a fraud for a party intentionally or by design to misrepresent a material fact or produce a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him. Wil-link v. Vanderveer (N. Y.) 1 Barb. 599, 607 (citing Story, Eq. § 192).

If a misrepresentation was of a trifling or immaterial thing, or if the other party did not trust to it, or was not misled by it, or if it was vague or unconvincing in its own nature, or if it was a matter of opinion or fact equally open to the inquiries of both parties, and no record to which either could be presumed to trust the other, there is no reason to interfere to grant relief upon the ground of fraud. Crislip v. Cain, 19 W. Va. 438, 439, 467.

The term includes an advantage gained by false statements of the law made by one who knows what the law is, over one who is ignorant of the law and relies upon the other party's statements. Lehman v. Shackelford, 50 Ala. 437, 439.

Fraud is a false answer in an examination under oath, relating to property insured, as to any matter of fact material to the inquiry, knowingly and willfully made with intent to deceive the insurer. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. Claffin v. Commonwealth Ins. Co., 3 Sup. Ct. 507, 515, 110 U. S. 81, 28 L. Ed. 76.

Fraud in the purchase of land should be construed to consist in knowingly misrepresenting a fact in some material particular. Specht v. Allen, 6 Pac. 494, 496, 12 Or. 117.

Fraud may exist from misrepresentation by either party, made with design to de-

ceive the other party; and in the latter case such misrepresentation avoids the sale, although the party making it was not aware that his statement was false. Such misrepresentation may be perpetrated by acts as well as words, and by any artifice design to mislead. Civ. Code Ga. 1895, § 3533.

Civ. Code, § 4026, defines fraud to be "misrepresentation of a material fact, made willfully to deceive, or ~~recklessly without~~ knowledge, and acted on by the opposite party, or if made by mistake and innocently ~~and acted on by the opposite party.~~" Barrie v. Miller, 104 Ga. 312, 314, 30 S. E. 840, 69 Am. St. Rep. 171. X

A policy of insurance providing that any "fraud or attempt of fraud" would make the policy void would include the fraudulent overvaluation of the property in the proofs of loss. Gelb v. International Ins. Co. (U. S.) 10 Fed. Cas. 157, 158.

In a case of fraud as vitiating a contract the volition of the victim is usually overcome by deceit, false representations, or false pretenses. City Nat. Bank v. Kusworm, 64 N. W. 843, 845, 91 Wis. 166.

Misrepresentations, to constitute fraud, must relate to something past or present. A broken promise, unless it be shown that there was an intention not to perform when the promise was made, does not constitute fraud. Where an insurance company agreed to send an applicant a life insurance policy stipulating that the premiums thereon should be paid semi-annually, but instead delivered a policy providing that the premiums due thereon should be payable annually, there was no fraud, but only a breach of contract. New York Life Ins. Co. v. Miller, 32 S. W. 550, 551, 11 Tex. Civ. App. 536.

An explicit, positive, false statement by a purchaser from a dealer in goods engaged in business that a rival dealer has offered to sell for less money, is held to be a "fraud" which would justify a rescission of the contract. Smith, Kline & French Co. v. Smith, 81 Atl. 343, 344, 166 Pa. 563.

To constitute fraud as against an insurance company, there must have been misrepresentations before the fire in regard to a material fact or material facts by reason of which the policies were fraudulently procured, or other matter of a fraudulent nature, which would compel the companies, in case of loss, to pay for property which was not destroyed, or not in existence. Springfield Fire & Marine Ins. Co. v. Winn, 27 Neb. 649, 657, 43 N. W. 401, 5 L. R. A. 841.

#### All modes included.

Fraud means and comprehends deceit in all the modes in which it may be practiced, and therefore it is inaccurate to say a party was, in a particular transaction, guilty of

fraud or misrepresentation, or fraud or covin, because, if guilty of either the two last, he was necessarily guilty of the former. *Dowling v. Carr's Adm'r*, 38 S. W. 1044, 18 Ky. Law Rep. 979.

Fraud is a generic term, and embraces all the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an advantage over another by false suggestions, or by the suppression of the truth. No definite and invariable rule can be laid down as a general proposition defining fraud, as it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated. The only boundaries defining it are those which limit human knavery. *Barr v. Baker*, 9 Mo. 850, 854.

Fraud may consist either in the suppression of the truth or in the assertion of a falsehood. *Allen v. Addington* (N. Y.) 7 Wend. 9, 20; *Faulkner v. Klamp*, 20 N. W. 220, 16 Neb. 174; *Brown v. Manning*, 3 Minn. 35, 44 (Gil. 13, 16), 74 Am. Dec. 736; *Sadler v. Robinson's Heirs* (Ala.) 2 Stew. 520, 523; *Hanson v. Edgerly*, 29 N. H. 343, 354.

"Fraud," as used in Bankr. Act, § 23, providing that the proceedings in bankruptcy shall not discharge a bankrupt of a "debt created by fraud," should be construed to include a debt created for goods sold for cash on delivery, the purchaser obtaining their possession without payment, and immediately shipping them beyond the reach of the seller, and then refusing to pay. *Classen v. Schoenemann*, 80 Ill. 304, 306.

"Fraud," as used to describe the character of the official acts of inspectors of an election, implies that some legal voter has been designedly and wrongfully deprived of his vote, or that an illegal vote has been purposely and unjustly received by those officers, or that a false estimate has been imposed on the public as a genuine canvass. *People v. Cook*, 8 N. Y. (4 Seld.) 67, 68, 79, 59 Am. Dec. 451.

In *Forsyth v. Vehmeyer*, 117 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723, the court thus defines the representation which constituted a fraud: "A representation as to a fact, made knowingly, falsely, and fraudulently, for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent." Where an action of fraud to the mind of the lawyer signifies the common-law action of fraud or deceit, the wording of the subdivision under discussion evidently was not framed with that precise remedy in view. The expression "judgments

in actions for frauds," conveys no such signification as that mentioned, and may include any positive intentional fraud, which was the basis of the judgment, and was the substance of the recovery. In *re Bullis*, 73 N. Y. Supp. 1047, 1055, 68 App. Div. 506.

"Fraud," as used in the bankrupt act, providing that the discharge of a bankrupt may be impeached for some fraud, is a very comprehensive term, and includes those unlawful preferences, payments, and transfers of property which the statute declares utterly void and a fraud upon the act. *Brereton v. Hull* (N. Y.) 1 Denio, 75, 77.

To constitute fraud there must be the assertion of something false; or, secondly, the suppression of something true, where there is a duty or profession of stating everything material; or, thirdly, what perhaps is included in one of the foregoing, a suggestion of falsity by statement of some facts and suppression of others which would qualify those stated. Baron Bramwell dissenting. *Lee v. Jones*, 17 C. B. (N. S.) 482, 508 (quoted in *Potts v. Chaplin*, 183 Mass. 276, 282).

Fraud is falsehood applied to the purpose of injury, and will not exist in the legal sense of the term, unless there is, first, an effort to falsify, and, second, a false impression produced. Both these things must concur, and the existence of both must, in some appropriate way, be established. *Vulcan Oil Co. v. Simons* (Pa.) 6 Phila. 561, 564.

Fraud may arise from facts and circumstances of imposition. It may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses will make on the one hand, and as no honest man would accept on the other. It may be inferred from the circumstances of the parties contracting that it is as much against conscience to take advantage of a man's weakness or his necessity as his ignorance, and it may also be collected from the nature and circumstances of the transaction as being an imposition on third parties. *Hinchman v. Emans' Adm'rs*, 1 N. J. Eq. (Sart.) 100, 110.

"A fraud may be collected or inferred, in the consideration of this court, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement." *Chesterfield v. Janssen*, 2 Ves. 125, 156 (quoted in *Cribbins v. Markwood* [Va.] 13 Grat. 495, 499, 67 Am. Dec. 775).

#### Official misconduct or bad faith.

While it is difficult to give a precise definition of fraud, yet in its broad signification it includes all acts and omissions which involve a breach of legal duty injurious to others. Official misconduct and bad faith are so near the domain of fraud that the

line of partition is indistinguishable. Thus, where a city council refused to grant a franchise to one company which offered \$30,000 for it, and granted it to another company without compensation, such conduct constitutes fraud authorizing a taxpayer to have the grant set aside. *Adamson v. Union R. Co.*, 26 N. Y. Supp. 136, 141, 74 Hun, 550.

#### **As a personal thing.**

A fraud is an individual and personal thing. It is a cause or complaint to the person only on whom it is committed. *Bloomingtondale v. Hodges*, 46 N. Y. Supp. 859, 860, 21 Misc. Rep. 6.

#### **As relating to signature of instrument.**

The word "fraud" or "duress," as used in Del. Super. Ct., Rule No. 7, relating to actions on deeds, bonds, bills, notes, or other instruments where a copy of the same is filed with the declaration, and providing that the execution of such instrument shall be taken to be admitted unless the defendant shall have filed an affidavit denying the signature or obligation of the instrument by reason of "fraud, duress, or other sufficient legal cause," relates to the signature or signing of the instrument. *Vandergrift v. Hollis* (Del.) 6 Houst. 90, 102.

#### **As rendering conveyance void.**

"Fraud," as applied to fraudulent conveyances, means conduct that operates prejudicially on the rights of another, or withdraws the property of a debtor from the lien of creditors. *Williams v. Harris*, 54 N. W. 926, 927, 4 S. D. 22, 46 Am. St. Rep. 753.

#### **As rendering debtor liable to arrest.**

The expression "cases of fraud," as used in Const. art. 1, § 16, providing that there shall be no imprisonment for debt except in "cases of fraud," "comprehends not only fraud in attempting to hinder, delay, and defeat the collection of a debt by concealing property, and other fraudulent devices, but embraces also fraud in making the contract (false representations, for instance), and fraud in incurring the liability (for instance, when an administrator commits a fraud by applying the funds of the estate to his own use)." *Melvin v. Melvin*, 72 N. C. 384, 386.

The fraud which by the Constitution may subject a debtor to arrest and imprisonment is not confined to fraud in the creation of a debt, but extends to subsequent fraudulent conduct of the debtor for the purpose of defeating his creditor in the recovery of the debt by due process of law. *Ex parte Clark*, 20 N. J. Law (Spencer) 648, 650, 45 Am. Dec. 394.

Pub. St. c. 222, § 14, providing that execution may issue against the body whenever it appears to the court rendering a judgment, or any judge thereof, that the defend-

ant has been guilty of "fraud in the detention" of his property, should be construed to mean the detaining of property not exempt by a judgment debtor for his own use, and refusing to apply it to the payment of the judgment. *In re Keene*, 3 Atl. 418, 15 R. I. 294.

#### **As rendering instrument void.**

Fraud which will vitiate an instrument may consist of any artifice practiced on a person to induce him to execute it when he did not intend to execute such an act. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind that a fraud or covin may relate to the obtaining of the instrument itself, and not the consideration on which it is based. It is not fraud which relates to the quality, quantity, value, or character of the consideration that moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is another of a different character, such as giving a note or other agreement for one sum or thing when it is for another sum or thing; or as giving a note under the belief that it is a receipt. Any deceit practiced on a person having reference wholly to the legal effect of an instrument the contents of which such person knew or might easily have known is not a fraud so as to vitiate the instrument, its contents not having been concealed or positively misrepresented. *Hendrix v. People*, 9 Ill. App. (9 Bradw.) 42, 45.

There are two kinds of fraud practiced "in the execution of an instrument." The first is where the instrument is misread to the party signing it, or where there is a surreptitious substitution of one instrument for another, or where by some other trick or device a party is made to sign an instrument which he did not intend to execute. The second consists in inducing the party to sign an instrument or execute it by misrepresentations or fraudulent representations as to collateral matters or as to the nature or value of the consideration. Where a release was executed by a party who fully understood what he was signing and the nature and character of the instrument, if he could show that he was deceived by fraudulent representations as to facts outside of the instrument itself it would be a fraud of the second class. *Papke v. G. H. Hammond Co.*, 61 N. E. 910, 912, 192 Ill. 631.

The phrase "fraud in execution of an instrument" includes the act of misreading the instrument to the party signing it, or the surreptitious substitute of one paper for another, or where by some other trick or device a party is made to sign an instrument which he did not intend to execute. *Papke v. G. H. Hammond Co.*, 61 N. E. 910, 912, 192 Ill. 631.



"Fraud in the procurement of a note," as used in section 2785 of the Code, has no reference to fraud in the contract out of which a negotiable security arose, or in the consideration for which it was given, but means fraud in the procurement by the holder, and not fraud in the procurement of the note as between the original parties of which the holder for value had no notice. *Grooms v. Oliff*, 20 S. E. 655, 93 Ga. 789.

#### As rendering judgment void.

The term is indefinite, and when it is said that a judgment is vitiated and may be nullified by fraud it is not to be understood that a fraud which consists in false testimony or a suppression of truth in respect to the matters litigated on the trial of the action which resulted in the judgment is sufficient to have this effect. Fraud such as will vitiate a judgment consists in preventing the complaining party from presenting the merits of his case, or imposing on the jurisdiction of the court or corrupting the court, or collusion between counsel, etc. *Hilton v. Guyott* (U. S.) 42 Fed. 249, 252.

Fraud cannot be predicated upon the fact that a debtor consented to a judgment for a debt which he honestly owed. Nor is it fraud for a debtor to consent to a judgment in favor of one of his creditors and deny that favor to all others. *Rice v. Adler-Goldman Commission Co.* (U. S.) 71 Fed. 151, 152, 18 C. C. A. 15.

#### As rendering marriage void.

"Fraud," as used in Rev. St. § 2350, declaring that a marriage to which the consent of either party has been "obtained by fraud" may in certain cases be avoided, does not mean from error or mistake into which a person may fall concerning the character or qualities of the other party, though occasioned by false statements or practices. No misconception as to the character, fortune, health, or temper will support the allegation of fraud; nor a false representation by the woman that she has been previously chaste. *Varney v. Varney*, 8 N. W. 739, 741, 52 Wis. 120, 38 Am. Rep. 726.

The mere concealment by a woman from her intended husband of the fact that she had been the mother of an illegitimate child some years before is not such a fraud as would be sufficient cause for annulling the marriage. *Smith v. Smith*, 8 Or. 100, 101.

#### Unconscientious synonymous.

See "Unconscientious."

#### Undue influence distinguished.

Strictly speaking, "fraud" and "undue influence" are not synonymous expressions. Undue influence is in one sense a species of fraud, and, while there are sometimes—perhaps usually—present elements of fraud, un-

due influence may exist without any positive fraud being shown. In *re Shell's Estate*, 63 Pac. 413, 28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181.

Fraud upon a testator in the making of a will consists in making that which is false appear to him to be true, and so affecting his will. Fraud need not be attended with undue influence, except in so far as the misrepresentation amounts to influence. There need be no pressure such as is necessary to constitute influence. *Gordon v. Burris*, 54 S. W. 546, 552, 153 Mo. 223.

It has been held that there may be great and overruling importunity and undue influence without fraud, which often has the effect to avoid a will. *Noble v. Enos*, 19 Ind. 72, 79 (citing *Davis v. Calvert* (Md.) 5 Gill & J. 269, 301, 25 Am. Dec. 282).

#### Warranty distinguished.

The term implies deceit or artifice. Fraud is distinguished from breach of warranty in that in fraud there is a guilty knowledge of the falsity of the representation on the part of the party making it, while in a breach of warranty there is not this guilty knowledge. *Marshall v. Gray* (N. Y.) 39 How. Prac. 172, 175.

"The same transaction cannot be characterized as a warranty and a fraud at the same time. A warranty rests on contract, while fraud or fraudulent representations have no element of contract in them, but are essentially a tort. When judges or law writers speak of a fraudulent warranty, the language is neither accurate nor perspicuous. If there is a breach of warranty, it cannot be said that the warranty was fraudulent with any more propriety than any other contract can be said to have been fraudulent because there has been a breach of it. On the other hand, to speak of a false representation as a contract of warranty, or as tending to prove a contract of warranty, is a perversion of language and of correct ideas." *Rose v. Hurley*, 39 Ind. 77, 81; *Shirk v. Mitchell*, 36 N. E. 850, 852, 137 Ind. 185.

#### In rape.

The term "fraud," as used in Pen. Code, art. 531, declaring carnal intercourse with a woman obtained by means of fraud to be rape, consists, by the express provision of the statute, in the use of some stratagem by which the woman is induced to believe that the offender is her husband, and does not include a mere attempt to have carnal knowledge of a woman when she is asleep. *King v. State*, 3 S. W. 342, 22 Tex. App. 650.

#### FRAUD IN FACT.

Actual fraud or fraud in fact consists in the intention to prevent creditors from recovering their just debts by an act which

withdraws the property of a debtor from their reach. Fraud in law consists in acts which, though not fraudulently intended, yet, as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. *McKibbin v. Martin*, 64 Pa. (14 P. F. Smith) 352, 358, 3 Am. Rep. 588.

Fraud in fact, as generally understood, is the actual existence of a wicked purpose or motive. It is sometimes distinguished from fraud in law, but in most cases any differences of opinion are more seeming than real. It is of little importance whether it be said that a certain transaction is a fraud in law or whether it is simply held, when viewed under the law, to be conclusive evidence of a fraudulent intent. In the one case the court judges of the intent from an act which it is not lawful to do. In the other case the act is clothed outwardly with legal approval, but at heart it is vicious, is inspired by wrongful motives, and aims at the accomplishment of ends which the law condemns. In the one case the act itself and its consequences control the judgment of the court; in the other it is a question of motive and purpose in the doer. *Cook v. Burnham*, 44 Pac. 447, 448, 8 Kan. App. 27.

#### FRAUD IN LAW.

See, also, "Constructive Fraud."

Fraud in law exists only when the acts upon which it is based carry in themselves inevitable evidence of it, independently of the motive of the actor. This principle is illustrated where an insolvent debtor makes a gift of his property. In such a case the property may be reached by creditors, because it constitutes a fund which justly belongs to them, while the donee has no equitable right to it. Any voluntary transfer by a debtor which deprives his creditors of a fund that equitably belongs to them is necessarily a fraud upon their rights, and therefore fraud is implied, which is sometimes denominated "fraud in law." *Delaney v. Valentine*, 49 N. E. 65, 69, 154 N. Y. 692.

In *Seward v. Van Wyck* (N. Y.) 8 Cow. 406, it was said that, strictly speaking, there is no such thing as fraud in law. Fraud or no fraud is, and ever must be, a question of fact. And in *Jackson v. Timmerman* (N. Y.) 7 Wend. 436, it is said there is no such thing as fraud in law as distinguished from fraud in fact. What was formerly considered as fraud in law, or conclusive evidence of fraud, and to be so pronounced by the court, is now but *prima facie* evidence to be submitted to and passed upon by the jury. *Burr v. Clement*, 9 Pac. 638, 639, 9 Colo. 1.

It is a fraud in law if the party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. *Northwestern Mut. Life Ins. Co. v. Montgomery*, 43 S. E. 79, 80, 116 Ga. 799 (citing *Foster v. Charles*, 6 Bing. 396, 19 E. C. L. 183).

#### FRAUD UPON THE LAW.

The phrase "fraud upon the law," as used in a proposition that the issue by a corporation of preferred interest-bearing stock guaranteed at 40 cents on the dollar to the amount of \$2,000,000, for which only \$800,000 was paid was "a fraud upon the law," means no more than that the issue of preferred stock is in violation of the principle of equality of right among stockholders of a corporation who unite their capital on equal terms in a common enterprise, and are therefore entitled to share equally, and without preference, in the profits or avails of the enterprise. *Taylor v. South & N. Alabama R. Co.* (U. S.) 18 Fed. 152, 155.

#### FRAUDULENT—FRAUDULENTLY.

Fraudulent is something that will deceive, cheat, and mislead, inducing a belief in what is not true, and action on such belief. *Wood v. State*, 48 Ga. 192, 297, 15 Am. Rep. 664.

Fraudulent is defined objectively as based on, proceeding from, or characterized by fraud. *Standard Dict.* Fraudulently is an adverb of the same meaning, and is used in *Code Civ. Proc.* § 1865, providing for the proof of loss of wills in certain cases, and that the plaintiff is not entitled to a judgment establishing a lost or destroyed will unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, to characterize the manner of destruction cited by the statute, as I construe the statute and construe the term "fraudulent" as applicable thereto. It appears to me that, in order to come within the lines thereof, there must be some intervening human agency in motion, or set in motion, to have brought about its destruction. We are unable to see how the mere accidental destruction of this instrument through the fault of no one, through the active agency of no one, can be construed or deemed as of a fraudulent character, so as to permit the application of this statute. In *re Reiffeld's Will*, 73 N. Y. Supp. 808, 810, 36 Misc. Rep. 472, 474.

In equity all acts, omissions, and concealments which involve a breach of legal or equitable obligation or duty, trust, or confidence justly reposed, and which are injurious to another, or by which an undue and unconscious advantage is taken of an-

other, are considered fraudulent. 4 Bouv. Inst. 167. A grossly improvident contract, made by a person in full possession of his mind, under circumstances of perfect fairness, will not be set aside; but when a person is of such feeble mind that he is incompetent to transact any business which requires judgment and forethought a court of equity regards the gross inequality of the contract as evidence of fraud, and will set it aside or reform it. *Kester v. Bahr* (Pa.) 1 Kulp, 262, 268.

To characterize an act as fraudulent in a pleading does not, in legal effect, charge it as fraudulent, unless some circumstance or fact be charged which shows in what the fraud consists, and how it has been effected. *Cochise County v. Copper Queen Consol. Min. Co.* (Ariz.) 71 Pac. 946, 949.

An allegation in a complaint as follows: "That said defendant at the time of said purchase of said lands knowingly, falsely, and fraudulently represented to said plaintiff that said lands were clear of all incumbrances," is equivalent to a charge that the representations were made with intent to deceive. *West v. Wright*, 98 Ind. 335, 339.

"Fraudulently," as used in an allegation that a person wrongfully, fraudulently, and falsely certified and represented certain things, should be given the meaning which the law gives it, and which attaches to it in common usage, to wit, a deliberately planned purpose and intent to deceive, and thereby be given an unlawful advantage. It necessarily includes the idea of a fraudulent intent. *Bank of Montreal v. Thayer* (U. S.) 7 Fed. 622, 625.

In a contest of probate of a will the jury found that representations made to the testator by the proponent of the will were false or fraudulent, and it was held that the word "fraudulent," as here used, has no well-defined legal meaning, so that this finding as to the representations being false and fraudulent amounts to nothing. In re *Benton's Estate*, 63 Pac. 775, 777, 131 Cal. 472.

Where no fraudulent act or conduct is set out in a pleading in an action for fraud, the word "fraudulently" is used as characterizing the acts of the party committing the fraudulent act. *Garst v. Hall & Lyon Co.*, 61 N. E. 219, 179 Mass. 588, 55 L. R. A. 631.

The word "fraudulently" in the bill in an injunction suit, which uses the word "fraud" to characterize the defendant's act, is insufficient to show fraud, such statement being too general to be the foundation of a decree. *Garst v. Hall & Lyon Co.*, 61 N. E. 219, 179 Mass. 588, 55 L. R. A. 631.

An allegation that a release for damages for injury suffered was obtained sur-

reptitiously and fraudulently does not inform the conscience of the court of the facts of the case upon which it is asked to act, nor enable the defendant to meet the accusation of wrongdoing against him. *Lumley v. Wabash R. Co.* (U. S.) 71 Fed. 21, 28.

"Fraudulently," as used in an answer that an oral agreement was made, and that immediately thereupon the other party fraudulently substituted a written memorandum expressing an entirely different contract, is not a sufficient allegation to a pleading of fraud. It is not unusual that the terms of a contract subsequently reduced to writing should first have been orally agreed on, and the subsequent written contract as a substitution. *History v. Dougherty* (Ariz.) 29 Pac. 649, 651.

"Fraudulently," as used in an indictment charging that the defendant did fraudulently embezzle and convert to his own use a certain sum of money, qualifies the words "embezzled" and "converted," and is descriptive of the motive with which the act is done. *State v. Jamison*, 38 N. W. 508, 509, 74 Iowa, 602.

#### As actual fraud or fraud in fact.

Fraudulently in law means more than illegal conduct, and implies moral turpitude and intentional fraud. It is synonymous with "actual and intentional wrongdoing" or "willful and corrupt dealing." *Worsham v. Murchison*, 66 Ga. 715, 719.

Within the meaning of a statute respecting insolvent debtors, declaring void all sales and transfers if fraudulent as to creditors, the phrase "if fraudulent as to creditors" means such sales or transfers as are frauds in fact, but not constructive frauds, or frauds by intentment of law. Gifts or conveyances without valuable consideration are not mere constructive frauds, or frauds by intentment of law. They are, as against creditors, fraudulent in fact. *Bailey v. Balou*, 44 Atl. 114, 69 N. H. 414.

Comp. Laws, § 1923, authorizing an attachment when the debtor is about to "fraudulently convey or assign," conceal, or dispose of his property so as to hinder, delay, or defraud his creditors, is to be construed as requiring an actual fraudulent intent. "The language clearly implies that there may be a conveyance or an assignment which will merely delay creditors as an incident to the transaction, and yet not be fraudulent." *Torlina v. Trorlicht*, 21 Pac. 68, 69, 5 N. M. 148.

"Fraudulently," as used in 1 Rev. St. 588, § 57; Laws 1849, p. 375, § 5—imposing a penalty on every person who shall "fraudulently" pass any gate on any turnpike or plank road without having paid the legal toll, should be construed in its ordinary sense, as referring to actual fraud as distinguished from con-

structive fraud. Every passage without the consent of the toll gatherer, and without the payment of the legal toll, would be fraudulent, as an act in fraud of the rights of the company; but it cannot be presumed that this very common and well understood word was used in such refined and very unusual sense. *Bridgewater & U. Plank Road Co. v. Robbins* (N. Y.) 22 Barb. 662, 667.

Fraudulent is defined objectively as based on, proceeding from, or characterized by fraud. Fraudulently is an adverb of the same meaning. The word "fraudulently" in Code Civ. Proc. § 865, providing for the establishment of a lost will when it was in existence at the time of testator's death or was fraudulently destroyed in his lifetime, implies some intervening human agency in motion, or set in motion to bring about the obstruction of the will, but does not include a mere incidental destruction of the instrument. In *re Reiffeld's Will*, 73 N. Y. Supp. 808, 809, 36 Misc. Rep. 472.

In order that there may be a debt fraudulently contracted, the debtor must have been guilty of some material deceptive act, word, or concealment done or suffered by him with the intent to induce the opposite party to consent to the debt. The opposite party must have relied upon such false acts or manifestations of the debtor, and yielded his consent to the contract on the faith thereof. Hence the wrongful conversion of personal property alone will not authorize the commencement of a suit by attachment under Rev. St. § 398, which furnishes such remedy "where the debt was fraudulently contracted on the part of the debtor." In such circumstances the plaintiff in fact agreed to no debt, nor can he lawfully treat it as such. *Finlay v. Bryson*, 84 Mo. 664, 666, 668.

#### As imputing dishonesty.

The word "fraudulent," as employed in a complaint alleging that a special assessment was unauthorized, illegal, fraudulent, void, and of no effect because of certain alleged defects and irregularities in the proceedings of the council, cannot be construed as imputing dishonesty to the members of the city council. *Durkee v. City of Kenosha*, 17 N. W. 677, 678, 59 Wis. 123, 48 Am. St. Rep. 480.

#### Hindering and delaying creditors.

The word "fraudulently," as used in an instruction relating to a conveyance with intent to fraudulently hinder and delay creditors, does not change substantially the import of the instruction. If the essential purpose was to hinder and delay other creditors, and not to secure bona fide debts due, the hindering and delaying being but an incidental, though necessary, result of such preferential transfer, it would be a fraudulent hindering and delaying, and the presence

of the word, if unnecessary, would not change the legal import of the charge, while its absence might mislead the jury in passing on the question before them. *Hodges v. Lassiter*, 2 S. E. 923, 924, 96 N. C. 351.

#### As inequitable or unconscientious.

The term "fraudulent," as used in speaking of equitable estoppels, is synonymous with "unconscientious" or "inequitable." *The Ottumwa Belle* (U. S.) 78 Fed. 643, 648; *Norfolk & W. R. Co. v. Perdue*, 21 S. E. 755, 759, 40 W. Va. 442.

#### Unlawful distinguished.

When a transaction is voided by the statute without respect to the motive which induced it, but on considerations of policy only, it is unlawful, and not fraudulent. To style it fraudulent whether the fraud be legal or otherwise may fix an unmerited stigma on the party to the transaction. A more just and appropriate appellation to apply to conveyances of the former class would be simply "unlawful," while the term "fraudulent" would still properly be applicable to the latter class of cases. *Hagerman v. Buchanan*, 17 Atl. 946, 947, 45 N. J. Eq. (18 Stew.) 292, 14 Am. St. Rep. 732.

#### FRAUDULENT ACQUISITION OF PROPERTY.

To constitute this offense, as defined by article 723 of the Penal Code, it must appear: (1) That the accused threatened to do some illegal act, injurious to the character, person, or property of another; and the indictment should aver the threats and the illegal act threatened with reasonable certainty. (2) That by means of such threats the accused fraudulently induced the person threatened to deliver to him certain property, which property should be described in the indictment as in an indictment for theft, except that no value need be alleged. (3) That the accused so obtained the property with the intent to appropriate the same to his own use. *Williams v. State*, 13 Tex. App. 285, 46 Am. Rep. 237.

#### FRAUDULENT ALIENATION.

A fraudulent alienation, in the sense of the rule that in all cases of fraudulent alienation the courts will follow and treat them as assets of the estate, is where an administrator wastes the assets by giving them away or selling at a gross undervalue, and thereby, to that extent, endangers the purposes of his trust, and is guilty of a fraud upon the rights of those in interest. The purpose of the administrator, tacit or declared, to make it up from his own means, however sincere, will not sanctify the transaction in law, or neutralize its viciousness. *Rhame v. Lewis* (S. C.) 13 Rich. Eq. 269, 310, 311.

**FRAUDULENT ALIENEE.**

A fraudulent alienee is he who, with knowledge of the wrongful purpose, unites with an administrator of an estate for the diversion of the property, assets, or other proceeds from the legitimate ends of the trust, and the application of them to the administrator's private purposes of necessity, self-indulgence, or speculation. *Rhame v. Lewis* (S. C.) 18 Rich. Eq. 269, 310, 311.

**FRAUDULENT CONCEALMENT.**

"A fraudulent concealment is the suppression of something which the party is bound to disclose." *Magee v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98, 23 L. Ed. 699; *Lake v. Thomas*, 36 Atl. 487, 489, 84 Md. 608.

"Fraudulent concealment," as used in reference to sales of personalty, is "the intentional omitting to disclose some bad quality, or some fact in relation to the property, known to the seller and unknown to the buyer, which it is material that the latter should know to prevent being defrauded." *Page v. Parker*, 43 N. H. 368, 367, 80 Am. Dec. 172.

A fraudulent concealment is the failure to disclose a material fact which the seller knows himself, which he has a right to presume that the person he is dealing with is ignorant of, and of the existence of which the other party cannot by ordinary diligence become acquainted. That it may furnish a sufficient cause of action, the fact suppressed must not only be material, but the materiality must either be known to the seller, or the facts must so constitute an element of the value of the contract as to authorize the inference of knowledge of its materiality. The concealment must be for the purpose of continuing a false impression or delusion under which the purchaser has fallen, or of suppressing inquiry, and thereby effecting a sale, with the intention to conceal or suppress, and it must operate as an inducement to the contract. *Jordan v. Pickett*, 78 Ala. 381, 389.

2 Rev. St. p. 23, § 35, subd. 4, providing that a discharge of an insolvent debtor shall be void if the insolvent shall "fraudulently conceal" the names of any of his creditors, or the amount of any sum due to any of them, should be construed to mean that the omission or misstatement must be intentional, and not to include a mere mistake or oversight; and hence the bare omission by the insolvent to insert the name of a creditor in the schedule of debts or the misstatement of the amount due any creditor will not alone vitiate the discharge. *Small v. Graves* (N. Y.) 7 Barb. 578, 578.

In the application of the rule that, if a lessor has knowledge of defects in the premises which are not discoverable by the ten-

ant, and which will imperil his person or property, and a liability arises from the fraudulent concealment thereof, the terms "fraud," "fraudulent concealment," "constructive fraud," and "deceit" are synonymous. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 67 N. E. 715, 716, 68 Ohio St. 328.

**FRAUDULENT CONTRACT.**

A statute authorizing the granting of bills of divorce on the ground of a fraudulent contract implies a cause of divorce which existed previous to the marriage, and such a one as rendered the marriage unlawful ab initio—as consanguinity, imbecility, or the like. *Benton v. Benton* (Conn.) 1 Day, 111, 114.

The collection of money for another by a firm which subsequently becomes insolvent and fails to pay over the same, and the denial of its receipt by a member of the firm, do not constitute a debt fraudulently contracted, within the meaning of the attachment law. *Rohan Bros. Boiler Mfg. Co. v. Latimore*, 18 Mo. App. 16, 17.

**FRAUDULENT CONVERSION.**

In order to amount to a fraudulent conversion of property, which has been made the subject of a bailment, to the bailee's use, it must be effected with intent to defraud the owner. Bad faith in the bailee is necessary. *State v. Sienkiewicz* (Del.) 55 Atl. 346, 348.

The word "fraudulently" in an indictment charging that accused did fraudulently embezzle and convert to his own use the money of the city, relates specifically to appellant's intent in converting the city money to his own use, and it is not necessary to allege that the money was embezzled and converted with the intention to embezzle and convert the same, and it could not be embezzled and converted innocently if done fraudulently. *State v. Patterson*, 71 Pac. 860, 861, 68 Kan. 447.

The word "embezzle" and the words "fraudulently convert to his own use" mean the same thing, as used in Cr. Code, § 80, providing that if any officer, etc., embezzles or fraudulently converts to his own use, etc., he shall be imprisoned in the penitentiary. *Spalding v. People*, 49 N. E. 993, 998, 172 Ill. 40.

A refusal to pay over money of another intrusted to one as agent or servant is doubtless evidence of a fraudulent conversion or fraudulent intent to convert, but it will not justify the statement that it establishes in law a fraudulent conversion. *Fitzgerald v. State*, 50 N. J. Law (21 Vroom) 475, 14 Atl. 746. Error in an instruction

that a refusal to pay over unapplied money to the principal, if the principal was justified in demanding it, amounted in law to a fraudulent conversion of it, is not cured by a subsequent statement that the jury should be satisfied that the refusal was with intent to convert. *Burnett v. State*, 37 Atl. 622, 623, 60 N. J. Law, 255.

### FRAUDULENT CONVEYANCE.

The term "fraudulent conveyance" is correctly applied to any conveyance made at a time when the amount of the debtor's property left with which to satisfy his indebtedness in comparison with the amount of the indebtedness must necessarily operate so as to hinder, delay, or defraud creditors. Whether a fraudulent conveyance has been proved is a question for the jury. *Whitehouse v. Bolster*, 50 Atl. 240, 243, 95 Me. 458.

Fraudulent conveyances "are such as are made with intent to hinder, delay, or defraud creditors or other persons of their lawful suits." *Seymour v. Wilson*, 14 N. Y. (4 Kern.) 567, 569.

A statute relating to a fraudulent conveyance includes a conveyance made with the intent to defraud the plaintiff as a subsequent judgment creditor. *Hoffman v. Junk*, 8 N. W. 493, 51 Wis. 613.

To constitute a fraudulent conveyance, there must be a creditor, to be defrauded, a debtor intending to defraud, and a conveyance of property out of which the creditor could have realized. *De Ruiter v. De Ruiter*, 62 N. E. 100, 103, 28 Ind. App. 9, 91 Am. St. Rep. 107.

A fraudulent conveyance within the meaning of Bankr. Act 1867, § 29 (14 Stat. 531), must be a conveyance made, as required by section 35, within four or six months before the filing of the petition by or against the debtor. *In re Freeman* (U. S.) 9 Fed. Cas. 750; 4 Ben. 245, 4 N. B. R. 64.

A conveyance is fraudulent within St. 1884, c. 106, § 9, providing for proceedings in invitum against any one, as an insolvent debtor, who shall make any fraudulent conveyance, if made to defeat the full and fair operation of the insolvent laws. *In re Jordan*, 50 Mass. (9 Metc.) 292, 295.

A conveyance is not considered fraudulent as to a creditor whose debt is secured by judgment or other lien upon the land transferred. The grantee necessarily takes subject to the lien, and the creditor may pursue the land in the same manner as if it had been conveyed to one who had purchased in good faith for a full consideration. *Potvin v. Denny Hotel Co.*, 66 Pac. 376, 380, 26 Wash. 309.

The question as to whether one purchasing personal property from a judgment

debtor acted fraudulently or bona fide depends upon the motive. The mere fact that the purchaser knew of the existence of the judgment does not of itself make the sale fraudulent; but, if he purchased the property for the purpose of defeating the creditor's execution, the purchase is fraudulent, though he may have given the full price. *Beals v. Guernsey* (N. Y.) 8 Johns. 446, 452, 5 Am. Dec. 348.

A conveyance may be legally fraudulent and void, though there is no dishonesty in the mind of the grantor, and although a deed is not deemed fraudulent from the single circumstance of its being founded solely on consideration of natural affection, yet the principle that a voluntary deed, made when the grantor is indebted, is invalid as against creditors, is settled law in this state, and is built upon the ground that no man shall be permitted to create an estate in his own family and among his own kindred at the expense of his creditors. *Lockyer v. De Hart*, 6 N. J. Law (1 Halst.) 450, 458.

A conveyance is said to be fraudulent in law when it has been executed under such circumstances that the law itself conclusively infers a fraudulent intent from the intrinsic nature of the circumstances, without any inquiry into the actual intent of the parties to the transaction. A conveyance is said to be fraudulent in fact where the circumstances are not such as that the law conclusively infers a fraudulent intent from them, but where the parties have actually intended to delay, hinder, or defraud creditors or subsequent purchasers. But both descriptions of cases are equally void under the statute of frauds, for in the first the fraudulent intent is inferred by the law, and in the second it is actually proved. *Land v. Jeffries* (Va.) 5 Rand. 599, 601.

A fraudulent conveyance, according to 2 Rev. Laws, p. 137, § 1, is one made with an intent to hinder, delay, and defraud creditors or other persons in their lawful suit. *Savage v. Murphy*, 21 N. Y. Super. Ct. (8 Bosw.) 75, 92.

A voluntary conveyance to a child or grandchildren, where the grantor is indebted at the time, is fraudulent and void as against his creditors. *Laurence v. Lippencott*, 6 N. J. Law (1 Halst.) 473.

Deeds made to keep property of a debtor from his creditors, and preventing them from taking it to secure and satisfy their debts, and so leave it in the power of the debtor to take his own time and use his own manner for applying it to the payment of his debts, would clearly be made to delay his creditors and deprive them of the right which the law gives them of taking their remedy into their own hands under legal process; and this would be such a fraud as would

make the conveyances void as to creditors. *Blodgett v. Webster*, 24 N. H. (4 Fost.) 91, 108.

### FRAUDULENT DISPOSITION.

It is a "fraudulent disposition" of property within the meaning of the attachment act (Rev. Code 1845) for a person to confess a judgment with intent to hinder and delay his creditors by having his property held up under an execution issued on the judgment. *Field v. Liverman*, 17 Mo. 218, 224.

Under a statute which provides that a writ of attachment may issue on showing that the defendant is about to fraudulently remove, convey, or dispose of his property to hinder and delay his creditors, the facts must show that the defendant is so acting with his property out of its ordinary and necessary use as to produce a reasonable conviction that a fraudulent disposition thereof is intended. *Hurd v. Jarvis* (Wis.) 1 Pin. 475, 477.

### FRAUDULENT ENTRY.

The mere walking into a storehouse, and subsequent concealment, with the intent to commit theft, does not of itself constitute a fraudulent entry, within Pen. Code, art. 838, providing that the offense of burglary is constituted by entering a house by force, threats, or fraud, with the intention of committing a felony or theft. The fraud included in the theft does not constitute fraud in the entry. They are distinct frauds within the purview of the statute. The fraud would be the same in the theft, or intended theft, whether the entry was accomplished by force, threats, or fraud. It could easily be demonstrated that the fraud included in the theft, or intended theft, would not operate to constitute the entry, by force or threats, and, unless the entry was by fraud, the subsequent theft or intended theft would not relate back to the entry, and be of sufficient cogency to constitute it a "fraudulent entry." *City of St. Louis v. State* (Tex.) 59 S. W. 889, 890.

### FRAUDULENT INTENT.

Fraudulent intent is not a physical entity which can be seen and felt, but a condition of the mind beyond the reach of the senses, usually kept secreted, not very likely to be confessed, and therefore can only be proved by unguarded expressions, conduct, and circumstances generally. *Roddey v. Erwin*, 31 S. C. 36, 46, 9 S. E. 729, 732.

"A fraudulent intent unexecuted is a mere mental concept. It is intangible. The inquiry whether an intent has been fraudulent is to some extent of a metaphysical character, because it involves an investigation

into an undisclosed and deliberately concealed mental design. When executed it is generally not susceptible of proof otherwise than as extrinsic visible acts which owe their origin to it indicate its antecedent or coincident existence. You cannot look into and see the hidden processes of the intellect. But as no rational creature does a deliberate act without some motive or design, you may, through the act when done, and through all its attendant surroundings, deduce or discover the intent with which it was performed. In no other way can the motives of human conduct be fathomed or exposed." *Du Puy v. Transportation & Terminal Co.*, 33 Atl. 889, 894, 82 Md. 408.

Fraudulent intent is a matter which can only be proved by unguarded expressions, conduct, and circumstances generally. *Guckenheimer v. Libbey*, 42 S. C. 162, 168, 19 S. E. 999, 1002.

### FRAUDULENT MISREPRESENTATION.

"It is said in *Bigelow*, *Frauds*, 468, that a fraudulent misrepresentation is made up of five elements: (1) A false representation; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) intention that it should be acted upon; (5) acting upon it with damage." *Wheeler v. Dunn*, 22 Pac. 827, 833, 13 Colo. 428.

A representation made by one upon his own knowledge as to a fact that will result and actually occur and exist, if made for the purpose of influencing the conduct of another, and it produces this result, may amount to a fraudulent misrepresentation, and, if untrue, should be dealt with as if a deliberate misrepresentation as to a fact then existing. Thus, where one is induced to purchase land by representations of the vendor that he controls a creamery near it, and that the purchaser shall have the keeping of the cattle near it, whereby he could obtain money to meet a deferred payment, and such representations are false, they constitute fraudulent misrepresentation. *Moore v. Cross* (Tex.) 26 S. W. 122, 128.

### FRAUDULENT MORTGAGE.

The word "fraud," used in describing mortgages presumed to be given in fraud of other creditors, means any unfair preference which the debtor may give to one of his creditors over the others by selling or mortgaging to him a portion of his property for a debt existing before the contract. *Civ. Code La.* 1900, art. 3360.

### FRAUDULENT PERSUASION.

The expression "false or fraudulent persuasion," as used in an instruction in a se-

duction case, is the equivalent of "false or fraudulent acts, promises, or inducements." *Graham v. McReynolds*, 18 S. W. 272, 273, 80 Tenn. 673.

### FRAUDULENT PURPOSE.

The term "fraudulent purposes," when used with reference to the keeping on foot a prior execution for fraudulent purposes, means not only actual fraud and dishonesty, but what is denominated legal fraud, forbidden by the law, without involving moral turpitude. *Williamson v. Johnston*, 12 N. J. Law (7 Halst.) 86, 89.

### FRAUDULENT REPRESENTATION.

Before a person can recover possession of property claimed to have been obtained by means of fraudulent representations, he must establish five distinct propositions tending to defeat the contract: (1) The representations; (2) their falsity; (3) the scienter or guilty knowledge of the person making the representations; (4) that the purchaser relied upon and was deceived by the representations; (5) the damages resulting to him in consequence thereof. *Wakefield Rattan Co. v. Tappan*, 24 N. Y. Supp. 430, 433, 70 Hun, 405.

The term "fraudulent representation" means false statements made with intent to deceive, and which actually produce such result. *Montgomery S. Ry. Co. v. Matthews*, 77 Ala. 357, 364, 54 Am. Rep. 60.

"To constitute a fraudulent misrepresentation, it need not be made in terms expressly stating the existence of some untrue fact; but if it be made by one party in such terms as would naturally lead the other party to suppose the existence of such state of facts, and if such statement be so made designedly and fraudulently, it is as much a fraudulent misrepresentation as if the statement of the untrue facts were made in express terms." Justice Crompton concurring in *Lee v. Jones*, 17 O. B. (N. S.) 482, 510 (quoted in *Potts v. Chapin*, 133 Mass. 276, 283).

"To constitute a fraudulent representation the party making the representation must represent that as true of his own knowledge which is not true, but as to the truth or falsity of which he has no knowledge; or must represent that as true which is false, and the truth or falsity of which he is presumed to know." *Stone v. Denny*, 45 Mass. (4 Metc.) 151, 154; *Brooks v. Hamilton*, 15 Minn. 26, 31 (Gil. 10, 14); *Lynch v. Mercantile Trust Co.* (U. S.) 18 Fed. 486, 487.

Although representations may be false, they are not deceitfully fraudulent unless known to the maker of them to be false. *Righter v. Roller*, 31 Ark. 170, 174.

In an action by a vendee to set aside a sale on the ground of fraudulent representations made by the vendor, an instruction that the fraud might be considered as proved if the jury were satisfied that "representations were made by the vendor that he knew were not true, or that he had not good reason to believe were true," was erroneous. The jury would be authorized to determine whether the vendor had or had not good reason to believe that his representations were true. They may therefore have found that he had not good reason to do so because he was too incredulous or careless to avoid being deceived by information obtained from others, by which no intelligent person in the exercise of common prudence ought to have been deceived. Such a finding would be based upon the imprudence or carelessness of the vendor, and not upon any fraudulent purposes or intent to deceive. *Hammatt v. Emerson*, 27 Me. (14 Shep.) 308, 326, 332, 46 Am. Dec. 598.

Fraudulent representation, with reference to the sale of an article, is some recommendation of the article or statement in regard to its good qualities which is known to be untrue. *Page v. Parker*, 43 N. H. 363, 367, 80 Am. Dec. 172.

A fraudulent representation, to vitiate a contract induced by it, is a representation of a past or existing fact; but a promise is not a representation, and when not a part of the contract does not affect it. *Estes v. Desnoyers Shoe Co.*, 56 S. W. 316, 319, 155 Mo. 577.

### FRAUDULENT TAKING.

"Fraudulently taking," as used in a verdict of a jury finding the defendant guilty of "fraudulently taking" coal, is not synonymous with "theft"; theft being composed of other elements and ingredients. The defendant may have been guilty of fraudulently taking the coal described in the indictment, and yet not have been guilty of the theft of such coal. *Johnston v. State*, 9 S. W. 48, 25 Tex. App. 731.

By "fraudulent taking," as used in a definition of theft, is meant that the person taking knew at the time of taking that the property was not his own, and hence an instruction giving such definition sufficiently informs the jury that, if they have any doubt as to whether the property was the defendant's own, they should acquit. *Spencer v. State*, 29 S. W. 159, 34 Tex. Cr. R. 65.

### FRAUDULENT TRANSFER.

Comp. St. c. 32, § 28, being an act to prevent the fraudulent transfer of property, by its own terms defines such an act to be either the secretion, sale, incumbrance, or fraudulent disposition of property, and the



definition is as much a part of the act as any other portion. The right of the Legislature to prescribe the legal definitions of its own language must be conceded. Neither does the definition prescribed do any violence to the ordinary use of the language when applied to the use of property in such a way as to hinder, delay, or defraud creditors. *Herald v. State*, 21 Neb. 50, 52, 53, 31 N. W. 258.

## FREE.

### See "Going Free."

In a grant by the commissioners of Baltimore, February 10, 1794, giving certain parties the right to construct and erect wharves along the water front in Baltimore, and providing that the wharves, streets, etc., be a common highway, and free for the public use, "free" means that they shall be open for the public use. It was not intended that they were to be free to the public in the sense that there was to be no charge for the use of the same. *Dugan v. City of Baltimore (Md.)* 5 Gill & J. 357, 375.

### As without compensation.

In a contract between two railroad companies, providing that one should have the perpetual and free use of the right of way of the other in a certain locality, the word "free" must be construed to mean free of compensation, and not merely uninterrupted use. *Alabama G. S. R. Co. v. South. & N. A. R. Co.*, 84 Ala. 570, 584, 3 South. 286, 292, 5 Am. St. Rep. 401.

The statement of a custom of a railroad company to return bags in which grain is shipped to the consignor "free of charge" means that the customers pay no further consideration than the freight derived from the business they give the company; but this is sufficient to prevent the transportation of the bags from being gratuitous, and hence liability of the carrier is not limited to that of gross negligence alone. *Pierce v. Milwaukee & St. P. R. Co.*, 23 Wis. 387, 391.

A condition imposed on the land-grant railroads by numerous statutes, provided that the said railroads shall be and remain a public highway for the use of the government, free from all toll or other charge for transportation of any property or troops of the United States, does not extend beyond the free use of the road as a highway. The provision means that the government may use the road, not that it may compel railroad companies to transport property and troops wholly without compensation for their service as carriers. *Lake Superior & M. R. Co. v. United States*, 12 Ct. Cl. 35.

### As without duty, tax, or toll.

"Free," as used in Const. art. 2, § 2, providing that the Mississippi river and the

rivers of the state shall be forever free, etc., is equivalent to "without any duty, tax, impost, or toll." *Osborne v. Knife Falls Boom Corp.*, 21 N. W. 704, 709, 32 Minn. 412, 50 Am. Rep. 590.

### As sound.

A specification of a patent contained the words "a perfect cast copper cylinder," and the claim, the words "free from blowholes and other similar defects." Held, that the claim must be construed to mean a cast copper cylinder so free from blowholes as to be considered sound—sufficiently perfect to be used in the arts for the purposes for which copper cylinders are used. *Adams v. Bridge-water Iron Co. (U. S.)* 26 Fed. 324, 327.

A warranty of a horse that he is "sound and free from disease" is to be construed as meaning that the horse is not diseased. *Johnson v. Wallower*, 15 Minn. 472, 478 (Gil. 387, 393).

### As unincumbered.

"Free property," as used by a debtor in testifying with reference to certain property which has been appraised, to a certain portion of which he was entitled as exempt from sale on execution, means such property as appears on the appraisal as unincumbered. *Northrup v. Cross*, 51 N. W. 718, 2 N. D. 433.

### As unobstructed.

A deed providing that the owner of a dominant estate was to have "free ingress and egress" over the servient estate will be construed so as to permit the owner of the servient estate to maintain gates across the way, which the owner of the dominant estate then using the way is required to open and close; the sole right of the owner of the dominant estate under such expression being a right of passage. *Brill v. Brill*, 108 N. Y. 511, 15 N. E. 538.

A deed providing that the grantee should have the free and undisturbed right to the use of a way cannot be construed to be a grant of an open way preventing the grantor from maintaining gates at the termini, where such gate or gates do not amount to a wrongful obstruction. *Boyd v. Bloom*, 52 N. E. 751, 752, 152 Ind. 152.

The grant of the "free use, right, and privilege of a passageway 10 feet wide," does not necessarily mean that there shall be no gate at the entrance to such passageway; and where, at the time the grant was made, there was a gate at the intersection of such passageway and the highway, which gate had always thereafter been maintained, except when it was temporarily out of repair, the continued maintenance of such gate was not a violation of the terms of such grant. "Free" is a relative term when applied to

the use of a thing. It does not follow that I have not the free use of a room because I have to open the door in order to get into it, nor does it follow that I have not the free use of an alley because I have to open the gate to get into and out of it. *Connery v. Brooke*, 73 Pa. (23 P. F. Smith) 80, 84.

The term "free and uninterrupted use," in a conveyance of a farm, providing that the grantee shall have the free and uninterrupted use and privilege of passing over other land of the grantor by a usual passageway, was considered, in view of evidence that such way had been used with gates and bars for 40 years and up to the time of the grant, and that such gates and bars were necessary to the convenient use of the grantor's remaining land, to mean the free and uninterrupted use and privilege of passing and re-passing over the ways as then existing, subject to gates and bars, and to convey a right to use the way without other or further impediment. *Garland v. Furber*, 47 N. H. 301, 303.

"Free and unobstructed use," as used in the reservation in a deed of the free and unobstructed use of the water which shall run or be turned in a certain channel, means and is equivalent to the natural flow of the water that may run or be turned into the channel. *Skowhegan Water Power Co. v. Weston*, 47 Atl. 515, 519, 94 Me. 285.

#### FREE AND CLEAR.

An agreement to convey land "free and clear" is satisfied by a conveyance passing a good title. *Meyer v. Madreperia*, 53 Atl. 477, 480, 68 N. J. Law, 258, 96 Am. St. Rep. 536.

#### FREE BAPTISTS.

See "Free-Will Baptists."

#### FREE BURYING GROUND.

A conveyance of land to trustees as a "free burying ground" means that the land is to be held free to all, or for the benefit of all, for the purpose designated. *Antrim v. Malsbury*, 13 Atl. 180, 183, 43 N. J. Eq. (16 Stew.) 288.

#### FREE COMMONERS.

Stock which escape from an inclosure through the owner's negligence in permitting the fence to fall down are considered free commoners. *Hinman v. Chicago*, R. I. & P. R. Co., 28 Iowa, 491, 494.

#### FREE DEALER.

The term "free dealer," as used in the consent of a husband, which states that he

gives his permission that his wife be allowed to become a free dealer, in a proceeding instituted by the wife under Act April 15, 1873, authorizing the courts to grant the right to a married woman to buy, sell, hold, and convey real and personal property, and to sue and be sued, as a feme sole, on petition accompanied with the consent of her husband, means that she may be decreed to have the powers mentioned in the act. *King v. Bolling*, 73 Ala. 306, 309.

#### FREE ELECTION.

"Free," as used in Const. art. 2, § 18, providing that all elections shall be free and equal, is synonymous with the word "uniform." The definition of free elections does not include the idea of uniformity in regulation, inasmuch as it is the settled policy of the state that there may be in force in localities subjects of elections which have been accepted by such localities, which are not in force in other localities which did not vote to accept them. Elections are free when the voters are subjected to no intimidations or improper influence, and when every voter is allowed to cast his ballots as his own judgment and conscience dictate; when the vote of every elector is equal in its influence on the result of every other elector; when each ballot is as effective as every other ballot. *People v. Hoffman*, 5 N. E. 596, 600, 116 Ill. 587, 56 Am. Rep. 793.

#### FREE EXECUTION.

A "free execution of the deed as aforesaid," when alleged in a pleading, means that the party executed the deed with all the formalities required in such a deed, namely, that he subscribed and delivered it. *Sutherland v. Wills*, 5 Exch. 715, 718.

#### FREE FISHERY.

"A free fishery or exclusive right over fishing in a public river is a royal franchise, which is now frequently vested in private persons either by a grant from the crown or by prescription. This right was probably first claimed by the crown upon the establishment of the Normans, and was deemed by the people a usurpation." *Arnold v. Mundy*, 6 N. J. Law (1 Halst.) 1, 87, 10 Am. Dec. 356 (quoting 2 Cruise, 278).

Sir William Blackstone correctly says that a free fishery is an exclusive right to fish in a public river; that it is a royal franchise derived by royal grants, and, as these grants were prohibited by the Great Charter, the grant must be previous to that charter; though Lord Coke considers a free fishery the same as a common fishery—that is, common to all the citizens of the state. *Yard v. Carman*, 3 N. J. Law (2 Penning.) 936, 943; *Freary v. Cooke*, 14 Mass. 488, 489. A free

fishery cannot exist in this country, the crown being restrained from making such grants long before the discovery of America. *Yard v. Carman*, 3 N. J. Law (2 Penning.) 936, 943.

Blackstone seems inclined to treat a free fishery as a species of royal franchise, conferring upon the citizen an exclusive right of fishing in a public river; but in this he is criticised by Mr. Hargreave in Co. Litt. 122a, note 7, who seems to think the term "free fishery" may appropriately be used to designate a common or public fishery. *Albright v. Sussex County Lake & Park Commission*, 53 Atl. 612, 618, 68 N. J. Law, 523.

Blackstone says that the distinction between a "free fishery" and a "several fishery" is that the latter is connected with the ownership of the soil, while the former is not. Bl. Comm. 39. Other authorities repudiate this distinction, and give other definitions to the different kinds of fishery. Mr. Schultes, in his treatise on Aquatic Rights, p. 32, elaborately reviews the question, referring to all the English authorities, and maintains that a free fishery is not exclusive, but is the same as a common fishery, and that a several fishery, although exclusive, is not necessarily connected with the ownership of the soil. "The principle that the ownership of the soil is material in determining when a fishery is exclusive and when common comports with our legislative action and ideas of such right." On the principle of ownership of the soil, it is that the owners of land bordering on fresh water rivers have the right of exclusive or several fishery therein in front of their lands. *Trustees of Brookhaven v. Strong*, 60 N. Y. 56, 64 (citing Ang. Tide Waters, 105).

#### FREE FROM AVERAGE UNLESS GENERAL.

See "Free from Average Unless General."

"Free from average unless general," as used in a policy of insurance on goods, is synonymous with "total loss." *Aranzamendi v. Louisiana Ins. Co.*, 2 La. 432, 433, 22 Am. Dec. 136.

The phrase "free from average unless general," in a marine policy, operates to relieve the insurer from liability unless the cargo is totally lost. *Wain v. Thompson* (Pa.) 9 Serg. & R. 115, 120, 11 Am. 1 675; *Chadsey v. Guion*, 97 N. Y. 833, 339. Thus, in the use of the term in a marine policy on profits of a cargo, the insurer is not liable if part of the cargo is sound and sold at a profit at the termination of the voyage, though enough of it is destroyed to make a loss of more than 50 per cent. on the entire cargo. *Wain v. Thompson* (Pa.) 9 Serg. & R. 115, 120, 11 Am. Dec. 675.

The phrase "free from average unless general," as used in a marine policy on a cargo warranted by the assured free from average unless general, is well understood at the present day to mean that the "underwriters are free from all partial losses of any kind which do not arise from a contribution towards a general average." *Blays v. Chesapeake Ins. Co.*, 11 U. S. (7 Cranch) 415, 418, 3 L. Ed. 389.

#### FREE FROM FAULT.

See "Fault."

In a requested instruction, that, if the defendant did nothing more than was necessary to protect himself against an assault by prosecutor if he made an assault, the jury should find defendant not guilty, unless he brought on the difficulty, the words "unless he brought on the difficulty" are not the equivalent of "free from fault." *Johnson v. State*, 34 South. 209, 210, 136 Ala. 76.

#### FREE FROM INCUMBRANCE.

That a contract of sale calls for a conveyance free from all incumbrance does not require a deed of general warranty against incumbrance. *Fiske v. Soule*, 25 Pac. 430, 432, 87 Cal. 313.

The use of the phrase "free from all incumbrances" in a title bond requiring a vendor to make good and sufficient warranty deed of certain land, free from all incumbrances, means that the land must be free from incumbrances, and therefore the contract requires more than the mere execution of a deed containing a covenant that the land is free from incumbrances. "In *Porter v. Noyes*, 2 Me. (2 Greenl.) 22, 11 Am. Dec. 30, the plaintiff was to make to the defendant a warranty deed free and clear of all incumbrances and it was adjudged that the agreement was not performed unless the land was free from incumbrances when the deed was to be given, and that it was not satisfied by a covenant in the deed that it was free from incumbrances." *Fletcher v. Button*, 4 N. Y. (4 Comst.) 396, 400.

A covenant in a deed that premises conveyed are "free from incumbrances," except a mortgage, is held not to estop the grantee from denying the validity of that mortgage. *Calkins v. Copley*, 13 N. W. 904-906, 29 Minn. 471.

A written warranty on a sale of chattels that they are "free from any incumbrance" means that the title shall be absolute in the vendee. *Chase v. Willard*, 39 Atl. 901, 67 N. H. 369.

A contract to convey land free from incumbrances is not satisfied by tender of a conveyance subject to unsatisfied and unpaid

mortgages, though the purchaser is permitted to deduct an equivalent from the purchase money, and though the mortgages are due and payable. *Webster v. Kings County Trust Co.*, 39 N. E. 964, 966, 145 N. Y. 275.

### FREE FROM KNOTS.

A contract providing that all flooring should be laid smooth and level and "free from knots" means free from all kinds of knots, including soft and hard ones. *Rush v. Wagner*, 12 N. Y. Supp. 2.

### FREE FROM OVERFLOW.

The term "free from overflow," in representations that certain lands on the Mississippi river are free from overflow, must be construed according to the common-sense meaning attached to such terms in relation to Mississippi or other bottom lands by those accustomed to speaking of them—as meaning all except extraordinary overflow—unless by the particular language used in connection with those terms a different meaning would be natural. *Yeates v. Pryor*, 11 Ark. (6 Eng.) 58, 68.

### FREE FROM PARTIAL LOSS.

In construing the term "free from partial loss," in *Kettell v. Alliance Ins. Co.*, 76 Mass. (10 Gray) 144, Mr. Chief Justice Shaw says: "The natural construction is that it leaves the insurer liable for all total losses, but it makes no distinction between absolute and constructive total losses, and, in case of a constructive total loss, which gives the assured a right to abandon, and he exercise the right, it becomes a legal total loss, as if absolute in its nature." *Mayo v. India Mut. Ins. Co.*, 152 Mass. 172, 25 N. E. 80, 9 L. R. A. 831, 23 Am. St. Rep. 814.

### FREE FROM PARTICULAR AVERAGE.

See "Particular Average."

### FREE GOVERNMENT.

The difference between a free and an arbitrary government is that in the former limits are assigned to those to whom the administration is committed, but the latter depends on the will of the departments, or some of them. *Kamper v. Hawkins*, 1 Va. Cas. 21, 23.

That government can scarcely be deemed to be free where the rights of a party are left to the will of the legislative body, without any restraint. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934 (citing *Wilkinson v. Leland*, 27 U. S. [2 Pet.] 627, 7 L. Ed. 542).

Free government consists of three departments, each with distinct and independent powers, designed to operate as a check

upon those other two co-ordinate branches. The legislative department makes the laws, while the executive department, with the judicial, construes and applies them. Each department is confined to its own functions, and can neither encroach upon, nor be made subordinate to, those of another, without violating the fundamental principles of a republican form of government. In re *Davies*, 61 N. E. 118, 121, 168 N. Y. 89, 56 L. R. A. 855.

### FREE INHABITANTS.

The expression "free inhabitants," as used in the Articles of Confederation, which declare that the free inhabitants of each of the states, paupers, vagabonds, and fugitives from justice excepted, should be entitled to all the privileges and immunities of free citizens in the several states, means free citizens. *Elmendorf v. Carmichael*, 18 Ky. (3 Litt.) 472, 477. "The term 'free inhabitant,' in the generality of its terms, would certainly include one of the African race who had been manumitted." *Dred Scott v. Sandford*, 60 U. S. (19 How.) 398, 418, 15 L. Ed. 691.

### FREE LANDS.

"Free lands," as used in a trust deed executed by a railroad company to secure certain bonds, which provided that the holders of the bonds were entitled to convert them into such of the lands as might be at the time free lands, meant such "as had not been bargained or sold, or contracted to be sold, through any particular agency or in any particular manner, or set apart or used for town-site or for depot purposes." *Sioux City & St. P. R. Co. v. Robinson*, 43 N. W. 826, 328, 41 Minn. 452.

### FREE LAW.

The term "free law" was used in England to designate the freedom of civil rights enjoyed by freemen. It was liable to forfeiture for disloyalty or conviction of an infamous crime. *McCafferty v. Guyer*, 59 Pa. (9 P. F. Smith) 109, 116.

### FREE LIBERTY.

A grant to a person, his heirs and assigns, of "free liberty, with servants or otherwise, to come into and upon" certain lands, and there hawk, hunt, fish, and fowl, is a grant of a license of profit, and not a mere personal license of pleasure, and the grantee may hawk, hunt, etc., by his servants in his own absence. *Wickham v. Hawker*, 7 Mees. & W. 63, 77.

### FREE NAVIGATION.

In Const. art. 18, c. 4, providing that no law shall be enacted to prejudice the right of

individuals to the free navigation of navigable streams leading into the Mississippi and St. Lawrence rivers, "free navigation" does not necessarily mean navigation of the streams in their natural condition, unobstructed and unimpeded. *Benjamin v. Manistee R. Imp. Co.*, 4 N. W. 483, 487, 42 Mich. 628.

The term "free navigation" does not mean a navigation entirely clear of obstructions. In the sense in which these terms are used by European jurists, the navigation of a river is free when it is not entirely interrupted, and not embarrassed by oppressive duties exacted by riparian states. In this country the navigation of a river is deemed to be free when it is kept open for vessels, cleared of such physical obstructions as would retard their passage beyond what is required for the necessary transit over the stream, and is exempt from exactions and delays other than for the enforcement of quarantine and health laws, and such occasional tolls as may be levied to meet the expenses of improving its navigation. Thus bridges with draws of sufficient width for the passage of vessels are allowed on rivers in Europe, like the Rhine, whose navigation is declared to be free. So, in this country, such bridges do not destroy the free character of the navigation, any more than ferries, though, like them, they may cause more or less delay to vessels. In *Palmer v. Cuyahoga County Com'rs* (U. S.) 18 Fed. Cas. 1026, in construing the fourth article of the Ordinance of 1787, respecting the Northwestern Territory, which declares that the navigable waters leading into the Mississippi and St. Lawrence shall be forever free, it was held that the ordinance does not prohibit the construction of any work on the river which the state may consider important to commercial intercourse, and that a dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. *Newport & Cincinnati Bridge Co. v. United States*, 105 U. S. 470, 496, 26 L. Ed. 1143.

#### FREE OF ALL CHARGES.

Instructions were given to sell a vessel for a certain sum, free of all charges. Held, that the term "free of all charges" should be construed as meaning free of all charges on account of the sale of the vessel, and not on account of the previous voyage, such as seamen's wages and provisions. *Dusar v. Perit* (Pa.) 4 Bin. 361, 364.

In England it is held in numerous instances that legacies given free from deduction, or free from expense, or free from charge or liability, are free from duty. In *re Bispham's Estate* (Pa.) 24 Wkly. Notes Cas. 70, 80.

#### FREE OF GRACE.

"Free of grace," as used in the body or margin of a note, means that the note is due or shall be due on the day of its maturity, according to its face, without the allowance of any days of grace. *Perkins v. Franklin Bank*, 38 Mass. (21 Pick.) 483, 485.

#### FREE ON BOARD.

See, also, "F. O. B."

The use of "f. o. b." in a contract for the sale of fruit f. o. b. evidences a sale for shipment. *Tustin Fruit Ass'n v. Earl Fruit Co.* (Cal.) 53 Pac. 693, 697.

A contract for the sale of fruit, stating that it is bought at "three cents per pound f. o. b. Haywards," is to be construed as showing that the price was to be paid or become due when the fruit was delivered to the carrier at Haywards. *Blackwood v. Cutting Packing Co.*, 18 Pac. 248, 250, 76 Cal. 212, 9 Am. St. Rep. 199.

"F. o. b." means, in mercantile parlance, "free on board"; that is, when used in an agreement that goods are to be delivered at a certain place f. o. b., means that they will be delivered to a carrier at that place free of drayage charges, etc. *Muskegon Curtain Roll Co. v. Keystone Mfg. Co.*, 19 Atl. 1008, 1009, 135 Pa. 132.

The initials "f. o. b." in a phrase occurring in a contract of sale that the vendor should bill the goods f. o. b. Pittsburgh, do not necessarily imply that the goods were to be delivered by the vendor to the vendee at Pittsburgh. The phrase is only evidence, and not conclusive, that the goods were to be so delivered to the purchaser. *Dannemiller v. Kirkpatrick*, 50 Atl. 923, 929, 201 Pa. 218.

A consular invoice stating the price or value free on board, in the absence of fraud, represents the dutiable value, subject, of course, to correction by appraisement, and was made up of the cost or value of the goods at the place of exportation, and the costs of transportation to place of shipment and the other charges; the aggregate being called the price of value free on board. *Robertson v. Bradbury*, 10 Sup. Ct. 158, 159, 132 U. S. 491, 33 L. Ed. 405.

The clause, "Free on board continental port, inspection at maker's works," as used in a contract of sale, is to be construed together, as meaning that the buyers were to have the goods free on board, with the inspection, and not to be subjected to the expense thereof. *Silberman v. Clark*, 96 N. Y. 522, 524.

The use of the words "free on board" in a contract for the sale and delivery of goods free on board vessel imports no obligation on the seller to act in delivering the goods until the buyer names the ship to which the

delivering is to be made. *Dwight v. Eckert*, 20 Wkly. Notes Cas. 441, 445, 12 Atl. 82, 84, 117 Pa. 490.

### FREE PASS.

A "free pass" means the privilege of riding over a railroad without payment of the customary fare. *Perkins v. New York Cent. R. Co.*, 24 N. Y. 196, 203, 82 Am. Dec. 281.

### FREE PASSAGE

See "Right of Free Passage."

### FREE PERSON OF COLOR.

See "Colored Person."

### FREE PUBLIC SCHOOL.

The term "free public school," as used in Const. art. 10, § 11, providing that the proceeds of all escheated property shall be faithfully appropriated for the purpose of establishing and maintaining free public schools, and for no other purpose or use whatever, means schools supported by the public for the use of the public generally, and hence does not include an orphan house under the control of a city, open only to poor orphaned children, or the children of poor, distressed, or disabled parents. In *re Malone's Estate*, 21 S. C. 435, 436, 451.

Pub. Laws, c. 588, April 14, 1876, exempting from taxation free public schools, means only schools which are established, maintained, and regulated under the statute laws of the state. *St. Joseph's Church v. Tax Assessors*, 12 R. I. 19, 20, 34 Am. Rep. 597.

A chapel used in part for religious worship, and in part for the residence of teachers in a free parochial school located on an adjoining lot, is not exempt from taxation under Gen. Laws, c. 44, § 2, exempting from taxation free public school buildings. In *re City of Pawtucket*, 52 Atl. 679, 24 R. I. 86.

The constitutional provision requiring the General Assembly to establish and maintain a thorough and efficient system of free public schools means that the schools must be open to all without expense. The right is given to the whole body of the people. *State v. Maryland Institute for Promotion of Mechanic Arts*, 41 Atl. 126, 129, 87 Md. 643.

### FREE SCHOOL.

A testator, in directing his trustees to cause a free school to be kept in a certain village, did not mean a free grammar school. *Attorney General v. Jackson*, 2 Keen, 541, 551.

"Free school," as used in a deed conveying land to a city for the use, maintenance, and support of a free school, does not mean free in respect to the universal admissibility of the children of all classes of inhabitants of districts, but to indicate a school which should be free in a pecuniary sense, and in respect to the expenses or charges for tuition therein. It is not synonymous with "common school." *Le Conteulx v. City of Buffalo*, 33 N. Y. 333, 339.

### FREE SERVANT.

Free servants are, in general, all free persons who let, hire, or engage their services to another in the state, to be employed therein at any work, commerce, or occupation whatever, for the benefit of him who has contracted with them, for a certain price or retribution, or upon certain conditions. Civ. Code La. 1900, art. 163.

### FREE SHAREHOLDERS.

The free shareholders of a building and loan association are subscribers to its capital stock, who were not borrowers from the association. *Steinberger v. Independent Loan & Savings Ass'n*, 36 Atl. 439, 440, 84 Md. 625.

### FREE STATE.

In the provision of Const. art. 1, § 13, "that each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 21, expel a member, and shall have all other powers necessary for a branch of the legislature of a free state," it is manifestly meant not to limit the powers of the General Assembly, but to confer certain parliamentary privileges on the separate branches, so that each house, when in session, could, without the concurrence of the other, promptly protect itself against indecency, corruption, or other misbehavior of members or strangers. The word "free" is to be understood of the state in her corporate capacity; and in the sense of independent and sovereign, and not of her individual citizens. If it be construed as a restraint of legislative power, it renders the Declaration of Rights useless, and reduces all the provisions for that purpose to a single phrase. *Sharpless v. City of Philadelphia*, 21 Pa. 147, 165, 59 Am. Dec. 759.

### FREE STOCK.

"Free stock," as the term is used in reference to the stock of a building association, "means stock which has not been borrowed upon." *Laurel Run Bldg. Ass'n v. Sperling*, 106 Pa. 334, 338.

**FREE TOLERATION.**

"Free toleration," as used in a conveyance of a full fee simple, reserving to the grantor, his heirs and assignees, a free toleration of getting coal for their own use, is equivalent to privilege. *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 29 Atl. 402, 403, 162 Pa. 114.

**FREE WILL AND ACCORD.**

"Free will and accord, without fear," as used in Act April 23, 1873, declaring that an alienation of the homestead by a married man should be void unless acknowledged by the wife, "of her own free will and accord, and without fear, constraint, or persuasion of her husband," was used to require protection of the wife from being tortured by fear, constrained by the domination of a stronger will, or seduced by the flattery, importunity, solicitation, or suasion of the husband, and hence required more than is expressed by the term "voluntary," by reason of which an acknowledgment by a wife, merely reciting that her signature was her voluntary act, was not a substantial compliance with the statute, and therefore rendered the conveyance void. *Scott v. Simons*, 70 Ala. 352, 356.

**FREEWILL BAPTISTS.**

The terms "Free Baptists" and "Freewill Baptists" are identical in meaning, and are used to designate persons of the same religious belief who are members of the same denomination; and a change of name of a church from "Free Baptists," to "Freewill Baptists" had no effect upon its creed or declaration of principles, nor upon its relation to other churches. *Park v. Chaplin*, 96 Iowa, 55, 64 N. W. 674, 676, 31 L. R. A. 141, 59 Am. St. Rep. 353.

**FREEDMEN.**

"Freedmen," as used in a will devising property to the Freedmen's Association, was held to refer to that class of persons who were emancipated during the late Civil War, and their descendants. *Fairfield v. Lawson*, 50 Conn. 501, 513, 47 Am. Rep. 669.

The terms "freedmen" and "freedwomen" in 13 Stat. p. 245, defining persons of color as including all free negroes, mulattoes, and mestizos, all freedmen and all freedwomen, and all descendants through either sex of any of these persons, must be regarded as indicating a class which had been in slavery, in contradistinction to previously free negroes, mulattoes and mestizos. *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, 333.

**FREEDOM OF SPEECH.**

See "Liberty of Speech and the Press."

**FREEDOM OF THE PRESS.**

See "Liberty of Speech and the Press."

**FREEHOLD.**

See "Movable Freehold"; "Tenant of the Freehold."

Involving a freehold, see "Involve."

"A freehold is any estate of inheritance or for life in either a corporeal or incorporeal hereditament existing in or arising from real property of free tenure." *Wyatt v. Larimer & Weld Irr. Co.*, 33 Pac. 144, 147, 18 Colo. 298, 38 Am. St. Rep. 280 (quoting 2 Bl. Comm. 104).

"A freehold estate is defined by Blackstone to be such an estate in lands as is conveyed by livery of seisin, and may be a fee simple or conditional fee, and may be for life only." *Hughes v. Milligan*, 22 Pac. 813, 314, 42 Kan. 396 (quoting 2 Bl. Comm. 104).

Estates of inheritance or for life are called estates of freehold. Civ. Code Cal. 1903, § 765; Rev. Codes N. D. 1899, § 3329; Civ. Code S. D. 1903, § 245; Rev. St. Okl. 1903, § 4030.

A freehold has been defined to be an estate in real property of inheritance or for life, or the term by which it is held. *Nevitt v. Woodburn*, 51 N. E. 593, 595, 175 Ill. 376; *Gage v. Scales*, 100 Ill. 218, 221.

Under our law a freehold may be defined as an estate of inheritance or for life in real property. *New Orleans, J. & G. N. R. R. Co. v. Hemphill*, 35 Miss. 17, 22.

A freehold was formerly characterized as an estate which could be created by livery of seisin only, or as the possession of the soil by a freeman. *New Orleans, J. & G. N. R. R. Co. v. Hemphill*, 35 Miss. 17, 22 (citing 2 Bl. Comm. 80).

By statute, estates of inheritance are denominated "estates of freehold"; estates for years are denominated "chattels real," and estates by will or by sufferance are called "chattel interests"; and it is further provided that the terms "real estate" and "land" shall be coextensive with lands, tenements, and hereditaments. *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453.

A will which, after several bequests of stock, devised all the remainder in the stocks, "with my freehold property to M.," conveyed a fee to M. *Roe v. Pattison*, 16 East, 221.

St. 1789, c. 14, provides that every citizen seized of a freehold estate in any town,

who shall reside thereon or live within the town, occupying the same, for two years, should gain a settlement in the town. Held, that a seisin of a freehold estate in right of his wife was sufficient to give one a settlement under the statute. *Inhabitants of Windham v. Inhabitants of Portland*, 4 Mass. 384, 387. See, also, *Hughes v. Milligan*, 22 Pac. 313, 314, 42 Kan. 396.

A suit to set aside a conveyance alleged to have been made by a debtor for the purpose of defeating the enforcement of the claim of defendant's judgment creditor does not involve a freehold, within the meaning of the statute allowing appeals to the Supreme Court in cases involving a freehold. *Biggins v. Lambert*, 68 N. E. 428, 204 Ill. 142.

A freehold is involved, within the meaning of the act giving the Supreme Court jurisdiction of appeals, where the necessary result of the judgment or decree is that one gains and the other loses a freehold estate, and also where the title is so put in issue by the pleadings that the decision necessarily involves a decision of such issue. *Ducker v. Wear & Boogher Dry Goods Co.*, 145 Ill. 653, 657, 34 N. E. 562 (citing *Malaer v. Hudgens*, 130 Ill. 225, 22 N. E. 855).

An action for forcible entry and detainer involves a freehold. *Brandenburg v. Reithman*, 3 Pac. 577, 578, 7 Colo. 323.

#### Equitable estate.

A statute providing that a person having a freehold estate shall thereby gain a settlement in the place where the estate is located, construed to include equitable estates of freehold, as well as legal estates. *Bernards Tp. v. Warren Tp.*, 15 N. J. Law (3 J. S. Green) 447, 454.

#### Homestead right.

A homestead right of the husband during the life of the wife being an intangible, inchoate, and conditional interest, nothing more than an expectancy is not a freehold estate, within the statutory or common-law definition of a freehold. His life estate may be initiated during coverture, but it is not consummated until her decease. It then becomes a vested right, and would undoubtedly be regarded as a freehold estate. *Hamilton v. Village of Detroit*, 88 N. W. 419, 421, 85 Minn. 83.

#### Life estate.

The term "freehold" includes an estate for life in realty. *Jones v. Jones*, 20 Ga. 699, 700; *Jeffers v. Easton, Eldridge & Co.*, 45 Pac. 680, 681, 113 Cal. 345; *Williams v. Ratchiff*, 42 Miss. 145, 154.

An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold. *Civ. Code Mont.* 1895, § 1215;

*Rev. St. Okl.* 1903, § 4031; *Rev. Codes N. D.* 1899, § 3330; *Civ. Code S. D.* 1903, § 246.

An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, but after his death it shall be deemed a chattel real. *Comp. Laws Mich.* 1897, § 8788.

One to whom a life estate is devised, if he shall occupy or take possession of the real estate, and who does take possession, has a "freehold interest," which, under *Rev. St. c.* 77, §§ 3, 10, is subject to execution. *Henderson v. Harness*, 52 N. E. 68, 70, 176 Ill. 302.

#### Mining claim.

A claim to public mineral land is a title or freehold, so as to support a claim for fixtures. *Merritt v. Judd*, 14 Cal. 59, 64.

#### Right of way.

"Freehold," as used in *Laws* 1887, p. 156, which exempts from the jurisdiction of the appellate courts cases involving a freehold, does not include a right of way granted by a deed as appurtenant to an estate in fee. *Oswald v. Wolf*, 19 N. E. 28, 126 Ill. 542.

#### Water right.

See "Water Right."

#### FREEHOLDER.

See "Reputable Freeholders"; "Resident Freeholder"; "Lawful Freeholders."

"A freeholder is one who owns land in fee or for life, or for some indeterminate period." *State v. Ragland*, 75 N. O. 12, 13; *Harlan v. State*, 33 South. 858, 859, 106 La. 333.

The word "freeholder" is generally used to designate the owner of an estate in fee in land. *Fore v. Hoke*, 48 Mo. App. 254, 261.

A freeholder is a person for whose sole benefit an undivided interest in fee is held by another in trust absolute, appearing on the conveyance. *People v. Board of Education of Grand Rapids*, 38 Mich. 95.

"A freeholder is one having title to real estate, and the amount or value of his interest therein is immaterial." *People v. Scott* (N. Y.) 8 Hun, 566, 567.

The term "freeholders," as used in statutes authorizing the laying out or alteration of highways on petition of the resident freeholders of a town, means residents of the town having a freehold estate therein. *Damp v. Town of Dane*, 29 Wis. 419, 427; *State v. Nelson*, 15 N. W. 14, 15, 57 Wis. 147.

A husband living with his wife on land owned by her, and occupied by them as



their homestead, is a freeholder. *Hughes v. Milligan*, 22 Pac. 313, 314, 42 Kan. 396. See, also, *Inhabitants of Windham v. Inhabitants of Portland*, 4 Mass. 384, 387.

A tenant who held by a free tenure under the feudal system had a right to the enjoyment of the land for his life, at least, and could not be dispossessed even for the nonpayment of rent or nonperformance of his services, and hence he was called a "freeholder." *Turner v. Dawson*, 80 Va. 841, 844.

The term "freeholders," as used in statutes requiring appraisers, etc., to be freeholders, is not construed with the same technical strictness as when used in deeds or other instruments affecting title. The purpose of such statutes is evidently to prevent appraisements being made by those who are not themselves interested in lands, and this would seem to be accomplished if the appraiser has a substantial interest in reality. *Wheldon v. Cornett* (Neb.) 94 N. W. 626.

#### Householder distinguished.

That one may be a freeholder, and not a householder, or a householder, and not a freeholder, seems to be too plain for argument. "Householder" refers to the civil status of a person, not his property, and a man may be a householder without owning the real estate or any interest therein, whereas a freeholder is one who owns a freehold estate; that is an estate in lands, tenements, or hereditaments of an indeterminate duration, other than an estate at will or by sufferance, as in fee simple, fee tail, or for life, or during coverture. One may be an extensive freeholder, and not be a householder. *Shively v. Lankford*, 74 S. W. 835, 838, 174 Mo. 535 (citing *Carpenter v. Dame*, 10 Ind. 129).

2 Rev. St. 1852, p. 24, §§ 1, 2, providing that the petit jurors shall be drawn from householders competent to serve as jurors, and that grand jurors shall be selected from freeholders or householders, means a freeholder in contradistinction to a householder. The term means one who holds a freehold estate in fee simple, fee tail, or for a term of life. A freeholder is the owner of a freehold estate which is an estate in lands or other property for the life of the tenant, or that of some other person, or for some other period, while a householder is the occupier of a house, a housekeeper, or master of a family. Hence, a man may be a freeholder and not a householder, or a householder and not a freeholder. *Bradford v. State*, 15 Ind. 347, 353.

#### Married woman.

Generally speaking, a freeholder is one who holds lands in fee or for life, or for some indeterminate period, so that a married woman who holds land in fee is a freeholder, within the meaning of Comp. St. c. 45, § 14, requiring the signers of a petition for an elec-

tion on the question of the issuing of bonds in aid of works of internal improvement to be freeholders. *Cummings v. Hyatt*, 74 N. W. 411, 412, 54 Neb. 35.

A married woman, having no interest on land other than that of a wife in community property, is not a freeholder owning lands, within the meaning of Acts 1887, § 2, requiring a petition to organize an irrigation district to be by such freeholders, for, though she might be a freeholder, she is not an owner, and the word "freeholder" cannot be used alone, without reference to the word "owning land." *Directors of Fallbrook Irrigation Dist. v. Abila*, 39 Pac. 794, 797, 106 Cal. 355.

#### Renter.

Anciently none but freeholders were considered owners of the soil, and a freeholder was defined to be the possessor of the soil by a free name. In modern times, for all civil purposes, a lessee for years has a part of the estate, and is the owner of the land during that period. *Biggs v. Farrell*, 34 N. C. 1, 4.

Code, § 4180, which allows a challenge for cause in a criminal trial to one summoned as a juror, and not a resident "freeholder" or householder for the preceding year, does not include a person who rented land for the preceding 12 months. *Iverson v. State*, 52 Ala. 170, 173.

#### FREEHOLDERS OF THE COUNTY.

The phrase "freeholders of the county," as used in Rev. St. c. 43, § 5, requiring dramshop licensees to give bond, with sureties "freeholders of the county," means freeholders of real estate situated there, though they are nonresidents. *Matthews v. People*, 42 N. E. 864, 866, 159 Ill. 399.

"Freeholder of the county" does not necessarily mean more than owners of real estate in the county, and, where a statute requires appraisers to be inhabitants of the county, a statement that the appraisers who acted under the statute were freeholders of the county is not equivalent to an allegation that they are inhabitants thereof. *Rix v. Johnson*, 5 N. H. 520, 525, 22 Am. Dec. 472.

#### FREELY.

It would seem that there ought not to be any difficulty in arriving at the signification of the words in the act of Congress providing that "if at any election for Representative," etc., "any person shall, by force, threat, menace, intimidation, or otherwise, unlawfully prevent any qualified voter from freely exercising the right of suffrage," etc. When a man is spoken of as "exercising a right," it is commonly understood that he is doing something. When a voter casts his ballot into the box, do we not say that he is "exercising the

right of suffrage"? And when he exercises this right freely, does he not do it according to his pleasure, without any constraint either upon his mind or his body? His will must not be controlled, and his physical opportunity for doing the act must not be interfered with. Any control over the one, or interference with the other, encroaches upon his freedom of action, and produces the mischief which the words of the statute were designed to guard against and cure. And what is it to prevent a voter from exercising this right? It is to put such a restraint upon his volition or his body that he cannot perform the act; producing, by threats or otherwise, such apprehension of personal loss or injury as to induce him not to vote, or to vote contrary to his wishes, being a restraint upon his will; an intervening between him and the ballot box, so as to render it physically impossible for him to cast his vote, being a restraint upon his body. Therefore there is a violation of the statute when a number of voters waiting in line to vote are expelled from the voting room, even though they return later and cast their ballots. *United States v. Souders* (U. S.) 27 Fed. Cas. 1267-1269.

#### **In acknowledgments by married women.**

"Freely" means only without constraint or compulsion. A certificate which certifies that a deed of conveyance was executed without fear or compulsion is sufficient, although it omits the word "freely." *Dennis v. Tarpenny* (N. Y.) 20 Barb. 371, 374.

"Freely," as used in Act 1788 (2 Greenl. Laws, p. 99), requiring an acknowledgment by the wife, on a private examination apart from her husband, that she executed the deed freely, without any fear or compulsion of her husband, in order to validate the conveyance, should be construed to mean that she has executed the deed without constraint or coercion or fear of injury of the husband, and not as used in a sense importing that the wife, in the execution of the deed, should act without a motive, or do it as a mere act of generosity, without any hope of present or future benefit. *Meriam v. Harsen* (N. Y.) 2 Barb. Ch. 232, 269.

The term "freely and of her own accord," in the acknowledgment of the execution of a deed by a wife that she executed it freely and of her own accord, is equivalent to the phrase "as her voluntary act and deed, freely," in *Aikin's Dig.* p. 93, § 23, requiring the acknowledgment in such cases to state the deed was executed by a wife as "her voluntary act and deed, freely." *Dundas v. Hitchcock*, 53 U. S. (12 How.) 256, 269, 18 L. Ed. 978.

Where a wife had joined her husband in a contract to sell land, and had stated to the officer taking her acknowledgment that she had not executed the deed under fear or compulsion, but that she did not do it freely, the

officer was justified in certifying her acknowledgment to be her free act, without fear, etc. "Freely" refers to her relations with her husband, and indicates a condition of freedom on her part from the influence of her husband, and not a freedom from obligation of a contract or other debt. *Goldstein v. Curtis*, 52 Atl. 218, 222, 63 N. J. Eq. 454.

A certificate of acknowledgment of a deed by a married woman, that she did so "freely and voluntarily," shows that she must necessarily have been without fear. It is possible that fear may exist without threats, but it is not very easy to suppose there can be fear if there be no compulsion. *Hadley v. Geiger*, 9 N. J. Law (4 Halst.) 225, 238.

"Freely and willingly," as used in a statute providing that the certificate of acknowledgment to a deed by a married woman should show that she declared that she did freely and willingly sign and seal the deed, is equivalent to "without bribe, threat, or compulsion," as used in a certificate showing that she acknowledged that she signed the deed without bribe, threat, or compulsion from her husband. Her freedom of action and willingness to make the deed have reference to, and are designed to negative, any improper influence or duress by the husband. She may regret to part with her property, or she may think the price inadequate, or she may be loth to change her residence, and be unwilling to execute the deed for such purposes, in one sense, while she, from considerations controlling her will, other than any constraint from her husband, may wish earnestly or even anxiously to execute the deed. *Belcher v. Weaver*, 46 Tex. 293, 294, 26 Am. Rep. 267.

#### **FREELY TO BE POSSESSED AND ENJOYED.**

A will devising to B. all the testator's lands, messuages, and tenements, by her freely to be enjoyed, was ambiguous as to the size of the estate intended to be created thereby, and could not be held to pass a fee, as against the heir, but might mean free of incumbrances or dispunishable of waste, etc. *Goodright v. Barron*, 11 East, 220, 225.

A devise of all testator's lands and tenements to his wife, to be by her freely possessed and enjoyed, gives only a life estate, and not an estate in fee. *Wheaton v. Address* (N. Y.) 23 Wend. 452.

A will in which testator devised certain property to his son R., and then made the following provision, "if the above said R. should chance to die without heir or issue, or both, said lands and effects shall fall into the possession of my son W., by him freely to be possessed and enjoyed," would convey a fee in the land. *Burkart's Lessee v. Bucher* (Pa.) 2 Bin. 455, 464, 4 Am. Dec. 457.

"Freely to be enjoyed," as used in a devise of real estate freely to be enjoyed by the beneficiary, means the free enjoyment for all purposes against the heir. The free enjoyment must, as Lord Mansfield says, mean "free from all limitations"; that is, the absolute property. *Campbell v. Carson* (Pa.) 12 Serg. & R. 54, 56.

## FREEMAN.

"The laws agreed upon by William Penn on the 5th of May, 1682 (section 2), provided that 'every inhabitant in the said province [Pennsylvania] that is or shall be a purchaser of 100 acres of land or upwards, his heirs or assigns, and every person who shall have paid his passage, and taken up 100 acres of land at one penny an acre, and have cultivated 10 acres thereof, and every person that has been a servant or bondsman and is free by his service, that shall have taken up his 50 acres

of land and cultivated 20 thereof, and every inhabitant, artificer, or other resident in said province that pays scot and lot to the government, shall be deemed and accounted a freeman of said province.' A freeman was an allodial proprietor—the opposite of a vassal or a feudal tenant; a free tenant or freeholder, as distinguished from a villein." *Fry's Election Case*, 71 Pa. (21 P. F. Smith) 302, 308, 10 Am. Rep. 698.

A person who had become a deserter, and refused to submit to military duties of the government, and thereby become an outlaw, was not a freeman, nor entitled to vote, under the Constitution. *McCafferty v. Guyer*, 59 Pa. (9 P. F. Smith) 109, 115.

"Freemen," as used in Const. art. 3, § 1, recognizing the right of the elective franchise in all freemen of the commonwealth, does not include the female sex. *Burnham v. Laning* (Pa.) 1 Pa. Leg. Gaz. 411, 9 Phila. 241, 242.



